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TELEPHONIC APPROVAL OF SEARCH WARRANT NOT VIOLATIVE OF FOURTH AMENDMENT

United States v. Turner

The fourth amendment to the United States Constitution,1 supplemented by rule 41 of the Federal Rules of Criminal Procedure,2 prescribes the standards against which the validity of federal search warrants are tested.3 Procedures established by the individual

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1 The fourth amendment provides:
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 persons or things to be seized.

U.S. CONST. amend. IV.

2 Prior to the amendment of October 1, 1977, FED. R. CRIM. P. 41(c) provided in pertinent part:

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. . . . Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce . . . .

Rule 41(c) further provides for recordation of the proceeding, execution of the warrant within a 10 day period to avoid staleness, and the need for further authorization before a search warrant can be executed other than during the daytime hours. Id.


The requirement of judicial evaluation prior to the issuance of a search warrant serves to interpose a magistrate between the citizen and the police. The Supreme Court, in McDonald v. United States, 335 U.S. 451 (1948), stated the rationale to this constitutionally mandated evaluation:

It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of [the police] . . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

Id. at 455-56.

The quantum of evidence necessary to support a finding of probable cause for the purposes of issuing a warrant lies somewhere between reasonable suspicion and proof beyond a reasonable doubt. While "evidence required to establish guilt is not necessary, common rumor or report, suspicion, or even 'strong reason to suspect'” will not be sufficient. Henry v. United States, 361 U.S. 98, 102 (1959). See also Locke v. United States, 11 U.S. (7 Cranch) 339 (1813). In Spinelli v. United States, 393 U.S. 410 (1969), the Supreme Court categorized
states, however, frequently subject local warrants to more exacting scrutiny than that mandated by the Constitution. Consequently, where federal and state officers jointly participate in the application for or execution of a state-issued warrant, and seized evidence is sought to be admitted in a federal prosecution, uncertainty arises concerning which jurisdiction's rule of law is to be applied in evaluating a motion to suppress that evidence.

Recently, in *United States v. Turner,* the Second Circuit confronted this problem and held that federal participation in a state-initiated search of the defendant's residence rendered the search federal in nature, thus subjecting the evidence seized to federal standards of admissibility. In addition, the court held that a search warrant, authorized over the telephone by a state magistrate as permitted by state law, satisfies the fourth amendment requirements that a warrant be "issued by a neutral and detached magistrate" and "supported by Oath or affirmation."

William Turner was arrested by California state authorities for allegedly violating a state law prohibiting the distribution of laetrile. While Turner was in custody, state and federal authorities, desiring to search his residence, sought authorization to do so under

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558 F.2d at 49.

Id. at 50.

Id. at 48. Cal. Health & Safety Code § 1707.1 (Deering 1975) provides in pertinent part:

The sale, offering for sale, holding for sale, delivering, giving away, prescribing or administering of any drug, medicine, compound or device to be used in the diagnosis, treatment, alleviation or cure of cancer is unlawful and prohibited unless (1) an application with respect thereto has been approved under Section 505 of the Federal Food, Drug and Cosmetic Act.

Believed by some to aid in the treatment of cancer, laetrile has not been approved by the Federal Food and Drug Administration, and its distribution in California is therefore prohibited under § 1707.1. The substance is legally manufactured and distributed abroad, particularly in West Germany and Mexico. Its status in the United States, however, has been highly questionable. *See, e.g.,* Holden, *Battle to Legitimize Laetrile Continues Unabated,* Science, May 20, 1977, at 854.
a California statute which permits the use of oral warrants. The officers telephoned a local magistrate who administered an oath and heard their testimony. Concluding that there existed sufficient probable cause to support the search, the magistrate directed the federal agent to fill in a blank warrant form and sign the judge's name. A search of Turner's premises was subsequently conducted, resulting in the seizure of a number of items which the federal government sought to use as evidence against Turner in a federal drug prosecution. The district court found that the procedure employed in obtaining the warrant was violative of the California law in that the warrant was not signed by a "peace officer" within the meaning of the statute. The court concluded that since California courts would suppress the seized evidence in the instant situation, such evidence was not admissible at Turner's trial.

On appeal, the Second Circuit reversed the district court. Judge Meskill, writing for a unanimous panel, initially sought to determine which standard—state or federal—was to be applied in deciding Turner's motion to suppress. Noting that federal agents

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10 558 F.2d at 48-49. Authorization for the warrant was sought pursuant to CAL. PENAL CODE §§ 1526(b), 1528(b) (Deering 1971 & Supp. 1978). Although the statutes are not limited to telephone authorizations, a large number of warrants issued under the statute have utilized the telephone. See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON POLICE 95 (1973); Miller, Telephonic Search Warrants: The San Diego Experience, 9 THE PROSECUTOR 365 (1974).

