Nebraska Law Review

Volume 56 | Issue 4 Article 6

1977

Use of an Informant's Tip in Establishing Probable Cause: *State v. Bernth*, 196 Neb. 813, 246 N.W.2d 600 (1976)

James Holman
University of Nebraska College of Law, holman@thwlaw.com

Note

Use of an Informant's Tip In Establishing Probable Cause

State v. Bernth, 196 Neb. 813, 246 N.W.2d 600 (1976).

In *State v. Bernth*[1] the requirements for use of an informant's tip in establishing probable cause under the fourth amendment were again considered in Nebraska.[2] Under the fourth amendment,[3] as applied to the states through the fourteenth amendment,[4] a warrant is required to search private property,[5] and a search warrant may only be issued upon a showing of probable cause.[6]

On April 4, 1975, the Associate Judge of the Hall County Court issued a warrant to search the premises of Rodney L. Bernth. The affidavit in support of the search warrant stated:

> That on the 2nd day of April, 1975, Affiant was advised by an in-

1. 196 Neb. 813, 246 N.W.2d 600 (1976).
2. The Nebraska Supreme Court previously considered the requirements in State v. Graves, 193 Neb. 797, 229 N.W.2d 538 (1975); State v. Glouser, 193 Neb. 190, 226 N.W.2d 328 (1975); State v. Holloway, 187 Neb. 1, 187 N.W.2d 85 (1971); State v. Waits, 185 Neb. 780, 178 N.W.2d 774 (1970); and State v. LeDent, 185 Neb. 380, 176 N.W.2d 21 (1970).
3. > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

   U.S. CONST. amend. IV.
4. Mapp v. Ohio, 367 U.S. 643 (1961). In Ker v. California; 374 U.S. 23 (1963), the Supreme Court held that the standard of reasonableness for obtaining a warrant is the same under the fourth and fourteenth amendments.
5. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).
6. "[P]robable cause . . . means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion." Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813). Probable cause has been said to have been established in an affidavit if a man of ordinary caution or prudence would be led to believe that an offense had been committed or that the accused is guilty of an offense. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

> formant in oral conversation of the following: That on the 29th day of March, 1975, said informant had a personal conversation with suspect and was advised by suspect that suspect had pounds of grass for sale.
>
> That on the 3rd day of April, 1975, Officer Brad Brush of the Grand Island Police Department advised Affiant that he had accompanied informant on said date in a motor vehicle during which time informant pointed out the above address as suspect's residence.[7]

The premises were searched and a quantity of marijuana was found. Bernth was convicted of possession of marijuana and possession of marijuana with intent to distribute. The Nebraska Supreme Court affirmed this conviction.[8]

The defendant argued on appeal that the affidavit failed to state with sufficient particularity that marijuana was kept at defendant's residence.[9] He claimed, therefore, that the affidavit did not establish probable cause for issuance of the warrant. In affirming the conviction and upholding the validity of the search, the Nebraska Supreme Court stated that affidavits for search warrants must be interpreted in a common sense and realistic fashion. The court stated that reasonable grounds for the issuance of a warrant to search specified premises exist if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe the property sought was on the premises described.[10]

The court concluded that the dealer status of the defendant was obvious in that he had stated to the informant that he had "pounds" of marijuana to sell. The court's reasoning proceeded on the following grounds. Because this quantity of marijuana could not be carried on the person, and being subject to theft, could not be left unprotected in an automobile, the marijuana could be kept in only one logical place—the defendant's residence. This conclusion could be reached by applying the issuing magistrate's "wide experience" in issuing search warrants, which "over the years has demonstrated that [marijuana is] usually kept in a dealer's place of residence

---

7. Brief of Appellant at 6.
8. 196 Neb. at 819, 246 N.W.2d at 603. A second issue before the court was whether simple possession of a controlled substance is a lesser included offense within a charge of possession with intent to distribute. The court concluded that simple possession is a lesser included offense, and reversed the conviction and sentence on the charge of simple possession.
9. *Id.* at 815, 246 N.W.2d at 601. Defendant conceded that the informant was reliable.
10. *Id.*

and under constant surveillance or supervision."[11] The court buttressed its reasoning by citing several federal appeals cases,[12] all of which approved issuance of a search warrant based upon an informant's tip; the tips in question, however, did not definitely state that the objects sought were in defendants' residences.[13]

