ANALYSIS AND SKILLS SERIES

CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE POLICE

1996 SUPPLEMENT

Myron Moskovitz

CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE POLICE

1996 SUPPLEMENT

Myron Moskovitz
Professor of Law
Golden Gate University

ANALYSIS AND SKILLS SERIES

1996

MATTHEW BENDER

ISBN #: 0–8205–2651–7

MATTHEW BENDER & CO., INC.
Editorial Offices
11 Penn Plaza, New York, NY 10001–2006 (212) 967–7707
2101 Webster St., Oakland, CA 94612–3027 (510) 446–7100

PREFACE

Things move fast in Criminal Procedure. New cases come down every day—some make big changes, others make small ones. This Supplement is meant to help you keep up with the times.

In preparing this Supplement, I was torn by two conflicting desires. My sympathy for students' workloads told me to keep it short, while a plethora of significant new cases impelled me to include those I considered especially worthy of attention.

Nevertheless, with your instructor's guidance, you might read this Supplement selectively. The new United States Supreme Court cases included here should be read, of course—they indicate the general direction of the law, as well as rule on specific issues. The lower court cases were chosen for a variety of reasons, and perhaps you need not read all of them. Some serve as a nice contrast to the cases in the book, involving similar facts, with a different twist. Others discuss issues on a fundamental level, which might stimulate your thinking. Others just reflect my peculiar taste for the bizarre—dope-sniffing dogs, pot-smoking lawyers, etc.—which help make this area so much fun for me, and maybe for you.

Hope you enjoy it.

Myron Moskovitz

TABLE OF CONTENTS

CHAPTER 1

PROBABLE CAUSE

Add on page 14, in Notes after *Aguilar v. Texas:*

Suppose the informant is not a human being, but *a dog?* In *U.S. v. Florez,* 871 F.Supp. 1411 (D.N.Mex., 1994), Officer Lujan's dog Bobo alerted to defendant's suitcase, indicating the odor of narcotics. Lujan opened the suitcase and found narcotics. At the suppression hearing, Defendant claimed that Lujan lacked probable cause, because the prosecution had failed to show that Bobo was reliable: "The Defendant argues not that dogs cannot accurately smell but rather that they smell too well: if a trained narcotics dog is such a sensitive detector that it can detect minuscule amounts of cocaine transferred from paper currency to another object, its detection cannot provide probable cause to believe that drugs are present on or in a given object. This level of sensitivity destroys the reliability necessary for probable cause to believe a crime has been committed or that a particular individual's property contains drugs."

The court held that the prosecution must prove the dog's reliability, and discussed how this might be done: "Various methods of providing an index of the dog's reliability and credibility narrow down to some basic elements. The magistrate should be advised of the following: the exact training the detector dog has received; the standards or criteria employed in selecting dogs for marijuana detection training; the standards the dog was required to meet to successfully complete his training program; the 'track record' of the dog up until the search (emphasis must be placed on the amount of false alerts or mistakes the dog has furnished). Only after this information has been furnished, is a magistrate justified in issuing a warrant."

The court found that the evidence here was insufficient to show that Bobo was reliable—even though a dog training school had "certified" Bobo:

> Certified dogs have been known to falsely alert. *See Doe v. Renfrow,* 475 F.Supp. 1012 (no drugs found on 33 out of 50 junior high and high school students to which narcotics dogs alerted); *United States v. Brown,* 731 F.2d 1491 (11th Cir.1984) (no drugs found after narcotics dog alerted to luggage at airport); *United States v. Young,* 745 F.2d 733 (2d Cir.1984) (no drugs found after narcotics dog alerted to defendant's apartment). * * * *
>
> Officer Lujan testified that he and Bobo have worked as a team since March of 1993, when he attended Global International and was introduced to Bobo. The pair went through a three week training program where they were trained five days a week for eight to ten hours a day. Bobo has a certificate of training from Global and is trained to detect the odor of marijuana, cocaine, heroin, and

methamphetamine. Bobo is also trained to detect residual odor which is the lowest scent threshold.

