Volume 38 | Number 2 Article 11

2-1-1960

Criminal Law -- Search Warrants -- Requirements of Search Warrants for Liquor Possessed for the Purpose of Sale

John H. Kerr III

Criminal Law—Search Warrants—Requirements of Search Warrants for Liquor Possessed for the Purpose of Sale

Although the recent case of *State v. Banks*[1] had a modern fact situation,[2] it brought to the attention of the North Carolina Supreme Court the old and troublesome problem of the requirements of search warrants obtained for liquor possessed for the purpose of sale.[3]

Search warrants may be issued in North Carolina only as authorized by statute.[4] The statute authorizing search warrants for liquor possessed for the purpose of sale and for liquor-making materials is G.S. § 18-13. The pertinent provisions are:

> Upon the filing of a complaint under oath by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before . . . [any] officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, or equipment or materials designed . . . for use in the manufacture of . . . liquor, a warrant shall be issued commanding the officer . . . to search the place or places described in such complaint or information . . . .

There is no other statute specifically dealing with the requirements of search warrants for liquor, but G.S. § 15-27 places certain restrictions on the issuance of *all* search warrants. It provides that:

> Any officer who shall sign and issue . . . a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person . . . in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action: Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring . . . a search warrant, shall be competent as evidence in the trial of any action.

Before the 1957 General Assembly enacted G.S. § 15-27.1, the North Carolina decisions were in conflict as to whether or not a liquor warrant issued under G.S. § 18-13 had to meet the requirements of G.S. § 15-27. G.S. § 15-27.1 was designed to resolve this conflict by providing that:

[1] 250 N.C. 728, 110 S.E.2d 322 (1959).

[2] The search warrant was obtained with information transmitted by highway patrol radio.

[3] The scope of this note will be limited to the procedure to be followed in issuing a search warrant, and will not discuss the requirement of a description of the place to be searched and of the items to be searched for. These latter requirements are found in N.C. GEN. STAT. § 15-26 (1953). As to the detail needed to comply with the statute, see MACHEN, SEARCH AND SEIZURE 21-28 (1950).

[4] State v. Mann, 27 N.C. 45 (1844); State v. McDonald, 14 N.C. 468 (1832).

"The provision of this article[5] shall apply to search warrants issued for any purpose including those issued pursuant to the provisions of G.S. 18-13 . . . ."

The fact that North Carolina needed such legislation becomes apparent when one examines the case law dealing with the procedure for issuing search warrants for liquor prior to the enactment of this statute. It appears that the court initially presumed that search warrants for liquor had to comply with the dual requirements of G.S. § 18-13 and G.S. § 15-27.[6] However, in 1952 in *State v. McLamb*[7] the court held that only the provisions of G.S. § 18-13 were applicable to search warrants for liquor. In that case the court held not relevant the defendant's contention that the search warrant was defective for the reason that the magistrate who issued it had not complied with the requisites of G.S. § 15-27 in that he had failed to require the procuring officer to furnish facts showing probable cause for the issuance of the warrant. Thus apparently under that decision, if the search warrant for liquor was sought by "an officer charged with the execution of the law," the normal G.S. § 15-27 requirement of furnishing facts upon which the officer based his belief to the examining magistrate was relaxed. *State v. Brady*,[8] a later case, reiterated this rule. Thus there arose a distinction between the basic requirements for the issuance of search warrants for liquor and the issuance of search warrants for other types of contraband.

The constitutionality of G.S. § 18-13 has never been challenged. However, since under the *McLamb* and *Brady* decisions its provisions do not require that an officer seeking a search warrant for liquor furnish facts showing probable cause for its issuance, this statute would appear to be vulnerable to such an attack. The North Carolina Constitution requires that all warrants "be supported by evidence,"[9] and the fourteenth amendment to the United States Constitution guarantees that a state shall issue no warrant without probable cause supported by oath or affirmation.[10] G.S. § 18-13 as interpreted by *McLamb* and *Brady* would not seem to meet the foregoing requirements.

[5] Article 4, chapter 15, entitled Search Warrants, of which G.S. § 15-27 is a component part.

[6] Several pre-1952 decisions deal with the issuance of search warrants for liquor possessed for the purpose of sale, and discuss compliance with G.S. § 15-27. *E.g.*, State v. Gross, 230 N.C. 734, 55 S.E.2d 517 (1949); State v. Elder, 217 N.C. 111, 6 S.E.2d 840 (1940); State v. Cradle, 213 N.C. 217, 195 S.E. 392 (1938).