In order to understand the significance of the *Bernth* decision, it is necessary to examine it against the background of the guidelines laid down by the United States Supreme Court on issuance of a search warrant based on an informant's tip. The Court has formulated these guidelines in six cases: *Jones v. United States*,[14] *Rugendorf v. United States*,[15] *Aguilar v. Texas*,[16] *United States v. Ventresca*,[17] *Spinelli v. United States*,[18] and *United States v. Harris*.[19]

In *Jones v. United States*,[20] the defendant's apartment was searched pursuant to a warrant based on an informant's tip.[21] Defendant argued on appeal that the affidavit did not establish prob-

11. *Id.* at 817, 246 N.W.2d at 602.
12. Agnellino v. State, 493 F.2d 714 (3d Cir. 1974); United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973); Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1973).
13. The applicability of these cases to the court's decision is at best debatable. Although none of the affidavits state that the objects sought were in the premises to be searched, there was sufficient information alleged in the affidavits to link the objects sought with the premises.

    In Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1973), for example, the informant saw the suspects carrying the sought-after automatic pistols and reported that they had told him they were returning to their apartment. In United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973), sufficient details were alleged about the suspect's criminal habits to establish that the evidence specified in the warrant was located in suspect's apartment, and to eliminate any other possible hiding place. Similarly, sufficient detail was alleged in Agnellino v. State, 493 F.2d 714 (3d Cir. 1974), to eliminate all other possible locations of the sought-after contraband other than in the suspect's restaurant.
14. 362 U.S. 257 (1960).
15. 376 U.S. 528 (1964).
16. 378 U.S. 108 (1964).
17. 380 U.S. 102 (1965).
18. 393 U.S. 410 (1969).
19. 403 U.S. 573 (1971).
20. 362 U.S. 257 (1960).
21. The affidavit contained information from an unidentified source that the suspect was "involved in the illicit narcotic traffic" and "kept a ready supply of heroin on hand" in the apartment. The informant also stated that he had purchased narcotics from the suspects at the apartment. The affidavit went on to state that the informant had previously given information which was correct, and that the information had been corroborated by other sources. *Id.* at 268-69.

able cause because it did not set forth the affiant's personal observations regarding the presence of narcotics in the apartment, but rested entirely on hearsay. Relying on *Nathanson v. United States*,[22] which held that an affidavit does not establish probable cause if it merely states the affiant's belief that there is cause to search, without stating facts upon which that belief is based, defendant argued, *a fortiori*, this is true of an affidavit which states only the belief of one not the affiant.

The Supreme Court rejected this argument. Because an officer may act without a warrant on an informant's tip, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge,[23] the officer may also act with a warrant based on an informant's tip, "so long as a substantial basis for crediting the hearsay is present."[24] Thus an affidavit for a search warrant may be based on hearsay so long as a substantial basis for believing the hearsay is evident in the affidavit.[25]

The Supreme Court reaffirmed the substantial basis test in *Rugendorf v. United States*.[26] In this case the informant provided a detailed description of allegedly stolen furs he had seen in petitioner's basement. This information was corroborated by independent police investigation. The Court, while emphasizing the amount of detail present in the affidavit,[27] held that the affidavit presented a substantial basis for crediting the hearsay.

In the seminal case of *Aguilar v. Texas*,[28] decided the same year as *Rugendorf*, the Supreme Court formulated more rigid guidelines for establishing probable cause than the nebulous substantial basis test. The warrant in *Aguilar* was obtained upon the basis of an affidavit which stated: "Affiants have received reliable informa-

22. 290 U.S. 41 (1933).
23. *See* Draper v. United States, 358 U.S. 307 (1959).
24. 362 U.S. at 269.
25. "Substantial basis" was established because the affidavit specified that the informant was reliable, having given correct information in the past; further, the affidavit alleged that the information given by the informant had been corroborated by other sources, and alleged that defendant was a known user of narcotics. Such corroboration "reduced the chances [that the information was] a reckless or prevaricating tale," and the charge that suspect was a known user of narcotics "made the charge against him much less subject to scepticism than would be such a charge against one without such a history." *Id.* at 271.
26. 376 U.S. 528 (1964).
27. The affidavit contained the informant's detailed description of the stolen furs along with another informant's statement labeling defendant a "fence."
28. 378 U.S. 108 (1964).

tion from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."[29] The Supreme Court reversed the conviction for possession of narcotics, and concluded that the warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause. The Court acknowledged the holdings of *Jones* and *Rugendorf* that an affidavit may be based on hearsay information, but held that "the magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' "[30] The affidavit contained no information from which the Court could determine why the officer concluded that the informant was reliable, and contained none of the underlying circumstances from which the informant concluded that the narcotics were in the premises to be searched. Such information could have been supplied had the affidavit detailed that the informant had given reliable information in the past, and that he had, for example, either seen or purchased narcotics on the premises to be searched.

