UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JAMES A. COWGILL
United States Air Force

ACM S31404

10 December 2008

Sentence adjudged 28 June 2007 by SPCM convened at McChord Air Force Base, Washington. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Tiffany M. Wagner (argued), Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Michael A. Burnat.

Appellate Counsel for the United States: Major Donna S. Rueppell (argued), Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Brendon K. Tukey, and Captain Naomi Porterfield.

Before

BRAND, JACKSON, and HELGET
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Judge:

In accordance with his pleas, a military judge sitting as a special court-martial found the appellant guilty of one specification of wrongful use of marijuana and one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. §

912a. The appellant also conditionally pled[1] and was found guilty of one specification of wrongful possession of marijuana in violation of Article 112a, UCMJ. The military judge sentenced the appellant to a bad-conduct discharge, two months confinement, and reduction to E-1. The convening authority approved the findings and sentence. On appeal, the appellant asserts that the military judge abused her discretion in denying his motion to suppress all evidence seized from his residence.

Background

On 5 January 2007, Special Agent AV of the Air Force Office of Special Investigations (AFOSI) sought Detective GK's assistance in obtaining a civilian search warrant for the appellant's off-base residence. Detective GK was a civilian detective assigned to the Tacoma, Washington Police Department and had worked with the AFOSI on such requests in the past. Special Agent AV told Detective GK that an unnamed, yet clean,[2] reliable source had told her that: (1) he witnessed the appellant and his roommate, JB, use marijuana in a glass bong at the appellant's residence on three occasions in December 2006; (2) he smelled marijuana while at the residence on various occasions in 2006; and (3) there was drug paraphernalia and marijuana at the appellant's residence. According to Detective GK, Special Agent AV also said that based upon that information they had conducted a urinalysis[3] and one of the subjects at the appellant's residence had tested positive for drug use.

That same day, Detective GK drafted an affidavit containing the aforementioned information and presented it to a local civilian judge (magistrate) to obtain a search warrant for the appellant's residence. During the suppression hearing, Detective GK testified that the use of the informant was unusual in that the informant was relaying the information through the AFOSI rather than directly to him. In assessing the source's reliability, the magistrate asked Detective GK what information the source had provided the AFOSI that had been corroborated. Detective GK told the magistrate that the positive urinalysis corroborated drug use and supported the source's reliability.

Based on the affidavit, the magistrate found probable cause to search the appellant's residence. The magistrate issued a search warrant, the execution of which led to the seizure of three to four grams of marijuana from the appellant's bedroom. At trial,

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[1] The appellant entered a conditional guilty plea to preserve his motion to suppress all evidence seized from his residence.

[2] Detective GK referred to Special Agent AV's source as "clean" in his testimony, meaning a source that had not engaged in misconduct. This source was later identified at trial as Staff Sergeant EM, one of the appellant's house mates.

[3] At trial, Special Agent AV denied telling Detective GK that the urinalysis was based on the information the source provided. According to Special Agent AV, she told Detective GK that the urinalysis test had been conducted several months prior. The urinalysis test was actually performed on the appellant's roommate, JB, in August 2006 as a result of a unit-wide sweep.

the appellant filed a motion to suppress the marijuana seized from his residence. He argued first that the affidavit supporting the search warrant was insufficient to establish probable cause, and second that the good faith exception to the exclusionary rule did not apply in this case. After hearing evidence and considering arguments from counsel, the military judge denied the appellant's motion.

Discussion

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. *United States v. Quintinilla*, 63 M.J. 29, 35 (C.A.A.F. 2006). We review the legal question of sufficiency for finding probable cause de novo, based on the totality of the circumstances. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). The abuse of discretion standard is a strict one, involving more than a difference of opinion. The challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be invalidated on appeal. *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

Probable Cause

Probable cause exists when there is sufficient information to provide the authorizing official a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f)(2). There must be a "substantial basis" on which to conclude probable cause existed. *United States v. Figueroa,* 35 M.J. 54, 56 (C.M.A. 1992).

> The task of the issuing magistrate is simply 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.

Illinois v. Gates, 462 U.S. 213, 238 (1983). "[D]etermination of probable cause by a neutral and detached magistrate is entitled to substantial deference." *United States v. Maxwell*, 45 M.J. 406, 423 (C.A.A.F. 1996) (quoting *United States v. Oloyede*, 982 F.2d 133, 138 (4th Cir. 1993)).