[7] 235 N.C. 251, 69 S.E.2d 537 (1952).

[8] 238 N.C. 404, 78 S.E.2d 126 (1953).

[9] N.C. CONST. art. I, § 15.

[10] "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." Wolf v. Colorado, 338 U.S. 25, 27 (1949).

Although the court emphatically stated in the *McLamb* and *Brady* decisions that G.S. § 18-13 was controlling as to the procedural requisites in cases of liquor warrants, in reality the court maintained this position for only a short time. Soon after the *McLamb* decision the court rendered several decisions that indicated that both G.S. § 18-13 and G.S. § 15-27 applied with equal force to the issuance of liquor warrants. In *State v. Rainey*[11] the court, ruling on the validity of a liquor warrant, stated, "The [issuing] procedure followed fulfills the requirements of the controlling statutes. G.S. 18-13 and G.S. 15-27 as amended."[12] In *State v. Harrison*[13] the court relied on G.S. § 15-27 to exclude evidence obtained under an invalid search warrant for liquor issued under G.S. § 18-13. In *State v. McMilliam*[14] the court again relied on the provisions of G.S. § 15-27 to exclude evidence obtained where officers made a search for liquor without a warrant under circumstances that required a valid search warrant.

In 1956 the court in *State v. White*[15] held that a search warrant for liquor was defective because the issuing officer had not required the constable to sign an affidavit under oath to support the issuance of the warrant as required by G.S. § 15-27. Thus this case was in direct conflict with the court's previous holding in the *McLamb* and *Brady* decisions.[16]

The 1957 General Assembly took cognizance of the conflict among the cases in this area and enacted the aforementioned G.S. § 15-27.1. The obvious intent of the General Assembly was to insure that before any magistrate issued a search warrant for liquor he would examine the complainant, take a sworn affidavit, and make a judicial determination of probable cause upon evidence furnished by the complainant. The General Assembly thereby overruled the *McLamb* and *Brady* decisions on this precise point.

In the principal case, *State v. Banks*,[17] a highway patrolman saw the defendant make eight or nine trips into an Alcoholic Beverage Control store and on each trip return to an automobile with a large paper bag. The patrolman stopped the defendant, asked for permission to search the automobile, and, when this request was refused, radioed headquarters and informed a second patrolman. Acting on this information, the second patrolman went before an issuing officer and obtained a search warrant. The automobile, stopped a second time by the patrolman, was

[11] 236 N.C. 738, 74 S.E.2d 39 (1953).
[12] *Id.* at 740, 74 S.E.2d at 40.
[13] 239 N.C. 659, 80 S.E.2d 481 (1954).
[14] 243 N.C. 771, 92 S.E.2d 202 (1956).
[15] 244 N.C. 73, 92 S.E.2d 404 (1956).
[16] For an analysis of the conflict between the *McLamb* and *White* decisions see NOTE, 35 N.C.L. REV. 424 (1957).
[17] 250 N.C. 728, 110 S.E.2d 322 (1959).

searched pursuant to the warrant, and a large quantity of tax-paid liquor was found.

The defendant was convicted for the illegal possession of the liquor that had been seized in his automobile, and on appeal the validity of the search warrant was challenged. In a per curiam opinion the North Carolina Supreme Court said that "the information furnished by Patrolman McDonald over the radio to Patrolman Moran, who signed the affidavit based on such information, pursuant to which the search warrant was issued, was sufficient *information* within the meaning of G.S. 18-13 to authorize Patrolman Moran to make the affidavit and to authorize the Clerk of the General County Court . . . to issue such warrant. *State v. McLamb* . . . ."[18]

The court's acquiescence in the use of the information transmitted over the patrol radio is in essence the approval of the use of hearsay evidence in obtaining a search warrant. This rule of evidence is established in North Carolina as in many jurisdictions,[19] and within the bounds of proper discretion[20] it would seem to be a sound and practical one. In light of North Carolina's adoption of the use of hearsay evidence to show probable cause, the magistrate was justified in issuing the search warrant in the *Banks* case.

Even if under the circumstances of the case the requirements of G.S. § 15-27 were not met,[21] the defendant failed to overcome the pre-

[18] *Id.* at 730, 110 S.E.2d at 323.

