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BULLOCK LAW OFFICES, LTD.

115 West Fifth Street, #2
Winnemucca, Nevada 89445

JACK T. BULLOCK II
Attorney at Law

TELEPHONE: (775) 623-6216
FAX: (775) 623-0781

April 17, 2003

Bernie Anderson, Chairman
Judiciary Committee
401 S. Carson Street, Rm. 3127
Carson City, NV 89701

RE: SB316 : Testimony

Dear Mr. Anderson:

I wish to inform you of my serious objections to the amendment of NRS 179.045 as proposed in SB 316. I also wish to be notified of any hearings on this matter.

The history of the reason behind the request to amend is needed in order to understand the problem. The statute, as it is currently, was amended in 1997 to allow for the incorporation of the affidavit in support of the warrant. This was done at the request of the Nevada District Attorney's Association to make it easier to identify the probable cause (or the reason) to issue the warrant. The statute requires that the statement of probable cause be placed on the warrant or the affidavit incorporated therein.

In the last several years, law enforcement has not placed the probable cause on the warrant. They have also not incorporated the affidavit. They have not done this because they routinely seal the affidavit pursuant to section 3 of the statute. The result of this process means that the citizen does not get informed of why their door is being broken down at 3:00 a.m. by the police in executing the warrant. There is a pervasive atmosphere of secrecy surrounding this process. The amendment would reinforce and continue this secrecy.

Recently, the Nevada Supreme Court has had the opportunity to address the meaning of the statute. In State v. Allen, which is attached, the Court ruled that law enforcement is required by the statute to place the probable cause statement on the warrant or use the affidavit incorporation process. If they don't do this, then all evidence recovered from the

ASSEMBLY JUDICIARY
DATE: 5-07-03 ROOM 3138 EXHIBIT F
SUBMITTED BY: Jack Bullock

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search is not admissible at the trial. This is correct because the statute is the implementing legislation of the Nevada Constitutional provisions in Article I, section 18. This case has impacted many pending cases in Nevada because law enforcement has not been following the statute.

It seems clear to me that every time the Supreme Court rules against the prosecution, the District Attorney's Association runs to the legislature to seek a correction of that ruling. The current statute is a good one and requires that the police not operate with total secrecy. The target of the search warrant, a citizen of this State, should be able to read on the warrant or in an attached affidavit why the government is intruding in his life. Imagine how you would feel if the police came to your home with a search warrant but you could not determine why they were there. I certainly would be incensed that I could not learn the reason for their intrusion.

The secrecy problem is further enhanced by the sealing of the affidavit process. The prosecution suggests that the Allen decision is inconsistent with the sealing process and an oral affidavit. The Supreme Court has clearly stated that the oral affidavit can be used but the current statute requires a mere statement of what the probable cause was. Surely, the prosecution knows what the oral testimony will be before the search warrant is prepared. Once the affidavit is sealed, then it takes a court order to unseal it. If the prosecution takes many months to finally charge a person, then that person will not be able to see the affidavit until the court process commences. If no charges are filed, then it is possible that the citizen will never know why the house was searched.

Additionally, as proposed in subsection 6 of the bill, a citizen would have to wait the 10 days before he could get a copy of the search warrant papers if the papers were not sealed. If the police are not acting properly, then a citizen will have no recourse against the police for misconduct. This secrecy is inconsistent with our constitution and a free society.

If there are going to be hearings on this matter, I would like to be notified so I can offer testimony against the bill. Thank you for your consideration of my concerns.

BULLOCK LAW OFFICES, LTD.

Jack T. Bullock II
Attorney at Law

JTB:S
Enclosure: As stated above.
C: John Marvel
John Carpenter
Pete Goicoechea

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Cite as: State v. Allen

118 Nev. Adv. Op. No. 84

December 19, 2002

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 38741

THE STATE OF NEVADA,

Appellant,

vs.

RUTH LAMAY ALLEN,

Respondent.

Appeal from a district court order suppressing evidence seized in a search pursuant to a defective search warrant. Sixth Judicial District Court, Humboldt County; Jerry V. Sullivan, Judge.

Affirmed.

Frankie Sue Del Papa, Attorney General, Carson City; David G. Allison, District Attorney, and Conrad Hafen, Chief Deputy District Attorney, Humboldt County, for Appellant.

Jack T. Bullock II, Winnemucca, for Respondent.

BEFORE YOUNG, C.J., ROSE and AGOSTI, JJ.

OPINION

PER CURIAM:

In this appeal, we are asked to determine whether a search warrant that did not contain a statement of probable cause was nevertheless valid because it complied with the "incorporation by reference" requirements of NRS 179.045(5)(b). We conclude that for a search warrant to comply with this provision, the affidavit containing the probable cause statement must be physically attached to the search warrant. Additionally, we conclude that the Leon[1] good faith exception does not apply to the actions of the police in this case.

