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Criminal Procedure—New York Code of Criminal Procedure Section 813-c Allows Accused to Challenge Perjurious Statements in an Affidavit Upon Which a Search Warrant Was Issued to Contravert the Warrant

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State Legislature which would statutorily reverse the instant case. The proposed amendment to the Alcoholic Beverage Control Law would make it a misdemeanor to serve liquor to persons under the age of eighteen, without having first obtained the consent of the child's parents.[22] If this proposed statute is passed in its present form, it would clearly settle the question raised in the instant case.

An absolute prohibition against serving liquor to children in one's home is unrealistic in light of today's social mores.[23] Furthermore, it conflicts with the desirability of acquainting children with the effects of intoxicating beverages.[24] A balance should be struck between the two competing policies involved here. Liquor control laws should allow for an opportunity for children to become acquainted with alcohol, while preventing abuses and excesses which could lead to a child's endangering his own life or safety, or that of others. Section 260.20 of the Revised Penal Law seeks to accomplish this by exempting parents and guardians from the scope of the statute. The proposed amendment to the Alcoholic Beverage Control Law now before the legislature would accomplish the same result by requiring the parent's prior consent.

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CRIMINAL PROCEDURE—NEW YORK CODE OF CRIMINAL PROCEDURE SECTION 813-C ALLOWS ACCUSED TO CHALLENGE PERJURIOUS STATEMENTS IN AN AFFIDAVIT UPON WHICH A SEARCH WARRANT WAS ISSUED TO CONTROVERT THE WARRANT

During the course of an arrest for policy gambling, evidence had been seized pursuant to a search warrant issued on the affidavit of a policeman. Defendant moved to suppress the evidence, alleging that the warrant was defective because the statements in the affidavit on which the issuance of the warrant rested were untrue. The New York City criminal court granted defendant a hearing on his motion to controvert the search warrant and suppress the evidence seized. At the hearing the magistrate weighed the evidence presented by the affiant in his affidavit against evidence presented by the defendant and two others who testified on the defendant's behalf that the statements in the affidavit were untrue. Following the hearing the magistrate granted the defendant's motion to suppress on the grounds of a "sharp conflict of testimony creating a doubt which must be resolved for defendant."[1] The Appellate term

22. "An Act to Amend the Alcoholic Beverage Control Law," A. Int. 2702, Print 2760 (Feb. 1, 1966).

23. 59% of underage teenagers in New York drink, although most of it takes place in the home. 60 Newsweek 20 (Nov. 26, 1962).

24. Barclay, *Straight Thinking about Drinking*, N.Y. Times Mag., Dec. 17, 1961, p. 43. Teen-age drinking is so widespread and its effects considered so important, that a movement has begun to foster education about alcoholic beverages in the schools. Nat'l Education Ass'n Journal 50:53, Dec. 1961.

1. People v. Alfinito, N.Y. City Court Order Docket No. 1340 (N.Y. City Ct. 1964).

reversed and directed a new hearing because the trial court failed to find and state the facts upon which it had relied in granting the motion to suppress. The people and defendant both appealed to the Court of Appeals. The Court first *held* that it was not always necessary as a matter of law that a trial court find and state the facts upon which it relied. The Court then *held* that section 813-c of the New York Code of Criminal Procedure is to be construed so as to permit an inquiry as to whether the statements in the affidavit were perjured; second, that the burden of proof is on the person attacking the warrant and that any fair doubt arising at the hearing as to the truthfulness of the statements in the affidavit should be resolved in favor of the warrant.[2] The Court then ordered a new hearing to determine the issues pursuant to the rules established in its holding. *People v. Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

That people are to be free from unreasonable searches and seizures of their persons, houses, papers and effects unless probable cause for such an action exists is a right guaranteed by the Constitution of the United States[3] and of the State of New York.[4] In 1914 the Supreme Court, relying on this Constitutional guaranty, decided *Weeks v. United States*.[5] That case held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through illegal search and seizure.[6] More than half a century later the Court in *Mapp v. Ohio*[7] while overruling its prior decision[8] held that the *Weeks* exclusionary rule was applicable to the states through the due process clause of the Fourteenth Amendment. As a result of *Mapp* the New York legislature in 1962 passed several procedural statutes to facilitate the mandatory application of the *Weeks* exclusionary rule in the New York courts.[9] One such statute,

2. People v. Alfinito, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965).

3. U.S. Const. amend. IV reads that "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."

4. N.Y. Const. art. 1 § 12. 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.

5. Weeks v. United States, 232 U.S. 383 (1914).

6. *Id.* at 398.