These stronger guidelines for establishing probable cause had their genesis in the statement of Mr. Justice Jackson in *Johnson v. United States*:[31]

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[32]

If warrants were to be issued on the basis of the information provided in *Aguilar*, then the inferences from the facts which lead to the complaint would not be drawn "by a neutral and detached magistrate," as the Constitution requires, but instead would be drawn by a police officer "engaged in the often competitive enterprise of ferreting out crime." The magistrate would in effect be accepting the police officer's judgment rather than his own, or

29. *Id.* at 109 (footnote omitted).
30. *Id.* at 114 (footnote omitted).
31. 333 U.S. 10 (1948).
32. *Id.* at 13-14 (footnote omitted). *See also* United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

worse yet, would be accepting the judgment of an unidentified informer.[33]

The Supreme Court apparently combined the "underlying circumstances" test of *Aguilar* with the "sufficient detail" analysis of *Rugendorf* in *United States v. Ventresca*,[34] where the Court held that, "where . . . circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant."[35] *Ventresca* involved a search warrant based on an affidavit couched in deliberately ambiguous terms as to who the observers of the alleged criminal activity were. Since the affidavit had not specified who had made the observations, the Court of Appeals for the Fifth Circuit invalidated the search warrant. The court of appeals could not determine whether the information provided by these others had or had not been based upon hearsay received from informants whose credibility could not be substantiated.[36]

In reversing the decision of the court of appeals, the Supreme Court was apparently influenced by the detailed descriptions contained in the affidavit.[37] These details, if read in a commonsense manner, would be sufficient to assure a magistrate that the source was credible and the information reliable, and supply a sufficient basis for establishing probable cause. The result of *Ventresca* is that the identity of the informer need not be stated, nor the underlying circumstances attesting to his reliability, so long as sufficient detail is provided to assure the magistrate that the source of information is reliable.[38] Further, in marginal or doubtful cases, the resolution is to be largely determined by the preference to be accorded to warrants.[39]

Although *Ventresca* seemed to relax the requirements for establishing probable cause, the more rigid standards of the *Aguilar* two-

33. 378 U.S. at 114-15.
34. 380 U.S. 102 (1965).
35. *Id.* at 109.
36. United States v. Ventresca, 324 F.2d 864, 869 (1st Cir. 1963), *rev'd*, 380 U.S. 102 (1965).
37. The affidavit described seven different occasions when a specified automobile made deliveries to the suspect's house; the contents of the automobile were described in detail on each occasion; the investigators reported the smell of fermenting mash emanating from the suspect's residence, and sounds similar to a motor or a pump were heard coming from the house. 380 U.S. at 104.
38. Levinson, *Employment of Informant's Statements in Establishing Probable Cause for Issuance of a Search Warrant*, 4 J. MAR. J. PRAC. & PROC. 38, 42 (1970).
39. 380 U.S. at 106; Jones v. United States, 362 U.S. 257, 270 (1960).

pronged test were reaffirmed in *Spinelli v. United States.*[40] *Spinelli* dealt with an informant's tip which was partially corroborated by independent sources. The defendant was convicted of conducting illegal interstate gambling activities despite his claim that the search warrant used to uncover evidence used to convict him was not founded upon probable cause. The affidavit in substance alleged: (1) that F.B.I. agents had followed defendant for five days, on four of which he was seen crossing from Illinois to St. Louis, Missouri, (2) that he had been seen to park his car at a St. Louis apartment house, and on one day was seen to enter a particular apartment in that house, (3) that the apartment contained two phones with specified numbers, (4) that defendant was known to affiant as a gambler and associate of gamblers, and (5) that the F.B.I. had "been informed by a confidential and reliable informant" that petitioner was "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones" which had been assigned the specified numbers.[41]

The Supreme Court deemed the informant's tip the fundamental item in the affidavit, for without it probable cause could not be established.[42] Rejecting the "totality of the circumstances" test used by the court of appeals to validate the warrant,[43] the Court employed a more precise analysis to determine the weight to be given to the tip.