FACTS

On October 12, 1999, Humboldt County Deputy Sheriff Mike Buxton ("Deputy Buxton") received information that a drug deal had occurred in a local Wal-Mart parking lot. After identifying the vehicle involved in the drug deal, Deputy Buxton obtained the address of the respondent, Ruth Allen ("Ms. Allen"), and began to conduct surveillance on her home in an attempt to locate the vehicle. On January 11, 2000, Deputy Buxton searched Ms. Allen's trash and found items containing Ms. Allen's name and pieces of marijuana.

Based on the foregoing, Deputy Buxton submitted an affidavit to a justice of the peace requesting the issuance of a search warrant. The justice of the peace determined that probable cause existed and authorized a search of Ms. Allen's residence. The warrant, drafted by Deputy Buxton and signed by the justice of the peace, provided the following: "Proof by [a]ffidavit having been made before me by Michael Buxton that there is grounds for issuing this Search Warrant, pursuant to NRS 179.035, and that there is property or other things to be seized that consist of items, or constitute evidence."

On January 20, 2000, Deputy Buxton and other investigators executed the search warrant. After arresting a man on the premises who had marijuana in his pocket, the investigators searched the home and found drugs in the bedroom and in a safe. Ms. Allen was arrested and charged with possession of a controlled substance for sale, a category D felony. As was his normal practice, Deputy Buxton left the search warrant and an inventory receipt of the items seized at Ms. Allen's house, but did not leave a copy of the affidavit.[2] The Deputy had not brought the affidavit with him when he searched the residence.

Ms. Allen filed a motion to suppress the evidence seized from her home, on which the district court held a hearing on September 13, 2001. One of the main issues at the hearing was whether the search warrant was insufficient on its face because it did not properly state probable cause or incorporate the probable cause affidavit by reference as required by NRS 179.045(5).[3]

At the hearing, Deputy Buxton conceded that the search warrant itself did not recite probable cause for the search.[4] Rather, the Deputy testified that probable cause was contained in his affidavit. Additionally, the Deputy testified that while the warrant did not contain the specific words "the affidavit is hereby incorporated herein," the warrant did make some reference to the affidavit.[5]

The district court granted Ms. Allen's motion to suppress the evidence seized during the search of her home. The court concluded that Deputy Buxton did not comply with either of the requirements of NRS 179.045(5).[6] The district court further concluded that the Leon good faith exception did not apply because "the search warrant lacked specific grounds or probable cause on its face."[7] The State appeals from that order.

DISCUSSION

This appeal revolves around several criminal procedure questions. First, how to properly attach an affidavit through "incorporation by reference." Second, if such an affidavit is incorporated, whether the affidavit needs to be left at the scene of a search pursuant to the warrant. Third, whether the Leon good faith exception to the exclusionary rule applies if police do not properly incorporate an affidavit into a warrant by reference or leave an affidavit at the scene of a search.

The Nevada and United States Constitutions require a search warrant to be issued only upon a showing of probable cause. "[N]o warrant shall issue but on probable cause, supported by Oath or Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized."[8]

Thus, a search warrant has three basic components: (1) It must be issued upon probable cause and have support for the statement of probable cause; (2) it must describe the area to be searched; and (3) it must describe what will be seized. The linchpin of a warrant, however, is the existence of probable cause.

The meaning of a statute is a question of law to be reviewed de novo.[9] We review NRS 179.045(5) to determine its plain meaning, which is intended to reflect legislative intent.[10] When a statute is plain and unambiguous, this court will give that language its ordinary meaning and not go beyond it.[11] However, if a statute is susceptible to more than one natural or honest interpretation, it

is ambiguous and we will examine the legislature's intent to determine the meaning of the vague language.[12] We conclude that the statute is not ambiguous and is clear on its face.

The Nevada Legislature amended NRS 179.045 in 1997 to permit a magistrate to seal the affidavit of probable cause upon a showing of good cause.[13] This now appears as NRS 179.045(3).[14] The section at issue here, NRS 179.045(5)(b), was proposed in the same amendment[15] and was designed to facilitate the magistrate's ability to seal affidavits.

If a magistrate, for good cause, seals an affidavit of probable cause under NRS 179.045(3), then the search warrant may incorporate that affidavit by reference under NRS 179.045(5)(b). However, the incorporation by reference provision does not eliminate the requirement that the warrant itself contain a statement of probable cause. Underpinning search warrant law is the requirement that search warrants be issued upon a showing of probable cause. Thus, the option provided under NRS 179.045 is to make a statement of probable cause and (1) state the names of the persons whose affidavits had been taken, or (2) incorporate the affidavit by reference in the warrant. Implicit in NRS 179.045(5)(b) is that a statement of probable cause be included in the warrant. Simply because an affidavit is incorporated by reference does not eliminate the need to include a statement of probable cause in the warrant.