7. 367 U.S. 643 (1961).

8. Wolf v. Colorado, 338 U.S. 25 (1949), was overruled by *Mapp*. *Wolf* refused to apply the *Weeks* exclusionary rule to the states because of the states' own experience in these fields and because of other means existing to the individual to protect his constitutional rights. (As to the "other means" discussed by the Court in *Wolf* see, Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961).) In spite of *Wolf* many states found these "other means" ineffective (see, *e.g.*, People v. Cahan, 44 Cal. 2d 434, 440, 282 P.2d 905, 911 (1955)) and applied the *Weeks* exclusionary rule of their own free choice. For a list of states adopting the *Weeks* rule before and after *Wolf* see, Elkins v. United States, 364 U.S. 206, Appendix at 224-32 (1960).

9. See N.Y. Sess. Laws 1962, ch. 954; McKinney's N.Y. Sess. Laws 1962, pp. 3673-74 where Governor Rockefeller lists the chapter as a result of *Mapp v. Ohio* making the *Weeks* exclusionary rule mandatory upon the New York state courts.

section 813-c of the New York Code of Criminal Procedure,[10] greatly resembled Rule 41(e)(4) of the Federal Rules of Criminal Procedure[11] and was to be the basis of the holding in the instant case.

Prior to *Mapp* the New York courts had allowed the fruits of an illegal search and seizure to be placed in evidence in state criminal proceedings.[12] That a search based on a search warrant requires probable cause and that the lack of such probable cause would make the warrant itself void, the search illegal, and the fruits of the search inadmissable as evidence in a state court is a result of the application of the *Weeks* exclusionary rule to the states by *Mapp*. Where the search and seizure is pursuant to a warrant based on an affidavit, the courts have allowed an aggrieved party to challenge the sworn statements in the affidavit as insufficient on their face to establish the required probable cause for the issuance of such a warrant.[13] But where an affidavit sufficient on its face to establish the required probable cause is challenged as untruthful, the decisions as to the validity of such a challenge are split. Some jurisdictions, reasoning that the probable cause required by the federal constitution[14] is that which is established when an affiant goes before the magistrate to procure the warrant, have denied defendant the right to later challenge the truthfulness of the statements in the affidavit to negate the existence of the required probable cause.[15] Other jurisdictions, including the majority of the federal courts, have reasoned that the statements in an affidavit giving rise to the required probable cause are factual in substance and must be capable of withstanding an attack on their credibility at a date subsequent to the issuance of the warrant.[16] How-

10. N.Y. Code Crim. Proc. § 813-c reads, "A person claiming to be aggrieved by an unlawful search and seizure . . . may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion."

11. Fed. R. Crim. Proc. Rule 41(e) reads, "A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for the use as evidence anything so obtained on the ground that . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, ..."

12. People v. Variano, 5 N.Y.2d 391, 157 N.E.2d 857, 185 N.Y.S.2d 1 (1959).

13. See, *e.g.*, People v. Alvis, 342 Ill. 460, 174 N.E. 527 (1930); Tischler v. State, 206 Md. 386, 111 A.2d 655 (1955); Gross v. State, 198 Md. 350, 84 A.2d 57 (1951).

14. U.S. Const. amend. IV.

15. See Kenny v. United States, 157 F.2d 442 (D.C. Cir. 1946); United States v. Gianaris, 25 F.R.D. 194 (D.D.C. 1960); United States v. Doe, 19 F.R.D. 1 (E.D. Tenn. 1956); United States v. Brunett, 53 F.2d 219 (W.D. Mo. 1931); Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943); Jackson v. State, 365 S.W.2d 935 (Tex. Crim. App. 1963). Typical of this line of cases is *United States v. Brunett* which states at 225 that "The 'probable cause' required by the Fourth Amendment is that shown by an affidavit. The commissioner is not required to conduct an investigation for determining whether the affidavit is true, and a subsequent showing of its falsity cannot have the effect of retrospectively invalidating a warrant valid when issued."