At Global each team had to score at least 80 percent in order to pass the program. When Officer Lujan and Bobo graduated from the academy they had a 94.3% accuracy rate. The Albuquerque Police Department sends their narcotics dogs and handlers back to Global for recertification every six months. Officer Lujan and Bobo were recertified in November of 1993 and received a 96.3% accuracy rating.

At the suppression hearing, Defendant Florez introduced into evidence Bobo's records which had been subpoenaed prior to the hearing. Officer Lujan testified that along with those records, he was asked to produce separately maintained incident reports which documented all instances where Bobo alerted. Officer Lujan stated that he tried to produce all such reports but because they were kept separately from Bobo's other records (relating to training, health, certification etc.), he could not be sure he located all of them. He further testified that there could be instances where no records were kept, such as when Bobo alerted and no drugs were found.

Indeed, defense counsel brought out four instances where Bobo alerted and no drugs were found which were not among the incident reports produced by Officer Lujan. * * * *

Officer Lujan testified that as a result of these proceedings and others like them, he has started keeping much more thorough records in order to better establish Bobo's reliability when called upon to do so in the future. Officer Lujan now daily records all of Bobo's activities including each time he alerts, whether or not drugs are found.

The Court finds Officer Lujan's previous method and scope of record keeping insufficient to establish Bobo's reliability. Without sufficient documentation to bolster Bobo's performance, Officer Lujan's testimony about Bobo's reliability and performance in the field was not credible as it was based on his admittedly limited and sketchy recollection. * * * *

In summary, where adequate and comprehensive records are maintained on a particular narcotics dog, and include results of controlled alerts made in training, as well as actual alerts in the field, the dog's reliability could be sufficiently established either through the records themselves or testimony from the dog's trainer who maintained the records. In this respect, the dog's alert is analogous to information provided by a reliable informant, and his alert without more could establish probable cause.

However, where records are not kept or are insufficient to establish the dog's reliability, an alert by such a dog is much like hearsay from an anonymous informant, and corroboration is necessary to support the unproven reliability of the alerting dog and establish probable cause. To accept less would compromise the very principles that the requirement of probable cause was designed to protect.

For a similar holding, *see U.S. v. Diaz,* 25 F.3d 392 (6th Cir., 1994). Other courts, however, have disagreed, holding that no showing of the dog's reliability is necessary to support a finding of probable cause. *See, e.g., U.S. v. Williams,* 69 F.3d 27 (5th Cir., 1995).

Add on page 18, after *Cunha v. Superior Court:*

(4) In *Commonwealth v. Banks,* 658 A.2d 752 (Penn. Supreme Court, 1995), "a police officer in a marked police car saw appellant standing on a Philadelphia street corner. Appellant reached into his pocket and handed an object to an unknown female who, in turn, gave appellant an undetermined amount of cash. The police officer testified that he could not identify the object which appellant had handed over. As the officer's patrol car drew near, appellant fled, but he was promptly captured. Appellant was searched and cocaine was found in a brown paper bag on his person. * * * * The central issue is whether the arrest was based on probable cause under the Fourth Amendment." The Court found no probable cause:

> Every commercial transaction between citizens on a street corner when unidentified property is involved does not give rise to probable cause for an arrest. Well recognized additional factors giving rise to probable cause were not present here. This is not a case where a trained narcotics officer observed either drugs or containers commonly known to hold drugs being exchanged. This is not a case where the police observed multiple, complex, suspicious transactions. And this is not a case in which the police officer was responding to a citizen's complaint or to an informant's tip. This is simply a case where a police officer chanced upon a single, isolated exchange of currency for some unidentified item or items, taking place on a public street corner at midday, and where appellant fled when approached by the officer. We believe that the fact of flight, under the circumstances presented, did not constitute a sufficient additional factor to give rise to probable cause.
>
> Under the Fourth Amendment, we have long held that flight alone does not constitute probable cause for an arrest. Of course, flight coupled with additional facts that point to guilt may establish probable cause to arrest. But the additional facts here do not by themselves "point to guilt." We find that mere police observation of an exchange of an unidentified item or items on a public street corner for cash (which alone does not establish probable cause to arrest) cannot be added to, or melded with the fact of flight (which alone does not establish probable cause to arrest) to constitute probable cause to arrest. Such facts, even when considered together, fall narrowly short of establishing probable cause.