The California Penal Code provides for oral judicial examination of the warrant applicant with mandatory recordation and transcription of the oral statement. The recording and transcribed statement are then filed with the clerk of the court so that the defendant may have access to the records for the purposes of questioning the magistrate's finding of probable cause. See CAL. PENAL CODE § 1526(b) (Deering Supp. 1978). Upon a finding of probable cause, the statute permits the magistrate to issue a search warrant by authorizing a peace officer to sign the magistrate's name on the duplicate original warrant. The duplicate warrants are each signed with the magistrate's name: the original by the magistrate himself, and the duplicate original warrant by the peace officer with the magistrate's oral authorization. In addition, the warrants are carefully dated and the exact time is noted so as to account for discrepancies between time of issuance and time of execution. Id. § 1528(b) (Deering 1971).

11 558 F.2d at 48. A conference phone was set up among the magistrate, two state officials and a special agent of the U.S. Customs Service. Id.

12 Id.

13 The search was conducted by state and local authorities as well as federal customs agents. Id. A total of 79 separate groups of items were seized, including invoices and letters directly relating to the charges against Turner. Brief for Appellant at 8.

14 558 F.2d at 49. The California statute authorizes a "peace officer" to sign the oral warrant. CAL. PENAL CODE § 1528(b) (Deering 1971). Under California law a federal customs agent is not considered a peace officer. Id. §§ 830.1-.7, .10-.12 (Deering 1971 & Supp. 1978).

15 558 F.2d at 49. The district court found that California courts would suppress although the defect was only technical in nature. See id.

16 Joining Judge Meskill in the opinion were Judges Gurfein and Feinberg.

17 558 F.2d at 49. On appeal to the Second Circuit, the government, relying on Sternberg v. Superior Court, 41 Cal. App. 3d 281, 115 Cal. Rptr. 893 (Ct. App. 1974), contested the
had taken part in the search, and that the prosecution was a federal one, the court concluded that the propriety of admission of the evidence was governed by federal law. The Second Circuit then turned to the defendant's contention that the procedures employed with respect to the warrant were violative of rule 41. The Turner panel stated that because the amended version of rule 41(c), which governs oral warrants, was not yet effective, it would assume that violations of the rule occurred and determine whether such violations necessitated suppression. Pointing to its prior decision in United States v. Burke, the court reasoned that suppression would be required only if the violations had been intentional or had resulted in prejudice to the defendant. Judge Meskill found no evidence of an intentional violation, and nothing to indicate that the defendant had suffered the type of prejudice which would lead to suppression.

Addressing Turner's constitutional arguments, the Second Circuit described the signing of the warrant by the customs agent on behalf of the magistrate as the "delegation of a purely ministerial task." Thus, the court found that telephonic warrants satisfy the constitutional requirement that warrants be issued by a magistrate where, as in the instant case, "the magistrate performs the substantive tasks of determining probable cause and authorizing the issuance of a warrant."
Dismissing the contention that a telephonic search warrant cannot be said to have been "supported by Oath or affirmation" within the meaning of the Constitution, the Turner panel concluded that the fourth amendment is "sufficiently flexible to account for such technological advances" and held telephonic oaths constitutionally valid.

In concluding that federal law governed the admissibility of the seized evidence, the Second Circuit applied the long-standing test enunciated by the Supreme Court in Lustig v. United States and Byars v. United States. In Lustig, the Court subjected evidence uncovered in a joint federal-state search to federal exclusion standards because federal officers "had a hand in" the search. Literally


28 See note 18 and accompanying text supra.

29 338 U.S. 74 (1949).

30 273 U.S. 28 (1927). In Byars, a search warrant was issued by a state municipal court judge directing "any peace officer" of Des Moines, Iowa to search defendant's residence for liquor and materials used to manufacture liquor. Id. at 29. After the warrant was issued, a local officer requested a federal agent to accompany him on the search. The joint search resulted in the seizure of liquor stamps ultimately used as evidence in a federal prosecution. Id. at 30-31. In reversing defendant's conviction, the Court categorized the search as federal, and thus subject to the proscriptions of the fourth amendment. Id. at 33. In so deciding, the Byars Court emphasized that the federal agent had participated in the search, not as a private person, but in his capacity as a federal agent. Thus, the Court concluded:

We cannot avoid the conclusion that the participation of the agent was under color of his federal stance and that the search in substance and effect was a joint operation of the local and federal officers. In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively on his own.