We start our examination of the issues by assessing whether the magistrate had a "substantial basis" for determining that probable cause existed. *Leedy*, 65 M.J. at 213 (citing *Gates*, 462 U.S. at 238); *Figueroa*, 35 M.J. at 56. In making this assessment we:

(1) look at the information made known to the magistrate at the time of his decision and (2) analyze the manner in which the facts became known to the magistrate. *Leedy*, 65 M.J. at 213-14.

Magistrate's Probable Cause Assessment

This inquiry centers on the information set out in the four corners of the affidavit, as illuminated by the source's veracity, reliability, and basis for knowledge, and coupled with other factors to determine the existence of probable cause. *Id.* at 214. Detective GK's affidavit lays out his background, education, and expertise in drug investigations. The affidavit also establishes the facts and circumstances supporting the request for the search of the appellant's residence.

The relevant facts and circumstances, as established in the affidavit, are: (1) on 5 January 2007, Special Agent AV sought Detective GK's assistance in obtaining a civilian search warrant for the appellant's off-base residence; (2) Detective GK had worked with the AFOSI on such requests in the past; (3) Special Agent AV told Detective GK that an unnamed, yet clean, reliable source had told her that: (a) he witnessed the appellant and his roommate, named JB, use marijuana in a glass bong at the appellant's residence on three occasions in December 2006; (b) he smelled marijuana while at the residence on various occasions in 2006; and (c) there was drug paraphernalia and marijuana at the appellant's residence; and (4) that based upon the source's information, the AFOSI had conducted a urinalysis and one of the subjects at the appellant's residence had tested positive for drug use. The affidavit contained no information about the unnamed source's reliability or veracity, other than that the AFOSI had determined the source to be reliable.

Under *Gates* the failure to establish a source's reliability can be overcome by the specificity of the information provided by the source and by corroboration provided by law enforcement officials. *Gates,* 462 U.S. at 241-42. In this case, the source provided detailed specifics about the appellant's usage of marijuana and the frequency of the appellant's use. The source indicated that he had personally witnessed the appellant use marijuana on three occasions in December 2006, the marijuana was stored in sandwich baggies, and he had smelled marijuana while at the appellant's residence on several occasions over the course of 2006, with the last time occurring on 28 December 2006, just days before the warrant was issued on 5 January 2007. This detailed information clearly bolstered the source's reliability. Additionally, Detective GK verified the address of the appellant's residence and checked the law enforcement computer database, wherein he found eight loud party complaints about the appellant's residence over the course of 2006, with the last complaint occurring just prior to the end of December 2006.

The appellant asserts that the only information in the affidavit showing the source was reliable is the erroneous information that a positive urinalysis of the appellant's roommate had resulted from information provided by the source. According to Detective

GK, this was a crucial factor in the magistrate's finding of probable cause. Even if this information is discarded, the fact remains that the appellant's roommate did test positive for marijuana in August of 2006, which corroborates the information provided by the source that he smelled marijuana at the residence throughout all of 2006.

Considering the totality of the circumstances, we find that the military judge did not abuse her discretion in finding the magistrate had a substantial basis for determining that probable cause existed. Further, even if the magistrate lacked a substantial basis for determining probable cause, the good faith exception to the exclusionary rule applies in this case.

Good Faith Exception

The good faith exception to the exclusionary rule is applicable in cases where the official executing the warrant objectively and reasonably relied on the magistrate's probable cause determination and the technical sufficiency of the warrant. *United States v. Leon*, 468 U.S. 897, 922 (1984). However, the Supreme Court also listed four circumstances where the good faith exception would not apply: (1) a false or reckless affidavit; (2) a "rubber stamp" judicial review where the magistrate abandoned his judicial role; (3) a facially deficient affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) a facially deficient warrant. *Id.* at 917, 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610).

The good faith exception articulated in *Leon* is contained in Mil. R. Evid. 311(b)(3). *United States v. Carter*, 54 M.J. 414, 420 (C.A.A.F. 2001). Mil. R. Evid. 311(b)(3)(B) provides that evidence obtained as a result of an unlawful search or seizure may be used if: (1) the search or seizure resulted from a search warrant issued by a competent authority; (2) the individual issuing the warrant had a substantial basis for determining the existence of probable cause; and (3) the officials seeking and executing the warrant reasonably and with good faith relied on the issuance of the warrant. In *Carter,* the Court examined the relationship between Mil. R. Evid. 311(b)(3) and the elements of the good faith exceptions in *Leon* and concluded that the second prong addresses the first and third exceptions in *Leon,* "i.e., the affidavit must not be . . . recklessly false, and it must be more than a 'bare bones' recital of conclusions." *Id.* at 421. The third prong addresses the second and fourth *Leon* exceptions; i.e. there can be no good faith where "the police know that the magistrate merely 'rubber stamped' their request, or when the warrant is facially defective." *Id.*

The military judge addressed the three prongs of Mil. R. Evid. 311(b)(3) and found they were all met in this case. Concerning the first and third prongs, the military judge concluded that the warrant was issued by a competent authority and the AFOSI acted upon that warrant in good faith.

