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## SEARCHING FOR PROBABLE CAUSE

S. M. FALLIS\*

A journey into the law of search and seizure in Oklahoma is a trip marked with dead-end roads, mis-marked trails and conflicting road signs. The legal morass in which the student or practitioner finds himself, should he venture on such a trip, is undoubtedly caused in part by the historical fact of prohibition in Oklahoma. The decisions reveal that the great majority of search and seizure cases have concerned violations of the liquor prohibition laws that existed in the state until 1959.<sup>1</sup> The fact that there was considerable public sentiment against these laws accounts, perhaps, for the great number of appellate decisions in this area. It must be noted that almost every Oklahoma search and seizure decision involves the question of the legality of search warrants used to obtain evidence for the prosecution of misdemeanors. Therefore, any examination of the law of search and seizure must be considered in light of prohibition. It must also be remembered that even though prohibition has been repealed the effects of search and seizure law established during "the dry years" lives on.

This article is not intended to be a review or study of all facets of the law applicable to the issuance of search warrants. It is intended rather as an inquiry into probable cause as applied to affidavits for the issuance of valid search warrants in Oklahoma. The purpose is to attempt to discover what probable cause is, and, what it can be or might be. On this basis our search for probable cause begins.

## CONSTITUTIONAL AUTHORITY

The Oklahoma constitutional provision relating to the issuance of search warrants<sup>2</sup> is a restrictive one and almost an

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<sup>1</sup> Ch 37, (1959) Okla. Laws 141, *Repealing* OKLA. STAT. tit 19, § 501 (1951).

<sup>2</sup> OKLA. CONST. art. II, § 30.

exact copy of the fourth amendment to the Constitution of the United States. The term "probable cause" is found in this amendment; it is the basis for the requirement that no search warrant can legally issue except upon a showing of probable cause supported by oath or affirmation.

Oklahoma statutes amplify the constitutional requirements for search warrants:

A Search Warrant shall not be issued except upon probable cause, supported by affidavit naming or describing the person and particularly describing the property and place to be searched.<sup>3</sup>

The magistrate must, before issuing the warrant, take, on oath, the complaint of the prosecuting witness in writing which must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.<sup>4</sup>

The basic tenet that a magistrate must find probable cause before granting the authority that opens the door for law enforcement is not open to question.

The law is well established in Oklahoma that, although there should be a strict construction of the affidavit for a search warrant, it should not be so technical as to destroy the true meaning.<sup>5</sup> The court logically recognizes that reason should be exercised when considering these affidavits. The fact does remain, however, that there are conflicting cases in regard to the application of the constitutional provision. For example, the court expressed the following attitude of caution in the case of *Gore v. State*:<sup>6</sup>

It is not the purpose of these Constitutional provisions to build a wall behind which criminals can hide and escape punishment. Some of them do and will escape but better so than disregard these safeguards designed to protect the innocent from being harrassed and annoyed, and sometimes abused by trespassing officers.<sup>7</sup>

<sup>3</sup> OKLA. STAT. tit. 22, § 1223 (1961).

<sup>4</sup> OKLA. STAT. tit. 22, § 1224 (1961).

<sup>5</sup> *Southard v. State*, 297 P.2d 585 (Okla. Crim. App. 1956).

<sup>6</sup> 24 Okla. Crim. 394, 218 P. 545 (1923).

<sup>7</sup> *Id.* at 412, 218 P. at 550.

The United States Supreme Court has stated that probable cause is sufficiently shown in an affidavit if a man of ordinary caution or prudence would be led to believe, and conscientiously entertain a strong suspicion of, the guilt of the accused.<sup>8</sup> The application of this general rule of law, however, has become more technical.