The Supreme Court applied the *Aguilar* test to both the tip and the corroborative allegations. Under this analysis, neither the tip

40. 393 U.S. 410 (1969). Following *Ventresca,* many federal courts began applying a "totality of the circumstances" test. Under this standard of review, probable cause may arise from the "totality" of the facts disclosed in an affidavit, even though each allegation in itself would be insufficient to establish probable cause. *See* Comment, *For Informant's Tips to Establish Probable Cause Such Tips Must Meet* Aguilar *Standards Even When Partially Corroborated by Independent Investigation,* 21 S.C.L. REV. 246, 249 (1969). *See also* Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967), *rev'd,* 393 U.S. 410 (1969); United States v. Pinkerman, 374 F.2d 988 (4th Cir. 1967); Hernandez v. United States, 353 F.2d 624 (9th Cir. 1965); Calo v. United States, 338 F.2d 793 (1st Cir. 1964); United States v. Crews, 326 F.2d 755 (4th Cir. 1964); United States v. Delia, 283 F. Supp. 470 (E.D. Pa. 1968).

41. 393 U.S. at 413-14.

42. The first two items reflect only innocent-seeming activity and data. Spinelli's travels to and from the apartment building and his entry into a particular apartment on one occasion could hardly be taken as bespeaking gambling activity; and there is surely nothing unusual about an apartment containing two separate telephones. Many a householder indulges himself in this petty luxury.

Id. at 414.

43. *See* note 40 *supra.*

nor the corroborative allegations were sufficient to establish probable cause—the tip did not provide any of the underlying circumstances upon which the magistrate could gauge the informant's reliability, nor did it provide any of the underlying circumstances from which the informant concluded that Spinelli was running a bookmaking operation.[44] Moreover, the independent investigative efforts of the F.B.I. did nothing to cure the defects in the informant's tip;

> [a]t most, these allegations indicated that Spinelli could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way.[45]

The Supreme Court further pointed out that, even absent a showing of the underlying circumstances, provision of sufficient detail of the accused's criminal activity would validate the warrant. This would let the magistrate know "that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."[46] There was, however, insufficient detail alleged to support a finding of probable cause. The detail alleged was that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This detail "could easily have been obtained from an offhand remark heard at a neighborhood bar."[47] *Spinelli*, then, stands for the proposition that an informant's tip must either pass the *Aguilar* underlying circumstances test, or must be supported by sufficient detail of the accused's criminal activities in order to support a finding of probable cause.

Finally, in *United States v. Harris*,[48] the Supreme Court expanded on the second prong of the *Aguilar* test. Rather than requiring a statement of some of the underlying circumstances from which the magistrate can conclude that the informant is reliable, the Court held that there is a substantial basis for crediting the informant's reliability where the informant gives the information against his own penal interest.[49] The Court simultaneously resurrected the *Jones* substantial basis test, holding that the affidavit established probable cause where the affiant corroborated the in-

44. 393 U.S. at 416.
45. *Id.* at 417.
46. *Id.* at 416.
47. *Id.* at 417.
48. 403 U.S. 573 (1971).
49. *Id.* at 583.

formant's tip by swearing knowledge and familiarity with defendant's illicit activity.

In summary, the Supreme Court cases delineate three ways in which an affidavit based on an informant's tip may be validated: (1) by providing a substantial basis upon which the magistrate may credit the informant's tip, (2) by providing the underlying circumstances from which the magistrate can conclude that the informant was credible and his information accurate, and (3) by providing sufficient detail of the accused's alleged criminal activities. In view of *Rugendorf*, *Ventresca*, and *Spinelli*, it appears that the Court's preference for the sufficient detail test is stronger than for either the underlying circumstances test or the substantial basis test. As a practical matter, however, satisfaction of any of these tests will probably result in a finding of probable cause, thereby validating the search warrant.[50]

In light of these tests, it is difficult to understand how the search warrant in *Bernth* could have been validated. It is clear that there is not sufficient detail in the affidavit of the type contemplated in *Ventresca* to establish that the sought-after contraband was on the premises described. Nor does the affidavit provide a substantial basis or detail the underlying circumstances from which it could be established that the contraband was located in the premises to be searched. The affidavit does not seem to fulfill the requirements of any of the tests previously set forth.