Concerning the second prong, the military judge specifically found that the appellant failed to present any evidence to indicate the affiant, Detective GK, knowingly lied or recklessly disregarded the truth. In fact, the military judge found that the erroneous information was mistakenly provided to the magistrate.

The military judge also did not find the affidavit so facially deficient in that it was a "bare bones" affidavit. We concur. By definition, "bare bones" affidavits are documents so lacking in information that a reasonable magistrate cannot find probable cause. The standard is that it must not only be unreasonable for the magistrate to issue the warrant, but that it is entirely unreasonable. *Leon*, 468 U.S. at 923. The affidavit could have contained additional information, especially about the reliability of the source, and it should not have contained the mistaken erroneous information. However, the affidavit did provide that the source had detected the smell of marijuana on several occasions throughout the previous year, the number of times the appellant had been using marijuana at his residence in December 2006, and the manner in which the appellant was using the marijuana, which established a substantial basis for the magistrate to determine the existence of probable cause. Accordingly, the military judge did not abuse her discretion in denying the appellant's motion to suppress.

Erroneous Promulgating Order

Finally, we note that the promulgating order erroneously: (1) lists the wrongful use of marijuana specification as Specification 2 rather than Specification 3; (2) states that the appellant conditionally pled guilty to the wrongful use of marijuana specification; (3) lists the wrongful possession of marijuana specification as Specification 3 rather than Specification 2; and (4) fails to reflect that the appellant conditionally pled guilty to the wrongful possession of marijuana specification. Preparation of a corrected court-martial order is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

JACKSON, Judge (Concurring in part, dissenting in part):

While I concur with the majority's findings with respect to the erroneous promulgating order, I respectfully dissent from its finding that the military judge did not

abuse her discretion in finding that the magistrate had a substantial basis for determining that probable cause existed and its finding that, absent a substantial basis, the good faith exception is applicable. For the reasons established below, I would set aside the finding of guilty to Specification 2 of the Charge and reassess the sentence.

Discussion

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. *United States v. Quintinilla*, 63 M.J. 29, 35 (C.A.A.F. 2006). We review the legal question of sufficiency for finding probable cause de novo, based on the totality of the circumstances. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).

I start my examination of the issues by assessing whether the magistrate had a "substantial basis" for determining that probable cause existed. *Leedy*, 65 M.J. at 213 (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)); *United States v. Figueroa*, 35 M.J. 54, 56 (C.M.A. 1992). In making this assessment I: (1) look at the *information made known to the magistrate at the time of his decision* and (2) analyze the manner in which the facts became known to the magistrate. *Leedy*, 65 M.J. at 213-14.

Magistrate's Probable Cause Assessment

This inquiry centers on the information set out in the four corners of the affidavit, as illuminated by the *source's veracity, reliability, and basis for knowledge*, and coupled with other factors to determine the existence of probable cause. *Id.* at 214. Detective GK's affidavit lays out his background, education, and expertise in drug investigations. The affidavit also establishes the facts and circumstances supporting the request for the search of the appellant's residence.

The relevant facts and circumstances, as established in the affidavit, are: (1) on 5 January 2007, Special Agent AV sought Detective GK's assistance in obtaining a civilian search warrant of the appellant's off-base residence; (2) Detective GK had worked with the AFOSI on such requests in the past; (3) Special Agent AV told Detective GK that an unnamed, yet clean, reliable source had told her that: (a) he witnessed marijuana use at the appellant's residence; and (b) there was drug paraphernalia and marijuana at the appellant's residence; and (4) that based upon the information provided by the source, the AFOSI had conducted a urinalysis and one of the subjects at the appellant's residence had tested positive for drug use.

The magistrate simply had no evidence as to the unnamed source's veracity. Additionally, the only evidence the magistrate had of the unnamed source's reliability was Special Agent AV's bare assertion that the source was reliable and the false information she provided to the affiant – that *based on the unnamed source's information a urinalysis was conducted* and one of the subjects at the appellant's residence had tested positive for drug use. The magistrate undoubtedly, as the military judge found, heavily relied on this false information in finding the unnamed source reliable and finding probable cause.