#### REQUISITES FOR THE VALID WARRANT

A positive statement can be made, based on the law of this state, that a complaint on "information and belief" would not constitute grounds upon which a magistrate may issue a valid search warrant.<sup>9</sup> It should be pointed out that there is a qualification to this rule. Though the term "information and belief" might have been used in the first portion of the affidavit, a later statement of facts in that same affidavit can give the magistrate grounds to find probable cause.<sup>10</sup> The reverse of this is also true. A bare statement alleging that the affiant has probable cause for believing and does believe, without an enumeration of facts and circumstances substantiating the affiant's belief, cannot be the grounds for a valid search warrant.<sup>11</sup> It is interesting to note that authority can be found in Oklahoma cases for the proposition that mere positive statements, or an affidavit in positive terms, may be sufficient even without a statement of facts upon which the information is based.<sup>12</sup> In 1937 a more accurate rule was announced by the court in *Denton v. State*:<sup>13</sup>

We are therefore of the opinion that the affidavit was sufficient for the officer to issue the search warrant for the reason that the statements made therein are positive. But in this connection and for future guidance we will say we think it is very much better practice to state in the affidavit the very facts upon which the informa-

<sup>8</sup> *Brinegar v. United States*, 338 U.S. 160 (1948).

<sup>9</sup> *Sikes v. State*, 323 P.2d 376 (Okla. Crim. App. 1958).

<sup>10</sup> *Hays v. State*, 71 Okla. Crim. 62, 108 P.2d 186 (1940).

<sup>11</sup> *Foley v. State*, 25 Okla. Crim. 145, 219 P. 179 (1923).

<sup>12</sup> *McCarthy v. State*, 86 Okla. Crim. 51, 189 P.2d 436 (1948).

tion is based so the officer may have this information before the warrant is issued.<sup>14</sup>

It is submitted that Oklahoma requires the following for a valid search warrant:

- (a) a written affidavit establishing probable cause, not merely "information and belief"; and,
- (b) a statement of facts or circumstances within the affidavit sufficient to give the magistrate the necessary grounds to make a finding of probable cause.

The question arises as to the type of statements of fact sufficient to establish probable cause. An attempt to determine general rules of definition gives one the feeling of being lost in a maze. This is obvious since the court itself has recognized the confusion concerning search warrants when it said in *Yeargain v. State*:<sup>15</sup>

This question has been before this court upon many different occasions and it is true that there not only is a seemingly [sic] conflict in some of the decisions but there is a conflict.<sup>16</sup>

A general statement of law to be considered is found in *Reutlinger v. State*:<sup>17</sup>

An affidavit for a search warrant which merely states the conclusions of the affiant indicative of a positive violation of law, is insufficient. The affidavit should state the facts upon which the conclusion is based.<sup>18</sup>

The Oklahoma court recognizes, however, that it is difficult to differentiate between evidentiary facts and mere conclusions.<sup>19</sup> There can be little argument on this point, particularly when one considers that an affidavit for a search

<sup>13</sup> 62 Okla. Crim. 8, 70 P.2d 135 (1937).

<sup>14</sup> *Id.* at 16, 70 P.2d at 139.

<sup>15</sup> 67 Okla. Crim. 262, 93 P.2d 1104 (1939).

<sup>16</sup> *Id.* at 264, 93 P.2d at 1105.

<sup>17</sup> 29 Okla. Crim. 290, 234 P. 224 (1925).

<sup>18</sup> *Id.* 234 P. at 226.

<sup>19</sup> *Smith v. State*, 30 Okla. Crim. 144, 235 P. 273 (1925).

warrant which alleged the following "facts" was held sufficient:

that certain intoxicating liquor is being manufactured, sold, bartered, given away, and otherwise furnished, and is being kept for the purpose of being sold, bartered, given away, and otherwise furnished, in violation of the prohibitory law of the state of Oklahoma (there follows a description of the liquor). That said liquor is being disposed of and kept in the manner aforesaid by one John Doe, whose real name is unknown to informant (there follows a description of the property to be searched) "That said building is a private residence, and is used as a place of public resort, and for the storage and furnishing of intoxicating liquor."<sup>20</sup>

In contrast, in *Hannan v. State*,<sup>21</sup> the affidavit read as follows:

That intoxicating liquors are being kept by John Doe, and in the said John Doe's possession, in a certain building situated at 616-618 E. Avenue in the City of Lawton, County of Comanche, and State of Oklahoma, for the purpose and with the intent of the said John Doe to sell the same in violation of the law, and for the purpose of committing a public offense.<sup>22</sup>

The court concluded that the allegations were nothing more than "naked conclusions". The court distinguished the two affidavits in three ways:

First, in naming and describing the persons; second, in naming and describing the intoxicating liquors; and third in describing the character of the place where the liquors were being kept. In the *Hannan* Case nothing is stated by naked conclusions; in the instant case there are some facts stated designating the person in possession, the kind of liquor, and the character of the place where it was being kept.<sup>23</sup>

<sup>20</sup> *Id.* at 145, 235 P. at 274.

<sup>21</sup> 29 Okla. Crim. 203, 233 P. 249 (1925).

<sup>22</sup> *Id.* at 206-07, 233 P. at 250.

<sup>23</sup> *Smith v. State*, 30 Okla. Crim. 144, 148-49, 235 P. 273, 274 (1925).

These distinctions seem somewhat remote and strained. It should be noted that under the Oklahoma Statutes, in force at that time,<sup>24</sup> relating to the search of private residences in the enforcement of the prohibition laws, a private residence, occupied as such, could not be searched unless it was a place of public resort. This was the reason for the allegation that the residence, though private, was in fact used as a place of public resort.

In the 1947 case of *Hughes v. State*<sup>25</sup> the affidavit for a search warrant read in part as follows:

Affiant further states that the above described premises is a place of public resort where divers persons congregate for the purpose of buying, selling, drinking, and offering for sale intoxicating liquor and where intoxicating liquors are manufactured, bartered, stored, and given away, in violation of the prohibition laws of the state of Oklahoma and constitute a public nuisance.<sup>26</sup>

The court determined that the affidavit in this case was proper; yet the allegations "constitutes a public nuisance" and "is a place of public resort" appear to be nothing more than mere conclusions by the affiant. In fact, the court recognized this in *Jordan v. State*.<sup>27</sup> Apparently the additional qualifying statement in the affidavit "that divers persons congregate for the purpose of buying and selling,"<sup>28</sup> removes the allegation from the realm of mere conclusion. A bare allegation that a place is a private residence and is in part a place of public resort is insufficient where no statement of evidentiary facts are set out upon which to base the conclusion.<sup>29</sup>

<sup>24</sup> Ch. 37, (1959) Okla. Laws 141, *Repealing OKLA. STAT. tit. 37, § 88* (1951).

<sup>25</sup> 85 Okla. Crim. 25, 184 P.2d 625 (1947).

<sup>26</sup> *Id.* at 29, 184 P.2d at 627.

<sup>27</sup> 327 P.2d 712 (Okla. Crim. App. 1958).

<sup>28</sup> *Id.* at 718.

<sup>29</sup> *Hughes v. State*, 85 Okla. Crim. 25, 184 P.2d 625 (1947).

In regard to the nature of facts required in an affidavit, the court has said that:

The statements set forth in the affidavit must be of facts and of the nature concerning things which would make the same competent as evidence in the court as tending to prove the same ultimate facts or conclusions.<sup>30</sup>

On the other hand this rule was ignored by the court in approving the following allegation in a search warrant affidavit:

[T]he described premises has a reputation in the community of being a place where liquor is stored in violation of the law.<sup>31</sup>

Obviously the affiant would not be able to testify to such a conclusion as a proper part of the prosecution's case in chief.

#### THE DEGREE OF PROOF

The degree of proof required to establish probable cause in so far as evidentiary facts are concerned must be considered. The court stated in *Ray v. State*<sup>32</sup> that:

The function of the search warrant in seizure proceedings is to aid the proper officers in procuring evidence to be used by the State in prosecuting the defendant, which evidence could not be secured without the aid of a search warrant. Being a preliminary proceeding to the main case, it is only necessary that the affidavit should show probable cause as in a preliminary hearing . . . . the same degree of proof should not be required in procuring a search warrant as would be required in securing a conviction in a trial.<sup>33</sup>

It also has been declared by the court that:

While a search warrant must be based upon evidentiary facts, the quantum of evidence necessary to show probable cause may be quite insufficient to support a verdict of guilty.<sup>34</sup>

<sup>30</sup> *Sikes v. State*, 323 P.2d 376 (Okla. Crim. App. 1958).

<sup>31</sup> *Simpson v. State*, 30 Okla. Crim. 344, 236 P. 55 (1925).

<sup>32</sup> 43 Okla. Crim. 1, 276 P. 785 (1929).

<sup>33</sup> *Id.* at 5, 276 P. at 786.

<sup>34</sup> *Pitzer v. State*, 69 Okla. Crim. 363, 103 P.2d 109 (1940).



It can be reasonably concluded at this point that the facts alleged in the affidavit for search warrant in order to establish probable cause, (a) must be evidentiary in nature, (b) cannot be bare conclusions, and (c) although evidentiary in nature, need not meet the degree of proof necessary for conviction.

These requirements are somewhat qualified because of conflicting court decisions. Reason dictates that although there may be some bare conclusions contained in an affidavit, the presence of evidentiary matters upon which the magistrate may determine probable cause should validate the instrument. The mere presence of some hearsay should not of itself defeat the affidavit. The question is not whether there are any facts contained in the affidavit, but rather if there are sufficient facts alleged to establish probable cause. It is certainly proper under the law of Oklahoma to assert that the absence of any evidentiary facts in the affidavit would defeat a finding of probable cause. Yet it is impossible to state with any certainty just how many or what type of evidentiary facts are necessary to establish probable cause.

#### THE USE OF HEARSAY

The consideration of hearsay as a proper basis for determining probable cause is of great importance to law enforcement. This is particularly true since it is generally recognized that it is necessary to rely on and use information from so-called unidentified informants. The law in Oklahoma on this question, as in the other areas of search and seizure, is confused.

The case of *Southard v. State*<sup>35</sup> has been relied on as authority for the rule that hearsay is not allowed to support probable cause in Oklahoma. This 1956 case concerned the crime of unlawful possession of intoxicating liquor, and the defendant argued in appealing his conviction that the affidavit

<sup>35</sup> 297 P.2d 585 (Okla. Crim. App. 1956).

was insufficient to support a search warrant. The affidavit stated in part:

That he (the affiant) has probable cause to believe and affiant does believe that intoxicating liquor is being manufactured, sold, etc., by Jack Southard on certain premises described (the kind of intoxicating liquor is not described or designated).

That said premises are not occupied as a residence (there is then a contradictory allegation) That said premises are occupied as a residence and a part or all of said residence is used as a store, shop, hotel, boarding house, or place of storage, and said residence is a place of public resort.

That the probable cause of affiants belief as above set forth is based on the following facts which your affiant personally knows to be true: That Jack Southard has a reputation as being a person who deals in intoxicating liquors.

That said premises, is known as being a place where intoxicating liquors are bartered, sold, and otherwise disposed of, and that affiant knows that intoxicating liquors are stored on said premises.<sup>36</sup>

After examining the affidavit the court said that “[i]t would appear affiant’s knowledge was based strictly on hearsay.”<sup>37</sup> It went on to hold that an affidavit based upon hearsay and “information and belief”, and not in positive terms, is insufficient to support a search warrant.

Where statements in an affidavit for a search warrant are made in positive terms, the court has often held that there can be no inquiry behind the affidavit to show that the affiant did not have sufficient knowledge of the statements alleged.<sup>38</sup> There have been instances, however, where the Court of Criminal Appeals concluded that the affiant did not in fact have personal knowledge of statements in an affidavit. These opportunities arose because the prosecutor failed to object at

<sup>36</sup> *Id.* at 590.

<sup>37</sup> *Id.*

<sup>38</sup> *E.g.*, *Addington v. State*, 268 P.2d 912 (Okla. Crim. App. 1954).

the proper time in the trial court. Therefore evidence outside the affidavit was taken for consideration on appeal.<sup>39</sup> By the same token, there have been cases in which the court made the same determination after examining only the affidavit.<sup>40</sup> It would be only fair to state that in such instances the court, right or wrong, had to deal in conjecture.

In the case of *Baker v. State*<sup>41</sup> the court set out a suggested affidavit which it said would have been proper in that case. The proposed affidavit included the following allegations:

[T]hat one ..... saw property of this character being conveyed to the premises of Harry Baker (defendant)

That Harry Baker had made statements to others indicating that he had desired to take this property.<sup>42</sup>

These statements are clearly predicated on hearsay information. The allegation that someone other than the affiant saw the property transported to the defendant's house is information from an informant and clearly hearsay. Furthermore, the allegation that the defendant had made incriminating remarks to a third party would, under the rules of evidence, also constitute hearsay. Notwithstanding these obvious hearsay allegations in the proposed affidavit the court considered them proper and referred to them as "facts as a basis for belief."<sup>43</sup>

The case of *Jordan v. State*,<sup>44</sup> decided shortly after *Southard v. State*,<sup>45</sup> is also of great interest at this point. A portion of the affidavit in *Jordan* alleged "that the defendant is known to be in the whiskey business".<sup>46</sup>

<sup>39</sup> *E.g.*, *Lee v. State*, 297 P.2d 572 (Okla. Crim. App. 1956).

<sup>40</sup> *E.g.*, *Yeargain v. State*, 67 Okla. Crim. 262, 93 P.2d 1104 (1939).

<sup>41</sup> 28 Okla. Crim. 408, 231 P. 320 (1924).

<sup>42</sup> *Id.* at 413, 231 P. at 322.

<sup>43</sup> *Id.*, 231 P. at 322.

<sup>44</sup> 327 P.2d 712 (Okla. Crim. App. 1958). See text accompanying notes 27-28 *supra*.

<sup>45</sup> 297 P.2d 585 (Okla. Crim. App. 1956). See text accompanying notes 35-37 *supra*.

The court sustained the affidavit, but with the reservation that it should not be considered as a model. In addition, language was used which shows the basis for the *Southard* decision:

[w]hile the affidavit in question is by no means a model, still it has been seen . . . that it contains positive allegations of purported facts within the knowledge of affiant, and is not based entirely on hearsay, as in the *Southard* case.<sup>47</sup>

It appears, therefore, that the court explains *Southard* as predicated on and dictated by the fact that the *entire* affidavit was based on hearsay.

*Lee v. State*<sup>48</sup> is sometimes relied on for authority that hearsay cannot be the subject matter of a search warrant affidavit in Oklahoma. In that case, for some unexplained reason, the information was furnished by a chief of police while the affidavit was sworn to by the sheriff of a different county. It appears that the affidavit was in positive form, but the prosecutor failed to make a timely objection at the trial court. This failure to object permitted evidence to develop which showed that the affidavit was not predicated on the personal knowledge of the affiant. The court reversed the conviction and said:

On the record thus made, it clearly appears that the matters alleged and sworn to by the sheriff were based not on his personal knowledge, but were predicated entirely upon information and belief. . . .<sup>49</sup>

It is interesting to note that this case was decided only seven days prior to the *Southard* case. Yet here the word *entirely* was used as it was later used in the *Jordan* case; reference

<sup>46</sup> 327 P.2d at 718.

<sup>47</sup> *Id.* at 719.

<sup>48</sup> 297 P.2d 572 (Okla. Crim. App. 1956).

<sup>49</sup> *Id.* at 573.

was made to the ruling in *Southard*.

In 1957 the court observed that:

[o]n the whole record as made herein the trial court should have sustained the motion to suppress for the reason the information in the affidavit was not predicated upon the personal knowledge of the affiant . . . but was based *entirely* upon hearsay.<sup>50</sup>

Twenty years earlier it had stated that:

[t]he affiant should swear to facts showing probable cause for his belief. *That does not mean that the affiant must know positively* that a person is a thief, or has liquor in his possession. To make an affidavit based upon knowledge of guilt would in many instances be impossible, but the affidavit should be based upon such facts as the belief is founded.<sup>51</sup>

It can only be concluded that there is a distinction between *facts per se*, that is, information within the personal knowledge of the affiant, and *allegations* which though not personally known, are sufficient to justify a conclusion of probable cause.

The court had an opportunity in 1942 to rule on an affidavit in which there was in addition to positive statements of fact an allegation that the affiant "knows persons who have bought whiskey there very recently".<sup>52</sup> It was urged on appeal that the failure to include the names of those who allegedly bought the whiskey would make the affidavit nothing more than an affidavit based on "information and belief". It must be noted that the questioned allegation is nothing more than hearsay, yet the court said:

We do not consider that it was necessary to allege the names of the parties who had bought the whiskey. . . . The statements in an affidavit for the issuance of a

<sup>50</sup> *Hice v. State*, 317 P.2d 294, 295 (Okla. Crim. App. 1957) (emphasis added).

<sup>51</sup> *Davis v. State*, 65 Okla. Crim. 306, 310, 86 P.2d 65, 67 (1938).

<sup>52</sup> *Young v. State* 74 Okla. Crim. 64, 123 P.2d 294 (1942).

search warrant need not be as specific as the allegations in an information or indictment.<sup>53</sup>

Perhaps the explanation of the apparent conflict in decisions is that the court considered the affidavit sufficient since it was not dependent *entirely* on hearsay. In any event, it cannot be said with certainty whether the law of this state considers hearsay in the form of information from a reliable informant proper for a search warrant affidavit. Certain conclusions can be stated, however. Affidavits *entirely* dependent on hearsay have always been ruled invalid in Oklahoma. Affidavits predicated in part on hearsay but which contain positive statements or evidentiary facts within the knowledge of affiant have sometimes been held sufficient.

#### FELONY V. MISDEMEANOR

The term "reasonable cause" has been used interchangeably with the term "probable cause" in Oklahoma.<sup>54</sup> Oklahoma law authorizes arrest for a felony and a subsequent search of the individual arrested without a warrant if the arrest is based on "reasonable cause".<sup>55</sup> There is no question but that officers properly effect arrests for felonies and conduct incidental searches each day. The reasonable (probable) cause authorizing the arrest in such cases may be predicated on hearsay.<sup>56</sup> Yet, that same information may not be sufficient to sustain an affidavit for a valid search warrant. It is not logical to interpret the law in such a way that it is easier to search without a warrant than it is to obtain a valid search warrant. Such an application of the law seems strange indeed in view of the preference the court has expressed for the use of search warrants:

The County Attorneys of this State, and no doubt many of them have already done so, should bring before them the sheriff and his deputies and also other peace officers

<sup>53</sup> *Id.* at 68, 123 P.2d at 299.

<sup>54</sup> *Chronister v. State*, 353 P.2d 493 (Okla. Crim. App. 1960).

<sup>55</sup> OKLA. STAT. tit 22, § 196 (3) (1961).

<sup>56</sup> *Davis v. State*, 377 P.2d 226 (Okla. Crim. App. 1963).

of their county and explain to them in detail *the necessity* of a search warrant.<sup>57</sup>

The court has often stated the historical reasoning and purpose behind the requirements of search warrants to enter a person's property. It would appear that they desire to encourage the use of warrants which can be accomplished only by a reasonable application of the rule concerning probable cause for affidavits.

There is another important factor in the Oklahoma decisions. Every case discussed involves a misdemeanor, usually a prohibition violation. Misdemeanor law, as distinguished from felony law, grants an officer authority to arrest and search without a warrant only if the offense is committed in his presence.<sup>58</sup> The officer may not make a misdemeanor arrest solely on the basis of reasonable (probable) cause or informant's information. This more stringent requirement might unconsciously have been applied by the court to conclude that he should not be able to obtain a search warrant in misdemeanor cases on that type of evidence.

To restrict those engaged in law enforcement to arrest or search based only on their personal knowledge, and preclude the use of hearsay information, would make it impossible for them to fulfill their responsibility. In the first place, such a requirement would obviate the necessity for search warrants. It would also require that a law enforcement officer be lawfully present at the commission of every crime or at the place where property, the subject of a search warrant, was held. The United States Supreme Court has pointed out these difficulties:

If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insuf-

<sup>57</sup> *Denton v. State*, 62 Okla. Crim. 8, 15, 70 P.2d 135, 138 (1937).

<sup>58</sup> *Hill v. State*, 298 P.2d 1066 (Okla. Crim. App. 1956).

ficient basis for a warrant. If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimize police conduct, and resort to them would ultimately be discouraged.<sup>59</sup>

It is now the well settled federal rule that:

hearsay evidence may provide the probable cause necessary for the issuance of a search warrant where a substantial basis for crediting the hearsay evidence is presented.<sup>60</sup>

It is important to examine the affidavit in the *Jones* case to insure that it was in fact not based entirely on hearsay. In effect it alleged that on a certain date the affiant received information that the defendant was involved in illegal narcotic traffic and kept a ready supply in the described apartment. The affidavit went on to allege that informant told the affiant that on many occasions he had purchased narcotic drugs from the defendant at that location. It set out the date of the last purchase by the informant. The affiant also swore that the defendants are "familiar to the undersigned and other members of the Narcotic Squad. *Both have admitted to the use fo narcotic drugs and display needle marks as evidence of same.*"<sup>61</sup> The affidavit also stated that the same information had been received from additional sources. The court held the affidavit sufficient to support a finding of probable cause. The case is cited as expressly sanctioning the use of hearsay evidence to secure a federal search warrant.

Subsequent federal decisions reiterate the *Jones* rule. One qualification was stated in *United States v. Ventresca*:<sup>62</sup>

"[A]n affidavit may be based on hearsay information

<sup>59</sup> *Jones v. United States*, 362 U.S. 257, 271 (1960).

<sup>60</sup> Annot., 10 A.L.R. 3d 359, 364 (1965).

<sup>61</sup> *Jones v. United States*, 362 U.S. 257, 267 n.2 (1960) (emphasis added).

<sup>62</sup> 380 U.S. 102 (1965).



and need not reflect the direct personal observations of the affiant," so long as the magistrate is "informed of some of the underlying circumstances" supporting the affiant's conclusions and his belief that any informant involved "whose identity need not be disclosed . . . was 'credible' or his information 'reliable'."<sup>63</sup>

The majority of state decisions indicate that they are following the lead of the federal rule. The acceptance of hearsay in those states, however, is with the same qualification as the federal rule: it is considered proper only where a substantial basis for crediting the hearsay evidence is presented. Oklahoma is counted among the minority of states on the basis of *Southard* and *Hice*.<sup>64</sup> However, in both of those instances the affidavits were *entirely* hearsay, no basis for crediting the hearsay was presented, and they were prior to the *Jones* decision.

The Oklahoma Court of Criminal Appeals has not really had the opportunity to rule on a factual situation which fits within the federal rule. Although one cannot say with any certainty that the court in Oklahoma would follow the federal rule, there is no authority to the contrary. The search for probable cause therefore continues, only time will disclose what is ahead on the trip. Perhaps the court will adopt the federal rule and help clear the fog emitting from decisions rendered during the prohibition years in Oklahoma.

<sup>63</sup> *Id.* at 108, citing *Aguilar v. Texas* 378 U.S. 108, 114 (1964).

<sup>64</sup> Annot., *supra* note 60. See text accompanying notes 35-37, 50-51 *supra*.