Id.

31 338 U.S. at 78. Lustig arose 22 years after Byars and similarly involved a joint search. In Lustig, a federal Secret Service agent intimated to state officers that he suspected defen-
applying this language, the Turner court concluded that the search therein was federal in nature.\textsuperscript{32} Such an interpretation of this phrase appears unwarranted, however, in view of the historical background of the Byars-Lustig rule.

At the time of the Byars and Lustig decisions, the exclusionary rule, which mandates the suppression of evidence improperly seized under the fourth amendment,\textsuperscript{33} only benefited victims of illegal fed-

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\item The exclusionary rule was first applied in the landmark decision of Weeks v. United States, 232 U.S. 383 (1914), wherein the Supreme Court required the return of evidence which had been obtained from the defendant in violation of the fourth amendment. Prior to Weeks, the emphasis of the exclusionary rule centered on the nature of the object sought to be seized. See, e.g., Boyd v. United States, 116 U.S. 616 (1886) (private nature of papers seized was key to suppression of their use). In Weeks, however, the Court transferred the emphasis from the nature of the object seized to the validity of the procedures utilized. 232 U.S. at 346.

In 1927, the Court further widened the scope of the exclusionary rule in Byars v. United States, 273 U.S. 28 (1927), by reversing a conviction which had been based on evidence illegally seized by state police with the assistance of federal officers. Twenty-two years later, in Lustig v. United States, 338 U.S. 74 (1949), the Court, clarifying Byars, concluded that evidence could be utilized if “secured by state authorities [and] turned over to the federal authorities on a silver platter” as long as the federal government did not participate in the violation of the citizen’s privacy rights and the government did not request the illegal search. Id. at 78-79. For a discussion of Lustig and Byars, see notes 30-31 and accompanying text supra.

On the same day that Lustig was decided, the Supreme Court, in Wolf v. Colorado, 338 U.S. 25 (1949), held the fourth amendment protections of privacy applicable to the states through the fourteenth amendment, but declined to require the states to apply the exclusionary rule because that rule was a product of “judicial implication” in federal cases and not expressly conferred by the fourth amendment. Id. at 28. The Court, noting that many states were reluctant to adopt the exclusionary rule even after Weeks, elected to defer to the judgment of the states as to protecting individuals against unreasonable searches and seizures. Id. at 28-31.
\end{itemize}
eral searches. Thus, evidence obtained in violation of the fourth amendment during the course of a state search could be admitted at trial in state court, even though federal agents had been involved in the search. By fashioning the Byars-Lustig doctrine, and categorizing as a federal warrant that which otherwise would have been labeled as a state warrant, the Supreme Court may have been attempting to enlarge the class of individuals protected by the exclusionary rule. Once a warrant was found to be federal in nature by virtue of federal participation in the search, the defendant became eligible to invoke the exclusionary rule.

Subsequent to the emergence of the Byars-Lustig approach,


See Wolf v. Colorado, 338 U.S. 25 (1949), wherein the Supreme Court held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure," id. at 32, and thus left the decision whether to adopt the Weeks exclusionary standards to the states. Id. at 33. At the time of the Wolf decision in 1949, 31 states had rejected the federal Weeks standards while only 16 states embraced it. See Table I of Appendix, reprinted in 338 U.S. at 38.

The language of Byars clearly indicates that the Court was cognizant of the abuses which might occur if a federal agent could participate in a state-oriented search unhampered by fourth amendment constraints:

"The court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violation of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.""

273 U.S. at 32 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

It is significant that in both Byars and Lustig the level of participation by federal agents in the respective searches was minimal. Yet in both cases the Supreme Court found a federal search and was therefore able to exclude the challenged evidence. 338 U.S. at 77-80, 273 U.S. at 30-34. Moreover, the Lustig opinion seems to indicate that federal participation, no matter how limited, would be sufficient to support a finding that the warrant was federal in nature. 338 U.S. at 78.

however, the Supreme Court, in Mapp v. Ohio, held that the exclusionary rule governs state as well as federal searches. In the wake of Mapp, the Byars-Lustig rule no longer is necessary to safeguard the rights of its original beneficiaries. As a result, it is submitted, the rationale for strict application of the rule has been effectively undermined. Perhaps it would be appropriate, therefore, for the Second Circuit to reevaluate its adherence to the Byars-Lustig doctrine. An alternative to that doctrine would entail an evaluation, on a case-by-case basis, of the relative extent to which federal and state agents have participated in a joint search and a corresponding categorization of the warrant.