Without question, had the magistrate not been erroneously advised that the unnamed source provided the information that resulted in the positive urinalysis, the magistrate would not have had any evidence with which to assess the reliability of the unnamed source's information. The majority sidesteps this issue by attempting to establish the reliability of the unnamed source's information by examining the specificity of the information provided and the efforts undertaken by the affiant to corroborate the unnamed source's information.

I respectfully believe the majority's approach is flawed for several reasons. First, the majority seems to be engaged in a de novo review of a probable cause determination, rather than a review that assesses, based on the information provided to the magistrate, whether the magistrate had a substantial basis for finding probable cause. In addressing this issue, this Court should not engage in a de novo review, but rather assess whether the magistrate had a substantial basis for finding probable cause. *Gates*, 462 U.S. at 236.

What we do know about the magistrate's determination is that despite the detailed information provided and the affiant's "corrobative" efforts, the magistrate needed additional evidence to find the unnamed source reliable. If such was not the case, the magistrate would not have asked Detective GK what information provided by the unnamed source had been corroborated. Thus, the detailed nature of the information and "corroborative" efforts standing alone were not sufficient evidence for the magistrate to find the unnamed source's information reliable.[4] The magistrate needed additional evidence and it was this additional evidence – the erroneous information that *based on the unnamed source's information a urinalysis was conducted* – upon which the magistrate relied to find the unnamed source's information reliable. In short, the majority, by finding that the specificity of the information and "corrobative" efforts alone were sufficient to establish the source's reliability, a finding the magistrate specifically did not make, is engaging in a de novo review.[5]

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[4] Even if this Court were to erroneously conduct a de novo review, the detailed nature of the information provided would not be sufficient to establish the reliability of the unnamed source's information.

[5] If, after being provided the detailed information and notice of the "corrobative" efforts, the magistrate had not queried Detective GK on the source's reliability, one could arguably presume, as the majority does, that the magistrate found the source reliable based on the detailed information and notice of the "corrobative" efforts.

Second, the majority asserts "[T]he source provided detailed specifics about the appellant's usage of marijuana and the frequency of the appellant's use . . . [and] [t]his detailed information clearly bolstered the source's reliability." However, prior to the magistrate's reliability determination, none of this detailed information had been verified as true. Neither the magistrate, Detective GK, nor Special Agent AV verified the truth of the unnamed source's assertions. Uncorroborated information, detailed as it may be, is simply insufficient to provide corroboration for other uncorroborated information. *Id.* at 241-246 (acknowledging that one may rely on information received by an informant so long as the information is reasonably *corroborated* by other matters). In short, there is no evidence that this detailed information bolstered the "source's reliability" in the eyes of the magistrate. In fact, the fact that the magistrate asked Detective GK what information provided by the unnamed source had been corroborated is evidence that the detailed information did not bolster the "source's reliability" in the eyes of the magistrate.

Third, the majority gives weight to the fact that Detective GK verified the address of the appellant and, in checking the law enforcement database, found eight loud party complaints regarding the appellant's residence. However, these facts are irrelevant to the determination of this issue. First, this information was never provided by the unnamed source and thus does not corroborate the unnamed source's information. Second, assuming *arguendo* this information was provided by the unnamed source, there is no causal connection between loud party complaints and prior drug use. Simply put, Detective GK's scant "corroborative" efforts may corroborate something but they do not corroborate the reliability of the unnamed source's information.

Lastly, the majority holds that even if the erroneous information is discarded, the fact remains the appellant's roommate tested positive for marijuana in August 2006 and this positive urinalysis corroborates the unnamed source's assertion that he smelled marijuana at the appellant's residence throughout all of 2006. Again, the majority appears to conduct a de novo review rather than examining the facts provided to the magistrate. While the magistrate was informed that the appellant's roommate tested positive for marijuana, the magistrate was never advised that "the appellant's roommate tested positive for marijuana in August 2006." Thus this fact, true as it may now be, was not a part of the magistrate's reliability calculus.