[19] Some courts have held affidavits sufficient where the affiant's belief is based on information received from "reliable persons," "responsible persons," "reputable persons," "citizens," and "credible people." Annot., 14 A.L.R.2d 605 (1950).

The federal rule is contra. "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury . . . and would lead a man of prudence and caution to believe that the offense has been committed." Grau v. United States, 287 U.S. 124, 128 (1932).

The North Carolina decisions seem to approve the hearsay rule, and there is no indication of an adoption of the federal rule. State v. Cradle, 213 N.C. 217, 195 S.E. 392 (1938). "There is nothing in the statute [G.S. § 15-27] that requires the complainant or other person who makes the affidavit to state therein who his informant is, or which requires the informant to make the affidavit, as seems to be the contention of the appellant." *Id.* at 218, 195 S.E. at 392; *accord*, State v. Elder, 217 N.C. 111, 6 S.E.2d 840 (1940). These cases hold only that the informer's name need not be given in the affidavit. Whether the magistrate would be justified in issuing the warrant without learning the source on the examination is an open question.

[20] A magistrate cannot be allowed to find a probability of guilt without examining the complaining witness in regards to his affidavit. G.S. § 15-27. This examination is to test the reliability of the evidence, and if the magistrate fails to make such an examination recourse may be had against him. G.S. § 15-27.

Reliable evidence has been held to include hearsay information originating with reputable informers. State v. Cradle, 213 N.C. 217, 195 S.E. 392 (1938); Annot., 14 A.L.R.2d 605 (1950). It would not appear that anonymous phone calls or tips should be accepted as reliable hearsay. MACHEN, SEARCH AND SEIZURE 11 (1950).

[21] From the statement of facts given in the *Banks* case it appears that Patrolman Moran told the issuing officer just what Patrolman McDonald had seen and that Patrolman Moran did sign the affidavit, so the requirements of G.S. § 15-27 would seem to have been complied with.

sumption of statutory compliance that arises when the warrant and supporting affidavit are set out in the record.[22] The decision is therefore proper. However, the court in citing the *McLamb* decision and speaking of meeting the requirements of only G.S. § 18-13 could leave the erroneous impression that there is still a distinction between the requirements for obtaining a search warrant for illegally possessed liquor and a search warrant for other statutory contraband. As we have noted, since the enactment of G.S. § 15-27.1, there is no longer any such distinction in the requirements for issuance of search warrants. It is unfortunate that the court did not seize upon this opportunity to take judicial notice of G.S. § 15-27.1, and it is hoped that on the court's next opportunity it will recognize this legislative move toward greater uniformity and thereby clear the muddy waters in this area.

JOHN H. KERR, III

Criminal Procedure—Capital Offenses—Prosecution's Mention of Death Penalty Before Jury as Error

Prior to 1949 a conviction of murder in the first degree in North Carolina carried an automatic death penalty under the former version of G.S. § 14-17.[1] That year the General Assembly added a proviso to the statute which stated that "if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life . . . and the court shall so instruct the jury."[2]

State v. McMillan[3] was apparently the first case interpreting this proviso. The trial judge had instructed the jury that they might recommend life imprisonment if they felt justified in doing so under the facts and circumstances of the case. A new trial was granted because the

[22] State v. Rhodes, 233 N.C. 453, 64 S.E.2d 287 (1951); State v. Elder, 217 N.C. 111, 6 S.E.2d 840 (1940); *cf.* State v. McMilliam, 243 N.C. 771, 92 S.E.2d 202 (1956), where the State failed to produce a search warrant or render testimony supporting its existence. The court ruled that the evidence obtained by the search would not be introduced. "It might have been a general warrant, which is 'dangerous to liberty'." *Id.* at 773, 92 S.E.2d at 204.

[1] "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree . . . ." N.C. Sess. Laws 1893, chs. 85, 281.

[2] N.C. GEN. STAT. § 14-17 (1953). For the origin of the proviso see *Report of the Committee for Improvement of Justice,* Popular Government, Jan. 1949, p. 13, col. 3; *Criminal Law, Survey of Statutory Changes,* 27 N.C.L. REV. 449 (1950). Provisos of like effect were also added to N.C. GEN. STAT. § 14-21 (1953) (rape), N.C. GEN. STAT. § 14-52 (1953) (burglary) and N.C. GEN. STAT. § 14-58 (1953) (arson).

[3] 233 N.C. 630, 65 S.E.2d 212 (1951).