Notwithstanding the uncertainty surrounding the vitality of its rationale, the Byars-Lustig rule is overwhelmingly accepted by existing judicial authority. Thus, the warrant at issue in Turner must be deemed federal in nature. Moreover, since the violation that had occurred had been a technical one, the court properly determined that, under the Burke test, no prejudice to the defendant had resulted. As technical defects are not the type of evil which the exclusionary rule is designed to deter, absent unfairness, they may be disregarded.

The Second Circuit's approval of the telephone-authorized search warrant in Turner is consistent with recently enacted rule 41(c). Designed to minimize existing technical obstacles, the new rule delineates procedures for obtaining oral authorization of search warrants. Although the provisions of this statute were not in effect

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39 Id. at 657. In Mapp, three Ohio police officers had broken into Mapp's home claiming that they had a search warrant. Id. at 644. At defendant's trial for possession of obscene matter, the prosecution failed to produce the warrant. Id. at 645. In a landmark opinion written by Justice Clark, the Court held the exclusionary rule of the fourth amendment applicable to the states through the fourteenth amendment. Id. at 657.

40 See, e.g., United States v. Hanson, 469 F.2d 1375 (5th Cir. 1972); Navarro v. United States, 400 F.2d 315 (5th Cir. 1968).
41 Id. at 386-87.
42 Rule 41(c)(2) provides: "When the circumstances make it reasonable to do so in the absence of a written affidavit, a search warrant may be issued upon sworn oral testimony . . . communicated . . . by telephone or other appropriate means . . . ." Fed. R. Crim. P. 41(c)(2). Under the procedures, a duplicate original warrant is prepared by the applicant and read for the magistrate's recordation and signature. Upon the magistrate's satisfaction that
when the Turner warrant was issued, the Second Circuit clearly applied similar standards in evaluating the procedures used by the issuing magistrate in that case. Thus, the Turner decision suggests that, in the future, the Second Circuit will uphold the constitutionality of the new rule 41(c) procedures in the absence of a showing that their flexible norms have been abused.

It has been suggested that a rule permitting oral authorization of search warrants will reduce the need for judicially created exceptions to the constitutional prohibition of warrantless searches. Such exceptions have been developed in the past to permit law enforcement officials to bypass the somewhat time-consuming procedures for obtaining a warrant when delay might result in the destruction or removal of important evidence. Although these exceptions were necessary to meet immediate and reasonable law enforcement needs, they appear somewhat anachronistic in an age of

all the requirements for issuance of the warrant have been met, he can direct the applicant to sign the magistrate's name and the exact time of issuance of the duplicate original warrant. Id. at 41(c)(2)(A). The amended rule further requires the recording of the conversation either by device or manual methods. Id. at 41(c)(2). This further restriction on the use of the oral warrant procedures recognizes two inherent limitations in their use: the lack of demeanor evidence and the possibility that highly complex warrants might be issued without the benefit of a written record. See Communication from the Chief Justice of the United States, H.R. Doc. No. 464, 94th Cong., 2d Sess. 23 (1976); Comment, Oral Search Warrants: A New Standard of Warrant Availability, 21 U.C.L.A. L. Rev. 691, 701-05 (1973).


"In Katz v. United States, 383 U.S. 347 (1967), the Supreme Court stated that "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the fourth amendment—subject only to a few specifically established and well-delineated exceptions." Id. at 357 (citations omitted) (emphasis in original); see Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

electronic communication.\textsuperscript{48} It is submitted that the Second Circuit's acceptance of the telephone-authorized \textit{Turner} warrant, coupled with its implicit approval of rule 41(c), will have a salutary effect in that it will encourage law enforcement officials to seek prior judicial approval for searches. It should be noted, however, that the widespread use of telephonic search warrants also raises the possibility that these flexible procedures will be abused by overzealous law enforcement personnel or careless magistrates. It is hoped that, in the future, the Second Circuit will be alert to this possibility and will scrutinize oral warrant-issuing procedures carefully to ensure that adequate procedural and substantive standards of law are being observed.

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\textsuperscript{48} A recent survey conducted in California determined that 65\% of all telephonic search warrants take 1 hour or less from decision to seek a warrant until time of issuance, with a majority of the remaining 35\% completed in less than 2 hours. Miller, \textit{Telephonic Search Warrants: The San Diego Experience}, 9 \textit{The Prosecutor} 385, 386 (1974).