16. See, *e.g.*, King v. United States, 282 F.2d 398 (4th Cir. 1960); Dixon v. United States, 211 F.2d 547 (5th Cir. 1954); United States v. Nagle, 34 F.2d 952 (N.D.N.Y. 1929); Williams v. Justice Ct., Oroville Judicial Dist., Butte Co., 230 Cal. App. 2d 724, 40 Cal. Rptr. 724 (1963). Typical of these is *King v. United States* which states at p. 400 footnote 4 that "Although the majority, perhaps, of state cases have held that the aggrieved person cannot challenge the truthfulness of the facts alleged by the affiant . . . , the rule in the federal courts is otherwise, and false facts given by the affiant will vitiate the warrant and search."

ever, even those jurisdictions allowing such an attack limit this right to cases where defendant's own statement that the affidavit is untrue is collaborated by other witnesses.[17] The United States Supreme Court, while never deciding directly whether authority for such an attack exists, seems to "assume" the presence of such authority.[18] This coupled with the trend in *Mapp* to expand the scope of fourth amendment rights to include protection from illegally seized evidence in state criminal proceedings would seem to provide the state courts with the impetus to allow a challenge against the truthfulness of an affidavit upon which the issuance of a warrant rests.

Prior to the instant case there was no binding authority in New York state for allowing such a challenge although several cases suggest that such authority exists. In one case the New York Court seemed to presume an attack on the truthfulness of an affidavit would be valid where it was obvious that the affiant wilfully failed to properly describe the premises to be searched.[19] Another case[20] relying on Sections 807 and 809[21] of the New York Code of Criminal Procedure allowed a pawnbroker to challenge the veracity of statements which had established probable cause for the search of his shop and the seizure of allegedly stolen property which he held as security for a loan. Section 807[22] provides that the magistrate must take testimony in regard to the grounds for the issuance of a warrant when the grounds for such an issuance are controverted. Although this section was in effect before *Mapp*, and therefore applied principally to the return of property rather than the exclusion of evidence, there is a case holding section 807 of the Code of Criminal Procedure as "being within the ambit of Section 813-c," the section involved in the instant case.[23] Thus one may argue (1) that section 807 allows an attack on the truthfulness of statements, which gave rise to the required probable cause for a search and seizure, in order to facilitate the return of illegally seized property; (2) that section 807 is to be read in conjunction with section 813-c of the New York Code of Criminal Procedure; and that therefore (3) section 813-c should allow an attack on the credibility of statements in an affidavit to facilitate the exclusion of evidence gained from a search pursuant to a warrant where the statements can be shown to be false. Another argument upon which the New York Court could have relied is that: (1) Those states having statutes similar

17. See *e.g.*, United States v. Nagle, 34 F.2d 952 (N.D.N.Y. 1929) where the court held at 954: "The mere sworn denial by the defendant . . . would not necessarily destroy probable cause, . . ."

18. Rugendorf v. United States, 376 U.S. 528, 532 (1964).

19. People v. Rainey, 14 N.Y.2d 35, 197 N.E.2d 527, 248 N.Y.S.2d 33 (1964).

20. People *ex rel.* Simpson Co. v. Kempner, 208 N.Y. 16, 23, 101 N.E. 794, 796 (1913).

21. N.Y. Code Crim. Proc. § 809 states that "If it appear that the property taken is not the same as that prescribed in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge, justice or magistrate must cause it to be restored to the person from whom it was taken, . . ."

22. N.Y. Code Crim. Proc. § 807 states that "If the grounds on which the warrant was issued be controverted, the judge, justice or magistrate must take testimony in relation thereto."

23. People v. Brown, 40 Misc. 2d 35, 37, 242 N.Y.S.2d 555, 558 (N.Y.C. Crim. Ct. 1963).

to the federal rule[24] allow an attack on the affidavit;[25] (2) New York has a statute[26] which is similar[27] to the federal rule;[28] therefore (3) New York should allow an attack on the truthfulness of statements in an affidavit.

When faced with the issue in the instant case the Court failed to recognize either the argument based on an analogy between section 813-C and section 807 or a comparison of section 813-c to the federal statute. Finding no controlling authority on the question New York state[29] and that the statute itself (*i.e.*, section 813-c[30]) was too general to answer such a specific issue the Court turned to foreign jurisdictions. These jurisdictions conflicted on the question of whether a challenge of the truthfulness of statements in an affidavit should be allowed.[31] Finding no concrete authority the Court based its opinion on the "modern thought which produced the decision in *Mapp v. Ohio*."[32] In so doing the Court faced the problem of balancing the right of the individual to be free from unfair warrants (*i.e.*, those based on false statements of an affiant) and the right of the state to be free from time consuming challenges to fair warrants. Facing this possible conflict of interest the Court allowed a challenge of the truthfulness of statements in an affidavit thus preserving the constitutional rights[33] of the individual. The Court, however, limited the authority for such a challenge in its holding to perjurious statements[34] in the affidavit where the challenging party met the burden of proof that probable cause was lacking for the issuance of the warrant.[35] In defining the burden which one must meet to controvert the warrant the Court held that the accused must show that there was no reasonable doubt that the statements in question were false in order to be successful in his attack.[36]