Rather, the case at hand mirrors *Gates* in that the weakness in the tip was the anonymity and lack of proven reliability of the unnamed source. *United States v. Tipton*, 16 M.J. 283, 286 (C.M.A. 1983). However, unlike in *Gates*, there was no substantial law enforcement corroboration of the unnamed source's information. Nor did affiant and the magistrate know the source was in the military.[6] Moreover, from a totality of the circumstances perspective, there were no other factors cited by the magistrate that

[6] Had the affiant and the magistrate known of the unnamed source's military status such knowledge arguably would have been sufficient to overcome the unnamed source's lack of proven reliability. *See United States v. Tipton*, 16 M.J. at 286-87 (C.M.A. 1983).

overcame the unnamed source's lack of proven reliability. So as to be clear, a source's proven reliability is important in probable cause determinations and such reliability must be established by substantial law enforcement corroboration, disclosure to the affiant and magistrate of the source's military identity, or otherwise established. Failure to establish a source's reliability will prove fatal to a finding of probable cause.

In short, the relevant inquiry is not whether the military trial judge or this Court can find facts that corroborate the unnamed source's information but whether the magistrate, at the time of his reliability determination, had sufficient facts to deem the unnamed source's information reliable. In the case sub judice, the unnamed source lacked proven reliability and there was a lack of sufficient evidence for finding the unnamed source's information reliable.

Mindful that a magistrate's probable cause determination should ordinarily be paid great deference and considering the evidence in the light most favorable to the prevailing party, I do not afford the magistrate great deference because I find the magistrate lacked a substantial basis for determining that probable cause existed.[7] *Gates*, 462 U.S. at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)); *Leedy*, 65 M.J. at 213-14; *Reister*, 44 M.J. at 413; *United States v. Cunningham*, 11 M.J. 242, 243 (C.M.A. 1981). Accordingly, I find that the military judge abused her discretion in finding that the magistrate had a substantial basis for determining that probable cause existed.

However, that does not end the inquiry. One must next determine whether the good faith exception to the exclusionary rule is applicable. For if the good faith exception is applicable, the evidence seized would be admissible even if the magistrate lacked a substantial basis for determining that probable cause existed. *United States v. Carter*, 54 M.J. 414, 421 (C.A.A.F. 2001).

Good Faith Exception

The good faith exception to the exclusionary rule is applicable in cases where the official executing the warrant objectively and reasonably relied on the magistrate's probable cause determination and the technical sufficiency of the warrant. *United States v. Leon*, 468 U.S. 897, 922 (1984). However, the Supreme Court also listed four circumstances where the good faith exception would not apply. Two of the circumstances – a facially deficient affidavit and a false or reckless affidavit – concern me today.

[7] The affidavit is arguably, at best, recklessly false and, at worse, knowingly false. Under such a situation, I do not afford the magistrate's probable cause determination great deference. *United States v. Gates*, 462 U.S. 213, 239 (1983); *Franks v. Delaware*, 438 U.S. 154 (1978).

First, the affidavit is so lacking indicia of probable cause, a deficiency caused by the unnamed source's lack of proven reliability, as to render official belief in the affidavit entirely unreasonable. *United States v. Lopez*, 35 M.J. 35, 42 (C.M.A. 1992).

Second, while there is no evidence that Special Agent AV deliberately lied to Detective GK, the information she provided on how the unnamed source's information corroborated drug use exhibited a reckless disregard for the truth. If there is anyone who should have known the basis for the positive urinalysis it should have been the agent who was investigating the appellant. Moreover, Special Agent AV's recklessly false information, albeit communicated to the magistrate via a surrogate (Detective GK), was pivotal to the magistrate's finding the unnamed source reliable and finding probable cause. As our superior court noted, "the good faith exception will not apply when part of the information given to the authorizing official is . . . given with 'reckless disregard for the truth.'"[8] *Lopez*, 35 M.J. at 41 (quoting *Leon*, 468 U.S. at 923).

In short, the good faith exception is inapplicable because the affidavit was facially deficient and recklessly false. The military judge abused her discretion in holding: (1) the magistrate had a substantial basis for determining that probable cause existed and (2) absent probable cause that the good faith exception applies. She thus abused her discretion in denying the appellant's motion to suppress. *Leedy*, 65 M.J. at 213. Accordingly, I would set aside the finding of guilty of Specification 2 of the Charge and reassess the sentence. For these reasons, I must respectfully dissent.

OFFICIAL

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[8] It makes little difference in the analysis that Detective GK has "clean hands." Special Agent AV used Detective GK to transmit recklessly false information to the magistrate. This information was pivotal to the magistrate finding the unnamed source reliable and finding probable cause. The exclusionary rule is designed to deter police misconduct. *United States v. Leon*, 468 U.S. 897, 916 (1984). I believe the exclusionary rule is applicable not only to prevent misconduct by affiants but by those, as in the case here, who would use affiants to engage in misconduct.