Justice Castille dissented:

> While a single surreptitious "commercial transaction" may not give rise to probable cause, and while flight alone does not give rise to probable cause, the totality of those circumstances surely does, especially when the flight following a transaction consistent with an illicit drug sale, is unprovoked by any actions of the police other than their "mere presence."
>
> Certainly, these were not the actions of an innocent individual and those actions gave rise to probable cause which supported the officer's arrest and search of appellant.

The effect of the majority opinion seriously undermines the ability of law enforcement officers to battle the proliferation of illegal drugs by giving free reign to the furtive sale of drugs on our public streets. A suspicious transaction, which includes the exchange of money for unknown items (such items being consistent and similar in size and configuration to items used in the illicit sale of drugs and exchanged in a manner not consistent with a normal commercial transaction), can give rise to reasonable suspicion as to allow an officer to inquire and investigate. Under a totality of those circumstances, this type of suspicious transaction combined with the seller's flight upon the sight of a uniformed officer in broad daylight, clearly gives rise to probable cause to seize the individual.

PEOPLE v. GRAHAM

New York Supreme Court, Appellate Division
626 N.Y.S.2d 95 (1995)

Sullivan, Justice.

This appeal presents the issue of whether the observation by an experienced police officer, in a "drug prone" location, of five separate transactions in each of which defendant exchanged money for a small object he removed from a brown paper bag and thereafter placed the bag on the ground next to a fence about ten feet away, gives rise to probable cause.

The following facts were testified to at the suppression hearing, at which the People presented the only witness. On April 23, 1992, shortly before 2 p.m., Police Officers Smith and McDonald, uniformed and on foot patrol in the Lincoln Projects, stationed themselves in the lobby of a building directly across the street from 2101 Madison Avenue, a playground and a drug-infested area. Smith, a police officer for over five and one-half years and assigned to patrolling the Lincoln Projects for over four years, had personally made 50 narcotics-related arrests involving crack cocaine in the area around 2101 Madison Avenue and had assisted in over 100 more such arrests. On that particular day, bright, sunny and providing Officer Smith with a clear, unobstructed view of the area between the two buildings, the playground was littered with empty crack vials.

At about 1:55 p.m., Smith, using binoculars, observed a man approach defendant, who was sitting on a bench in the playground area in front of 2101 Madison Avenue. Defendant got up and the two men met between the bench and a fence. The man handed money to defendant, who reached into a brown paper bag he was holding, took out a small object and handed it to the man who, at that point, walked off. Defendant then took the brown paper bag, placed it on the ground next to a fence about ten feet away and sat back down on the bench.

A few minutes later, at approximately 1:59 p.m., Smith observed two other men approach defendant, who got up and retrieved the brown paper bag. The first man handed money to defendant, who reached into the bag, removed something from the bag and, while concealing the object in his cupped hand, handed it to the first man, who left. Defendant engaged in the same transaction with the second man, at

the conclusion of which he again placed the brown paper bag on the ground near the fence before returning to the bench.

Approximately two minutes later, at 2:01 p.m., two women approached defendant, who got up from the bench and retrieved the brown paper bag. The first woman handed money to defendant, who then reached into the bag, removed a small object and handed it to her; she then walked off. The second woman engaged in the same transaction with defendant, who once again placed the bag on the ground next to the fence and returned to the bench where he had been sitting.