The principal defect of the affidavit in question is that the statements of the informant do not sufficiently connect the contraband sought with the residence to be searched. The essence of the *Aguilar* test for probable cause is that the magistrate must be informed of "some of the underlying circumstances from which the informant concluded that the narcotics *were where he claimed they were.*"[51] Similarly, probable cause for the issuance of a search warrant to search specified premises exists "if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe the property sought *was on the premises described.*"[52] Clearly, there must be shown that some connection exists between the property sought and the premises to be searched.

The Supreme Court cases indicate several ways in which this connection may be established. A report that the informant had either seen defendant at work or had placed a bet with him, coupled

50. Levinson, *supra* note 38, at 46.
51. Aguilar v. Texas, 378 U.S. at 114 (emphasis added).
52. State v. Bernth, 196 Neb. 813, 815, 246 N.W.2d 600, 601 (1976) (empha-

with police surveillance, would have sufficed to link the criminal activity with the premises to be searched in *Spinelli*.[53] Similarly, seeing or purchasing contraband on the premises in question was enough to establish probable cause in *Jones*,[54] *Rugendorf*,[55] and *Harris*.[56] Finally, a detailed report of police surveillance of the premises may be sufficient to establish that the objects sought are in the premises to be searched.[57]

In the *Bernth* case, however, not only did the affidavit not detail any of the underlying circumstances from which the informant concluded that the marijuana was where he said it was, but the affidavit did not even have the informant concluding that the marijuana was anywhere. The affidavit merely stated that "[a]ffiant has reason to and does believe that there is situated within the above-described premises, a controlled substance, to-wit: marijuana."[58] The affiant's statement is clearly a "mere affirmation of suspicion and belief without any statement of adequate supporting facts,"[59] and as such is but a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision."[60] When a magistrate issues a search warrant upon a mere affirmation of suspicion or belief, not supported by sufficient facts to sustain a finding of probable cause, he abdicates his constitutional function as the "neutral and detached"[61] magistrate determining probable cause, and, by adopting the affiant's conclusions, acts as a "rubber stamp" for the police.[62]

This analysis does not assert that the Court guidelines *supra* are exhaustive. There are innumerable fact situations which would support a finding of probable cause.[63] Generally, however, the statement "I have pounds of grass for sale" will be insufficient to establish probable cause to search. In order to establish probable cause, such a statement requires either additional allegations by the informant linking the marijuana with the premises to be searched, or corroboration through independent police investigation.

---

sis added).

53. Spinelli v. United States, 393 U.S. at 416.
54. Jones v. United States, 362 U.S. at 271.
55. Rugendorf v. United States, 376 U.S. at 532.
56. United States v. Harris, 403 U.S. at 579.
57. United States v. Ventresca, 380 U.S. 102, 111 (1965); Aguilar v. Texas, 378 U.S. 108, 114-15 (1964) (*dicta*).
58. Brief of Appellant at 14.
59. Nathanson v. United States, 290 U.S. 41, 46 (1933).
60. Spinelli v. United States, 393 U.S. 410, 414 (1969).
61. Johnson v. United States, 333 U.S. 10, 14 (1948).
62. Aguilar v. Texas, 378 U.S. 108, 111 (1964).
63. United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960).

The adequacy of the informant's tip to establish probable cause is found by allowing the magistrate to use his "wide experience" which over the years has shown that a dealer keeps his supply in only one place—his home.[64] This application of "wide experience" is based on the magistrate's common sense. However, there is a serious question as to the validity of going beyond the face of the affidavit and interpreting it in the light of the magistrate's presumptions. The United States Supreme Court has held that in passing on the validity of a warrant, the Court may consider *only* information brought to the attention of the magistrate.[65] In *Giordenello v. United States*,[66] the affidavit was held insufficient to establish probable cause, because it contained no affirmative allegation that the affiant spoke with personal knowledge of the allegations contained therein. This defect, the Court held, could not be cured "by the [magistrate's] *reliance upon a presumption* that the complaint was made on the personal knowledge of the complaining officer."[67] Similarly then, it would seem that the defect in the *Bernth* affidavit could not be cured by reliance on the presumption that a dealer keeps his supplies only in his home. Moreover, this may not be a valid presumption in the first place. Two Nebraska cases have shown that one need only be in possession of a very small amount of a controlled substance to be deemed guilty of possession with intent to distribute.[68] A small amount of a controlled substance need not be kept at the dealer's residence, but could be hidden literally anywhere—in an automobile, the residence of a friend, or on the person. It is thus not a valid presumption that a dealer always keeps his supply at home.