In cases where a magistrate has not sealed an affidavit and it is incorporated by reference in the warrant, that affidavit must accompany the warrant and be provided to the target of the search or left at the residence. This allows the person whose privacy is being invaded to know immediately why a warrant has been served and upon what grounds it was issued.

In the current case, the affidavit was not sealed, and the record does not indicate that the Deputy attempted to do so. Thus, it should have accompanied the search warrant. As Deputy Buxton testified, the only statement of probable cause was in the affidavit. His failure to provide that affidavit to Ms. Allen was a failure that invokes the exclusionary rule. The exclusionary rule, while not acting to cure a Fourth Amendment violation, is a remedial action used to deter police from taking action that is not in accordance with proper search and seizure law.[16] Thus, we conclude that the evidence seized in the search of Ms. Allen's home was correctly suppressed.

We also hold that Deputy Buxton's conduct does not fall within the purview of the Leon good faith exception to the exclusionary rule.[17] Exclusion is only appropriate where the remedial objectives of the exclusionary rule are served.[18] Under the Leon exception, an officer's objectively reasonable reliance on an invalid warrant issued by a magistrate or judge will not act to suppress evidence seized under the warrant. However, under the objective standard, an officer is required "to have a reasonable knowledge of what the law prohibits."[19]

Because we conclude that NRS 179.045(5) is not ambiguous, we also conclude that the Leon good faith exception does not apply in this case. Deputy Buxton's actions did not follow the requirements set forth in NRS 179.045. If the Deputy had properly incorporated the affidavit by reference, he was required to provide Ms. Allen with both the search warrant and the accompanying affidavit. Thus, Deputy Buxton's actions show that he did not have a reasonable knowledge of what the law requires. If he did have such knowledge, he would not have acted in a prohibited manner.

CONCLUSION

We conclude that the district court properly suppressed evidence seized from Ms. Allen's home. Deputy Buxton did not follow the requirements of either NRS 179.045(5)(a) or (b), and the Leon exception to the exclusionary rule does not apply. Accordingly, we affirm the district court's order.

**********FOOTNOTES**********

[1] United States v. Leon, 468 U.S. 897 (1984).

[2] Deputy Buxton testified that he was never trained to leave an affidavit at a residence.

[3] NRS 179.045(5) provides, in relevant part:

> The warrant must be directed to a peace officer in the county where the warrant is to be executed. It must:
>
> (a) State the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof; or
>
> (b) Incorporate by reference the affidavit or oral statement upon which it is based.

[4] Deputy Buxton testified that he prepared the warrant in the manner that he was trained.

[5] In 1997, the Legislature added the language that is codified as NRS 179.045(5)(b). 1997 Nev. Stat., ch. 213, § 1, at 741. This section was added to allow for sealed warrants pursuant to the newly added NRS 179.045(3). Deputy Buxton testified that he was never trained that a statement in the warrant that an affidavit was "incorporated by reference" was necessary.

[6] The trial court stated:

> The law required that [D]etective Buxton deliver or leave a copy of a sufficient search warrant stating probable cause or incorporation of the probable cause, unless he had a judicial order sealing the Affidavit. Attaching or even leaving the probable cause Affidavit at the residence could have fulfilled legal requirements. On the face of the search warrant you could put something such as "attached to this search warrant is the probable cause affidavit of Investigator Buxton, which is incorporated by reference."

[7] NRS 179.085(1) states:

> A person aggrieved by an unlawful search and seizure may move the court having jurisdiction where the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:
>
> . . . .
>
> (b) The warrant is insufficient on its face . . . .

[8] Nev. Const. art. 1, § 18; see also U.S. Const. amend. IV (substantially similar language).

[9] State v. Friend, 118 Nev. ___, ___, 40 P.3d 436, 439 (2002).

[10] Washington v. State, 117 Nev. ___, ___, 30 P.3d 1134, 1136 (2001).

[11] City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

[12] Banegas v. SIIS, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001).

[13] 1997 Nev. Stat., ch. 213, § 1, at 741.

[14] NRS 179.045(3) states:

> Upon a showing of good cause, the magistrate may order an affidavit or a recording of an oral statement given pursuant to this section to be

sealed. Upon a showing of good cause, a court may cause the affidavit or recording to be unsealed.

[15] 1997 Nev. Stat., ch 213, § 1, at 741.

[16] See Leon, 468 U.S. at 906 (quoting United States v. Calandra, 414 U.S. 338, 354 (1974); Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

[17] See Powell v. State, 113 Nev. 41, 45, 930 P.2d 1123, 1125-26 (1997) (discussing Leon).

[18] Id. (discussing Arizona v. Evans, 514 U.S. 1 (1995)).

[19] Leon, 468 U.S. at 920 n.20 (citing United States v. Peltier, 422 U.S. 531, 542 (1975)).

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