Although Smith could, through the binoculars, observe money being exchanged in each of these transactions, he could not see what was being taken out of the brown bag and given in return. Asked to explain why, Smith, who believed that the objects were less than an inch in length, stated: "A vial is very small. It was kind of cupped. It was a fast transaction."

After observing the fifth transaction, Smith and McDonald left their observation post and walked across to where defendant was seated. McDonald approached defendant while Smith walked over to the bag, picked it up and, looking inside, saw six vials of what he knew from experience was crack cocaine. At Smith's direction, McDonald then arrested defendant.

Finding the testifying police officer credible and "an experienced officer trained in narcotics investigation in evaluating his observation", the hearing court found that Officer Smith had good reason to believe, given that the "stash" was kept not on defendant's person but was "secreted within reasonably close distance," that what he saw was not an "innocent transaction." Accordingly, the court denied suppression. * * * *

The thrust of defendant's argument on appeal is that Officer Smith's observations of defendant as he exchanged unidentified objects for money in a drug-infested area, in the absence of other significant factors, are insufficient to establish probable cause. * * * *

Clearly, if Officer Smith had observed vials, glassine envelopes, tinfoil packets or any other type of package commonly associated with a drug transaction, probable cause would have existed. But the observation of a drug package is not a sine qua non for the existence of probable cause in a drug sale.

In a probable cause analysis, the emphasis should not be narrowly focused on a recognizable drug package on any other single factor, but on an evaluation of the totality of circumstances, which takes into account the "realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents."

As this court noted in *People v. Shaw,* 193 A.D.2d at 391, the jurisprudence in this area "has moved beyond such niceties as distinctions based on the color or degree of opacity of the envelope" to the point where the visual identification of the object exchanged for money is merely one element in the totality of circumstances to be considered in any probable cause assessment. Since street-level drug sales typically involve small, easily concealable packages, utilization of a totality of the circumstances analysis is both reasonable and necessary. Street sellers of

narcotics should not enjoy an immunity from arrest or search merely because they are able to conceal their wares during the exchange; concealment is itself a common characteristic of illegal conduct.

In *People v. McRay,* 51 N.Y.2d 594, the Court of Appeals identified certain factors which, when combined with the passing of a glassine envelope, may give rise to a finding of probable cause. The court initially pointed to the exchange of money, noting, "To begin with the most obvious, if money is passed in exchange for the envelope, probable cause almost surely would exist. Exchange of currency negates all but the most implausible explanation for the transaction, and thus conveys more than sufficient indicia of a drug sale to warrant an arrest." The court also noted that "additional evidence of furtive or evasive behavior on the part of the participants suffices to establish probable cause [citations omitted]. Such evidence, suggesting consciousness of guilt, has traditionally been considered some proof of a crime [citations omitted]." In addition, the court indicated that among the other factors to be considered were the police officer's experience and whether the area involved is a "drug prone" location.

McRay was decided in 1980, at the time of a "heroin epidemic." The drug trade is still flourishing, but it is the sale and use of crack cocaine which has now reached epidemic proportions. The passing of a glassine envelope is no longer the only hallmark of the street corner transaction. The passing of vials of crack cocaine—objects too small to be identified except at very close range—is equally if not the more prominent characteristic of a drug sale in today's marketplace. But the other factors identified in *McRay* are still relevant to an assessment of probable cause.