Previous Nebraska cases dealing with search warrants issued upon an informant's tip have not relied upon a presumption that the sought-after contraband was in a given place, but have always established a connection between the premises to be searched and

64. State v. Bernth, 196 Neb. at 817, 246 N.W.2d at 602.
65. This is called the "four corners" doctrine. *See* Aguilar v. Texas, 378 U.S. 108, 109 n.1. (1964); Giordenello v. United States, 357 U.S. 480, 486 (1958); United States *ex rel.* Rogers v. Warden of Attica State Prison, 381 F.2d 209, 218 (2d Cir. 1967); United States v. Hinton, 219 F.2d 324, 326 (7th Cir. 1955).
66. 357 U.S. 480 (1958).
67. *Id.* at 486 (emphasis added).
68. State v. Rathburn, 195 Neb. 485, 239 N.W.2d 253 (1976) (400 tablets of LSD sufficient to sustain conviction for possession with intent to distribute); State v. Sullivan, 190 Neb. 621, 211 N.W.2d 125 (1973) (possession of under a pound of marijuana by two persons sufficient to sustain conviction of possession of controlled substance with intent to distribute).

the objects to be seized. In *State v. Graves*,[69] for example, the Nebraska Supreme Court upheld the issuance of a search warrant based on an informant's tip, even though the tip had not stated that the heroin sought was on the premises to be searched. However, a sufficient connection was established between the two when the informant stated that the contraband was expected to be delivered at the premises, and by the fact that the apartment had previously been used for heroin cutting purposes.[70]

Similarly, in *State v. Glouser*[71] the connection between the searched-for heroin and the place to be searched—defendant's person and luggage—was established by the fact that defendant and her husband both had a past history of association with drugs, and that defendant was making frequent trips of short duration to an area of known drug source, carrying a very small amount of luggage. This was sufficient to reasonably indicate a drug operation to a magistrate.[72]

The result in *Bernth* is even more puzzling when compared to *State v. Holloway*.[73] There the affidavit in support of the search warrant was held to be insufficient to establish probable cause, because it merely recited that the only reason for the affiant's belief that the sought-after guns were kept on the described premises was "information received from an informant whose information has been reliable in the past."[74] The court held that the affidavit recited a bare conclusion, and detailed none of the underlying circumstances from which either the affiant or the informant concluded that the guns were where they said they were.

CONCLUSION

By going beyond the previous judicial holdings in emasculating the fourth amendment protection against unreasonable searches and seizures,[75] the Nebraska Supreme Court threatens to warp the entire legal system, which "will uproot principles even at the core of American law."[76] In a broad sense, the holding means that on

69. 193 Neb. 797, 229 N.W.2d 538 (1975).
70. *Id.* at 803, 229 N.W.2d at 542-43.
71. 193 Neb. 190, 226 N.W.2d 328 (1975).
72. *Id.* at 195-96, 226 N.W.2d at 331.
73. 187 Neb. 1, 187 N.W.2d 85 (1971).
74. *Id.* at 2-3, 187 N.W.2d at 88.
75. State v. Bernth, 196 Neb. at 819, 246 N.W.2d at 603 (McCown, J., dissenting).
76. Snowden, *A Holistic Jurisprudential View of the Drug Victim*, 54 NEB. L. REV. 350, 352 (1975).

the basis of one simple statement, even if said in jest, the court could issue a warrant to search not only an individual's home, but his automobile, office, business, or anywhere else under his control.[77]

James Holman '78

77. 196 Neb. at 819, 246 N.W.2d at 603 (McCown, J., dissenting).

> The decision of this court effectively destroys the protection afforded to every citizen under the specific terms of the Constitution of the United States . . . . It also sets out a new and unique basis for determining what constitutes probable cause for the issuance of a search warrant. If the home of any citizen is open to police search whenever a reliable informer reports that the citizen made a statement implicating himself in the possession of illegal substances or things, the dread spectre of a police state is all too close and real.

Id. at 821, 246 N.W.2d at 604.