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File Folder #13 COHEN/WHCO: ANTHONY KENNEDY - SENATE JUDICIARY COMMITTEE QUESTIONNAIRE (2)

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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1	FORM	FINANCIAL DISCLOSURE REPORT (W/ ATTACHMENT)	10	ND	B6
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JUDICIARY COMMITTEE QUESTIONNAIRE
ANTHONY M. KENNEDY

Attachment to

Answers to Part I, Questions 13(2) and 13(3)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1093
D.C. #CR 81-907

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

ALBERTO ANTONIO LEON, ET AL.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Central District of California
Wallace A. Tashima, District Judge, Presiding
Argued and submitted October 7, 1982

[Filed Jan. 19, 1983]

Before: KENNEDY, TANG AND FERGUSON, Circuit Judges.

The defendants are charged with violations of 21 U.S.C. § 846 (conspiring to possess and distribute cocaine) and 21 U.S.C. § 841(a)(1) (possessing methaqualone and cocaine with intent to distribute it). The defendants filed pretrial motions in the district court to suppress evidence obtained by police officers pursuant to a search warrant issued by a state judge, arguing that the affidavit supporting the warrant made an insufficient showing of probable cause. The district court granted the motions in part, holding that the affidavit given in support of the warrant was inadequate. The government brings this interlocutory appeal challenging the district court's determination. We affirm.

The government raises three issues on appeal: (1) whether the independent examination standard is applicable to appellate review of a district court's conclusion that an affidavit does not establish probable cause for the issuance of a search warrant; (2) whether the district court erred in concluding that the search warrant affidavit failed to establish probable cause; and (3) whether the evidence seized under an invalid search warrant should be suppressed if the police acted in good faith.

In *United States* v. *Chesher*, 678 F.2d 1353 (9th Cir. 1982) this court recognized that a determination of whether an affidavit is sufficient to establish probable cause for the issuance of a search warrant is a question of law. *Id.* at 1359. Accordingly, we may make an independent examination of the propriety of such a determination. *See, e.g., United States* v. *One Twin Engine Beech Airplane, Etc.*, 533 F.2d 1106, 1108-09 (1976).

We have independently examined the probable cause issue, and conclude that the district court correctly decided that the affidavit failed to establish probable cause sufficiently. In seeking the search warrant, the affiant relied upon the assertions of informants and independent police investigation. The information from the informants and that obtained during the investigation did not provide sufficient cause for a search of any of the structures identified in the warrant.

We consider first the propriety of the authorization to search the Price Drive residence of Sanchez and Stewart. Where an affiant relies on information provided by an informant the affidavit must first, give facts to show the reliability of the information and second, give facts to support the credibility of the informant. *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 375 U.S. 108 (1964); *United States* v. *Johnson*, 641 F.2d 652 (9th Cir. 1980).

The affiant adequately set forth facts to permit the judicial officer making the probable cause determination to determine the basis of the informant's knowledge of the criminal activity which occurred at the Price Drive residence. However, the information was over five months old. The long delay between the informant's acquisition of the particular information and the search negates the inference of probable cause. *Durham* v. *United States*, 403 F.2d 190, 195 (9th Cir. 1968). Neither are we satisfied that the independent police investigation uncovered any evidence of ongoing criminal activity at the residence which would tend to cure the staleness defect. *Cf. United States* v. *Huberts*, 637 F.2d 630, 638 (9th Cir. 1980), *cert. denied*, 451 U.S. 975 (1981). As the district court observed, the police observations were as indicative of innocence as of guilt.

The affidavit was also insufficient in that it failed to establish the credibility of the informant. *Aguilar* v. *Texas*, 378 U.S. at 114. The independent police investigation did not produce information which corroborated the details of the informant's information. *Cf. United States* v. *Johnson*, 641 F.2d 652, 658-59 (9th Cir. 1980).

The affidavit satisfied neither prong of the *Aguilar-Spinelli* test. Thus, the district court properly ruled that the evidence derived from the search conducted at the Price Drive residence should be suppressed.

The affidavit is clearly deficient in providing justification to search Leon's Sunset Canyon residence. One informant told police 17 months before the search that Leon was involved with the "Cuban Mafia" and that he participated in the importation of drugs into this country. Another informant told police that Leon had a quantity of quaaludes at his residence. The affidavit is devoid of any factual circumstances indicating the basis of these statements. Moreover, the affidavit completely fails to establish the veracity of either informant. Again, the independent police investigation did not un-

cover information sufficient to cure any of these defects. Thus the district court correctly ordered the suppression of evidence discovered as a result of the Sunset Canyon search.

Finally, the government invites us to follow the lead of the Fifth Circuit and recognize a "good faith" exception to the exclusionary rule. *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). We have not heretofore recognized such an exception and we decline the invitation to recognize one at this juncture.

AFFIRMED.

Re: *United States* v. *Leon* —No. 82-1093

KENNEDY, Circuit Judge, dissenting:

The majority opinion states the law correctly, but, I respectfully submit, it misapplies controlling legal principles to the facts of the case.

The affidavit for the search warrant sets forth the details of a police investigation conducted with care, diligence, and good faith. It is true that the informant whose tip started the investigation had seen drugs in the house five months previously; but what the officers observed when surveillance began, together with the information obtained on the persons using the residences in question, was quite inconsistent with any explanation other than illegal drug activity. Known narcotics violators visited the principal residence in question for ten minutes or so, and would exit with a brown paper bag, usually placed in an automobile trunk. One of the persons suspected of being a principal supplier had previously been arrested for a Miami-Los Angeles transportation of drugs, and the occupants of this house traveled between those cities during this investigation.

The informant's observation pertained to ongoing criminal activity, not simply a single criminal act that was not likely to be repeated. Staleness is less significant where the activity is continuous. *See United States* v. *Huberts*, 637 F.2d 630, 638 (9th Cir. 1980), *cert. denied*, 451 U.S. 975 (1981).

Information in a warrant is not stale if the continuing course of suspicious conduct validates the information given at the outset. *See United States* v. *Huberts*, *supra*. That same course of conduct serves to corroborate the reliability of the informant.

One does not have to read many cases involving illegal drug traffic before it becomes clear exactly what was going on at the residences described by the officer's affidavit. The investigation described in the affida-

vit was made by a law enforcement officer with
sive training in the investigation of drug traffic. H
made over five hundred arrests. His opinion that
trafficking was going on is itself entitled to we
though the specific factual allegations taken alone
support the inference. The magistrate did not er
submit, in issuing the warrant.

Whatever the merits of the exclusionary rule, its r
idities become compounded unacceptably when cour
presume innocent conduct when the only common sens
explanation for it is on-going criminal activity. I woul
reverse the order suppressing the evidence.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1093
D.C. No. CR 81-907

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

ALBERTO ANTONIO LEON, et al.,
DEFENDANTS-APPELLEES.

[Mar. 4, 1983]

ORDER

Before: KENNEDY, TANG and FERGUSON, Circuit Judges.

The Petition for Rehearing is denied.

Judge Kennedy would grant the Petition for Rehearing but hold the case on the calendar until the Supreme Court's ruling in *Illinois* v. *Gates*.

JUDICIARY COMMITTEE QUESTIONNAIRE
ANTHONY M. KENNEDY

Attachment to

Answer to Part II, Question 4

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Answer to Part II, Question 5

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