In the instant case, any person observing defendant and his five customers and his method of operation, using good common sense, would have, in the totality of circumstances, concluded that defendant was involved in the sale of narcotics. From a succession of customers, defendant received cash in exchange for an object less than an inch in length, which he removed from a brown paper bag. While defendant had been holding the bag before the first transaction, after the first exchange, he placed the bag on the ground next to a nearby fence before returning to the bench on which he had been sitting some ten feet away. In each subsequent transaction, Smith observed defendant go over to the fence, retrieve the bag, remove a small object which he gave to the customer in exchange for cash, return the bag to the ground near the fence and then walk back to the bench. By placing his bag near the fence, retrieving it only to remove small objects that he concealed in his cupped palm, exchanging them for cash and then replacing the bag in the same place near the fence, defendant was obviously distancing himself from the contents of the bag and taking caution to conceal whatever he was selling. This is hardly the type of behavior engaged in by legitimate street vendors, who advertise their wares openly. Defendant's behavior is typical of a drug dealer plying his trade in a known drug location. The use of a stash has been held to constitute furtive behavior indicative of drug dealing.

Moreover, of course, any person with Officer Smith's expertise, which included participation in over 150 cocaine related arrests in the very area where these transactions occurred, an area which, on the day in question, was littered with empty

crack vials, would have unhesitatingly so concluded. Considerable deference was due his conclusion that he was observing drug transactions.

While the observation of one such transaction under these circumstances might leave room for doubt, the observation of the same exchange repeated five times within a matter of minutes removed any such doubt. In each, while Officer Smith could not observe the object exchanged, he could tell that it was less than an inch in length—consistent with the length of a vial. Moreover, the purposeful concealment of the objects exchanged in the palm of defendant's hand, as Smith observed, was consistent with the conduct of a low-level street seller.

In sum, considering the totality of the circumstances, we are of the view that any experienced police officer, confronted with what Officer Smith, an experienced officer, particularly with respect to narcotics activity in the location in question, witnessed, would reasonably have concluded that what he had observed were five drug sales from a brown bag which defendant used as a stash. The officer's observations and assessment of defendant's actions in the circumstances demonstrated probable cause to search the brown bag for drugs and to arrest defendant.

Accordingly, the judgment of the Supreme Court, New York County, convicting defendant, after trial, of criminal possession of a controlled substance in the third degree and sentencing him, as a predicate felony offender, to an indeterminate term of imprisonment of from five to ten years, should be affirmed.

Note from Wally: Is *Graham* consistent with *Cunha?* Put another way, if you were representing the prosecution in *Graham* and your opposing counsel cited *Cunha,* could you "distinguish" *Cunha?* How?

Add on page 36, after *Illinois v. Gates:*

(3) A pretty good review of *Draper, Aguilar,* and *Gates* appears in *State v. Butler,* 655 So.2d 1123 (Fla.Sup.Ct., 1995).

UNITED STATES v. SONAGERE

U.S. Court of Appeals, 6th Circuit
30 F.3d 51 (1994)

Guy, Circuit Judge.

Defendant Tony Sonagere entered a conditional guilty plea to manufacturing marijuana and aiding and abetting in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. He now appeals the district court's antecedent denial of his motion to suppress evidence seized in a search of a warehouse that was leased to him. * * * *

I.

On August 3, 1992, Detective Michael Stott of the Akron Police Department applied for a warrant to search a warehouse at 1140-42 Old South Main Street in Akron, Ohio. In his affidavit, Stott described a tip he had received from an unnamed informant:

> Affiant states that the Information Source within the last ten days made the following observations about the inside of the above described location: a. The Information Source observed two tables approximately 6 feet by 6 feet containing approximately 100 Marijuana plants per table. These plants were between 3 and 4 feet in height. b. The Information Source observed 10 to 12 smaller tables, approximately 3 feet by 3 feet. These tables contained what appeared to be one Marijuana plant per table. These plants were 8 to 10 feet in height. These plants were tied at the top to the grow lights for support. c. The Information Source observed large fluorescent growing lights over the tops of the tables and also a shelf containing several spray bottles of different colored liquids. d. The Information Source observed an electrical control panel on the wall and several floor and exhaust fans. e. The Information Source while making these observations saw an automatic sprinkler system placing a liquid mist over the Marijuana plants.