That the Court's holding in the instant case is a necessary step in the pro-

24. Fed. R. Crim. Proc. Rule 41(e).

25. See 79 C.J.S., *Search and Seizure* § 86 (1952 Cumm. Supp. 1965) and cases cited therein; Annot., 5 A.L.R.2d 394, 396 (1949, Supp. 1965).

26. N.Y. Code Crim. Proc. § 813-c.

27. See People v. Brown, 40 Misc. 2d 35, 37, 242 N.Y.S.2d 555, 558 (N.Y.C. Crim. Ct. 1963) which states that "If the New York practice is to be at least as efficacious as the Federal practice, . . ." Such language could well mean that New York wished to effectuate a statute which was similar in form and substance to its federal counterpart.

28. Fed. R. Crim. Proc. Rule 41(e).

29. Instant case at 185, 211 N.E.2d at 645, 264 N.Y.S.2d at 245 (1965).

30. N.Y. Code Crim. Proc. § 813-c.

31. Rugendorf v. United States, 376 U.S. 528, 532 (1964); King v. United States, 282 F.2d 398 (4th Cir. 1960); United States v. Nagle, 34 F.2d 952 (N.D.N.Y. 1929) were all cases which suggest or hold that authority for an attack on the truthfulness of statements in an affidavit upon which a warrant was issued exists. Holding no authority exists are: Kenny v. United States, 157 F.2d 442 (D.C. Cir. 1946); United States v. Brunett, 53 F.2d 219 (W.D. Mo. 1931); Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943); Johnson v. State, 163 Tex. Crim. 101, 289 S.W.2d 249 (Crim. App. 1956).

32. Instant case at 185, 211 N.E.2d at 646, 264 N.Y.S.2d at 246 (1965).

33. U.S. Const. amend. IV; N.Y. Const. art. 1 § 12.

34. Instant case at 186, 211 N.E.2d at 646, 264 N.Y.S.2d at 246 (1965). "We hold as follows: first, that section 813-c of the Code of Criminal Procedure is to be construed so as to permit an inquiry as to whether the affidavit's statements were perjurious, . . ."

35. United States v. Napela, 28 F.2d 898 (N.D.N.Y. 1928); United States v. Goodwin, 1 F.2d 36 (S.D. Cal. 1924).

36. Instant case at 186, 211 N.E.2d at 646, 264 N.Y.S.2d at 246 (1965).

tection of an individual's fundamental rights seems clear. To hold otherwise would mean that the constitutional right[37] to be free from unreasonable search and seizure could be obliterated any time a policeman was prepared to perjure himself.[38] The fact that the accused can seek retribution by initiating an action for perjury[39] is of little consolation to a person convicted of a criminal charge on the basis of illegally seized evidence. As a result of the Court's holding the possibility of continuous harassment by municipal authorities to discourage so-called undesirables from residing within their communities, through fraudulently procured search warrants, is eliminated.

However, the Court by interpreting section 813-c of the New York Code of Criminal Procedure in the narrow context of the instant case specifically held that only perjurious statements were open to an attack by an aggrieved party. Perjury as defined by the New York Penal Law Section 1620 requires a wilful assertion of fact, opinion, belief or knowledge made by a witness who knew the same to be false. Thus the Court left undecided the rights of an accused to challenge the validity of statements in an affidavit where an unintelligent or overzealous police officer makes a good faith mistake. By so doing the Court has failed to give its holding the value that it may have. That the Court, relying on the "modern thought which produced the decision on *Mapp v. Ohio*,"[40] would if faced with the question expand its present holding to allow a challenge to statements in an affidavit which rest on a good faith mistake of the affiant seems clear. But until such an expansion is effectuated it is possible that a lower court relying on this case might deny an accused the right to attack statements in an affidavit unless it could be shown that the statements were perjurious. In distinguishing between an outright lie and a good faith mistake by the affiant the Court has forced the challenging party to shoulder a double burden of persuasion. First the accused would have to satisfy the magistrate that the affiant's statements were false. Then if the accused were successful in meeting the first burden he would further have to show that the statements were perjurious as distinguished from a mere mistake on the part of the affiant. To eliminate the inequities arising from such a double burden of proof the New York courts would be wise to follow those jurisdictions which have allowed the accused to challenge statements in an affidavit without distinguishing between whether the challenged statements were a lie or a mistake.[41]