Elsewhere in the affidavit, Stott stated that another Akron police officer, one Harkness, had recently encountered two men "welding the hinges shut on the outside doors" to the warehouse. When Harkness approached these men, they appeared "extremely nervous." Stott's affidavit provided no other significant information relating to the warehouse.

On the basis of Stott's affidavit, an Akron municipal court judge determined that probable cause existed to search the warehouse.

The judge issued the search warrant on August 3 and it was executed later that day. The executing officers seized 219 marijuana plants and a large quantity of hydroponic growing equipment from the warehouse. * * * *

II.

Sonagere argues that the affidavit did not establish probable cause to search the warehouse. * * * *

It is settled that a state magistrate's determination of probable cause is entitled to "great deference." *United States v. Leake,* 998 F.2d 1359, 1363 (6th Cir.1993). Our task on appeal is to determine whether, in light of the totality of the circumstances, the magistrate had a "substantial basis" for concluding that "a search would uncover evidence of wrongdoing." *Illinois v. Gates,* 462 U.S. 213, 236 (1983).

Two factors are often critical in determining whether a confidential informant's tip provides such a "substantial basis." First, an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles the informant's tip to greater weight than might otherwise be the case." Id. at 234. Second, the extent to which the tip is corroborated by the officers' own investigation is significant. Id. at 244.

In *Leake,* we considered these factors in the course of determining whether an anonymous informant's tip established probable cause for the search of a certain house. The informant there merely reported that he had smelled marijuana in, and seen marijuana "stacked in the basement" of, the house. The police placed the house under surveillance after receiving the tip, but observed "nothing unusual." We held

that the affidavit that was based upon this tip did not establish probable cause for two reasons: first, the tip "was not 'rich' in relevant detail," and second, the officers' surveillance of the house did not yield any corroboration of the tip.

Sonagere asserts that *Leake* is controlling here, but we disagree. First, unlike the tip in *Leake,* the tip here was extremely rich in relevant detail. The informant described the size and number of the marijuana plants in the building; the size, number, and shape of the tables upon which they rested; the manner in which the plants were supported; the lighting, ventilation, and watering systems used to grow the plants; and the presence of collateral items. This is a far cry from reporting that marijuana was "stacked in the basement."

Second, Officer Harkness' encounter with the two men outside the warehouse corroborated the tip to some extent. Like the "somewhat unusual travel plans" of the defendants in *Gates,* the welding of the door hinges and the extreme nervousness of the men was unusual activity that suggested the existence of a criminal enterprise.

Sonagere stresses that the informant had never before provided the police with information. Given the other strengths of the affidavit, however, this fact does not overly concern us, since the anonymous informant in *Gates* likewise had no history of reliability. We also note that the affidavit in no way misrepresented the informant's history.

Sonagere also points out that the affidavit did not explain how the informant was able to enter the warehouse or how he was able to distinguish marijuana plants from other plants. We do not think the affidavit is undermined by these facts; the informant in Gates gave no hint of how he was able to observe or identify the drugs he said were kept in the Gates' basement, and the Supreme Court did not seem troubled by that fact.

We therefore conclude that the Akron municipal judge had a "substantial basis" for determining that Stott's affidavit established probable cause to search the warehouse. * * * *

Affirmed.

Merritt, Chief Judge, dissenting.

I disagree with the majority's decision regarding Sonagere's suppression motion. The affidavit in support of the search warrant did not support a finding of probable cause and no reasonable police officer would have relied on the validity of the warrant. The seized evidence should have been suppressed.

The majority, citing *Illinois v. Gates,* relies completely on the "extreme" richness of detail provided by the anonymous "information source." In the majority's view, that detail combined with the suspiciousness of two men welding the hinges of a door shut provide probable cause to issue a search warrant.

The majority is forced to overlook the many troubling aspects of this case and to give strained interpretations to *Gates* and *Leake* in order to reach their result. The "information source" here had never been used by the police before, the police officer testified that he had no basis to judge the source's credibility or reliability, the affidavit failed to provide any indication of the reliability of the source, the

affidavit failed to state whether the source knew the name or names of the persons who owned the contraband or leased the warehouse, it failed to provide any date or dates upon which the source saw the contraband other than to say it was within the last ten days, it failed to set forth how the source was able to gain entry into the warehouse and it failed to describe any planned future activity that could have been verified by the police.

Even more troubling, the police officers did nothing to corroborate any of the information or develop independent information that might supplement that of the information source. After the police received the information they merely drove by the warehouse and noticed two nervous individuals welding a door shut. That corroborates nothing that the "information source" told to the police and in no way indicates that marijuana is being grown inside the warehouse.

The majority is correct that rich detail can be an important element in assessing an anonymous tip. Detail becomes compelling, as in *Gates,* when the police are able to corroborate it through independent police work. "The court's decision in *Gates* rested primarily upon the very specific details in the letter, and the subsequent thorough police confirmation of many of those details." *United States v. Leake,* 998 F.2d 1359, 1363 (6th Cir.1993) In this case, the police failed to follow the dictates of *Gates* or *Leake* when they failed to do any investigation before applying for the search warrant, a basic principle which the Court has ignored.

If the majority is correct that detail is all that is needed to support a search warrant, the Fourth Amendment will no longer be any constraint or check on the issuance of search warrants. Any 'detailed' information, uncorroborated by the police, from virtually any unknown, unreliable source, would support issuance of a search warrant. That cannot possibly be the meaning of probable cause under the Fourth Amendment. Now any sort of fabricated information designed to harass an enemy will get a search warrant issued. A home is not much of a castle anymore. The great drug war of our times has reduced the castle to a hovel where the state may presume that marijuana is grown.

COMMONWEALTH v. JONES

Pennsylvania Supreme Court
668 A.2d 114 (1995)

Montemuro, Justice.

This is an appeal from an order of the Superior Court which reversed the order of the Court of Common Pleas of Allegheny County granting Appellant's Motion to Suppress evidence seized pursuant to a search warrant. At issue is whether the affidavit underlying the search warrant is sufficient to establish probable cause as required by the Fourth Amendment of the Federal Constitution. Because we find that the affidavit provides a substantial basis to establish probable cause, we affirm the Superior Court.

On June 2, 1993, detectives with the City of Pittsburgh Police Department obtained a search warrant for 423 Biddle Street, Pittsburgh, Pennsylvania. The affidavit of probable cause upon which the search warrant was issued reads:

> Within the past (24 hrs) of 2 June 1993, the above Detectives have received information concerning the sells, of Marijuana, Cocaine, and Crack Cocaine (which is the base form of Cocaine). Detectives received this information from a past reliable confidential informant, who from hereon will be referred to as the C.I. Also, the above described individuals will be referred to as the actor, actors. The fore mentioned C.I stated that he/she was inside of the above location and personally observed (2) two ounces of Cocaine in the powder form. C.I also stated that she/he personally observed paraphernalia used to prepare powder cocaine into crack cocaine inside of one of the bedroom inside of the house. C.I furthermore stated that she/he has just personally observed (Kimba Jones) in the East Liberty area in the Mall area sells cut off plastic baggies of Marijuana. The above C.I stated that the above active has been going on for the past (2) two months to the above C.I's knowledge. C.I stated that around the hours of 3PM to the late evening, drugs abusers could be observed coming and going in the above apartment. This C.I is knowledgeable with the appearance of Marijuana, Cocaine, and Crack Cocaine. And how it is ingested into the human body. C.I states that the above actors would hide the drugs through out the apartment. The above C.I has been reliable in the past with the arrest and convention of the following people: J. Snoe on 7-18-92 for possession of Crack Cocaine, who received two years probation from Judge Little. L. Cargile on 7-23-92 for possession of Marijuana, whose case is still pending in the Courts of Allegheny County. J. Newsome on 7-30-92 for poss with intent to Del Crack Cocaine, who case is still pending in the Courts of Allegheny County. Due to the above reasons Det's would like to secure a search warrant.

While the police were executing the warrant, Appellant, West Jones, arrived and was informed by the police that he would be subject to a pat-down search if he entered the apartment. Jones entered, and a pat-down search revealed a bag of crack cocaine on his person. * * * *

The standard for evaluating whether probable cause exists for the issuance of a search warrant is the "totality of circumstances" test as set forth in *Illinois v. Gates,* 462 U.S. 213 (1983). A magistrate is to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

The information offered to establish probable cause must be viewed in a common sense, nontechnical manner and deference must be accorded to the issuing magistrate. The duty of a court reviewing the decision is to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Jones' first allegation is that the totality of circumstances test does not lessen the requirement for police corroboration of information provided by an informant. The Commonwealth contends that corroboration is merely one factor to be considered in the totality equation, and the lack of corroboration does not render a search warrant per se invalid.

The totality of circumstances test was adopted to do away with rigid, precise determinations of probable cause. *See Gates,* 462 U.S. at 232. To require corroboration in every situation would be contrary to the purpose of the totality of circumstances test: allowing a flexible, common sense approach to all the circumstances of an affidavit.

Turning our attention to the totality of the circumstances of this case, we begin by examining the informant's basis of knowledge. The affidavit in the instant case states that the informant has personally observed: Kimba Jones selling drugs; drugs in the Biddle Street apartment; drug abusers coming and going from the apartment from 3 p.m. to late evening; and paraphernalia used to prepare powder cocaine into crack cocaine inside the apartment. The information provided by the informant is not a rumor or speculation, but is based upon direct, personal observation. Because the affidavit provides a sufficient basis of knowledge, no corroboration is required.

As to the informant's veracity, although *Gates* recognized the importance of police corroboration, it did so in the limited circumstance of anonymous tips because the veracity of persons supplying such tips is unknown. In such a circumstance, corroboration provides a "substantial basis for crediting the hearsay." In addition, an informant's veracity can also be established through an assertion that the informant has given reliable information in the past. Reliability can be shown by reliable and accurate prior tips, or it may also be determined by independent corroboration of the tip, however, the affidavit "need not meet all these criteria. Therefore, if an informant's veracity has already been established through prior reliable tips, corroboration is not necessary.

In the case *sub judice,* the magistrate was presented with an affidavit containing information from an informant who was known to police and had provided reliable information in the past. The affidavit specifically states that the informant had provided tips on three prior occasions, resulting in one conviction and two cases pending before the courts. Furthermore, the affidavit provides names of the prior arrestees and the dates they were arrested. Since the reliability of the informant had already been established by the prior tips, corroboration was not necessary.

Taking into account all the circumstances presented to the magistrate, including the basis of knowledge and veracity of the informant, we hold that a substantial basis existed to find probable cause.[7]

---

[7] The Dissent contends that we have authorized the issuance of a search warrant based solely on the reliability, that is, the past performance, of a confidential informant, and in the process have relieved the affiant of any obligation to corroborate an informant's report. Such a contention mischaracterizes our holding. In this case, the affidavit contains the basis of the informant's knowledge—his current, personal observations. Thus we do not rely solely on the informant's reliability, but assess the foundations of the information he has supplied. The correct reading of our Opinion is that when an affidavit contains information from a reliable informant, and the basis of that knowledge is provided, corroboration is not required. Further, there never has been an obligation to corroborate information if the informant is sufficiently reliable and the source of his knowledge is presented to a magistrate. Contrary to the Dissent's assertion, we have not "gutted" the probable cause requirement. Rather, we have looked within the four corners of the affidavit, applied the totality of circumstances test, and determined that the magistrate had a substantial basis for concluding that probable cause existed in this case.