37. U.S. Const. amend. IV; N.Y. Const. art. 1 § 12.

38. People v. Angrisani, Magis. Ct., City of N.Y., Bronx County, Docket No. 707,708 (1962). In this case the same affiant as in the instant case presented an affidavit to the magistrate which on its face reflected the required probable cause. At a hearing the affiant had emphatically and unequivocally identified one Marconi as the person he had observed carrying on a number of incriminating activities. The observations were proven false since Marconi had been incarcerated in a Federal prison during the period of the alleged observations.

39. People v. Politano, 17 A.D.2d 503, 507, 235 N.Y.S.2d 712, 716 (3rd Dep't 1962), *aff'd* 13 N.Y.2d 852, 192 N.E.2d 271, 242 N.Y.S.2d 491 (1963).

40. Instant case at 186, 211 N.E.2d at 646, 264 N.Y.S.2d at 246 (1965).

41. See, *e.g.*, United States v. Nagle, 34 F.2d 952, 954 (N.D.N.Y. 1929) where the court said that, "if the defendant presents proof that the premises were closed . . . , or any other

A second limiting factor of the Court's decision in the instant case is the risk of nonpersuasion which has been placed on the challenging party. That the case clearly establishes the correct allocation of burdens between the accused and the state seems clear.[42] However, by requiring the challenging party to show beyond a reasonable doubt that the statements are false,[43] the Court has erected a substantial barrier for an accused. With such a burden an accused who proved by a preponderance of the evidence that the challenged statements were false would be unsuccessful in his attack. To hold as the Court did that this burden is justified because the challenged statements have previously been examined by a "judicial officer in issuing a warrant"[44] at an *ex parte* hearing denies an accused his right to cross-examination which is the basis of our adversary system. It may be that by construing section 813-c of the New York Code of Criminal Procedure to allow for an attack on perjurious statements only, the Court felt a heavy burden of persuasion was necessary to protect the affiant.[45] For if the accused were to show the affiant's statements were perjurious the affiant might be open to a felony charge[46] based on such a showing. By eliminating the distinction between perjurious and mistaken statements in an affidavit the justification for placing such a heavy burden on the accused would fall. The Court then could require a standard such as that necessary for the magistrate to find probable cause in the first instance.[47] Thus the accused would be allowed to challenge the truthfulness of statements in an affidavit where he presented proof sufficient to warrant a man of reasonable caution to believe the statements were untrue. Such a standard would facilitate the task of distinguishing between a fair warrant and an unfair warrant while promoting the interest of both the individual citizen and the community.

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testimony which satisfies the commissioner that the prohibition agent was mistaken, or made a false affidavit, it would be the duty of the commissioner to vacate the search warrant."

42. People v. Malinsky, 15 N.Y.2d 86, 91, 204 N.E.2d 188, 192, 255 N.Y.S.2d 850, 856, n.2 (1965) states that "the People, in order to prevail, are under the necessity of going forward in the first instance with evidence to show that probable cause exist . . . in obtaining a search warrant . . . ." This language, while clearly placing the burden of production on the state, left open the question as to the burden of persuasion where an accused challenges statements in an affidavit. This question has apparently been settled by the instant case.

43. Instant case at 186, 211 N.E.2d at 646, 264 N.Y.S.2d at 246.

44. *Ibid.*

45. See People v. Valasto, 258 App. Div. 896, 16 N.Y.S.2d 289 (2d Dep't 1939); Goldman v. Commonwealth, 100 Va. 865, 42 S.E. 923 (1902). Both held that a similar burden of persuasion rests on the state when it wishes to show criminal fraud (*i.e.*, the evidence must be so convincing as to exclude every reasonable doubt of guilt of the accused).

46. See People v. Clemente, 136 N.Y.S.2d 779 (Sup. Ct. 1954). Stating that where perjury goes to a "material matter," it is of the first degree and a felony.

47. See People v. Massey, 38 Misc. 2d 403, 405, 238 N.Y.S.2d 531, 534 (Sup. Ct. 1963) stating that in order for the magistrate to find probable cause, the facts and circumstances before him must be "sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed."