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ANALYSIS OF LEGISLATIVE AMENDMENTS

The original NRS 179.045 enacted by the 1967 Session of the Legislature and required affidavits to establish the grounds for the issuance of the warrant. In subsection 2 the following statement is made: "It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof". Thus, from the very beginning of this statute, there has been the requirement to state the grounds or probable cause on the warrant.

The 1975 amendment merely defined the term "daytime" to mean from 7 a.m. to 7 p.m.

The 1981 amendments essentially added the oral statement to the magistrate process. This is the telephonic search warrant process. The above language was change from the word "shall" to the work "must".

The 1993 amendments did nothing substantive but did change "shorthand" to "court"

The 1997 amendments added subparagraph 3 to NRS 179.045 which is the sealing of the affidavit process. Additionally, the former subparagraph 4 was written to allow for the incorporation by reference of the affidavit in lieu of the statement of grounds or probable cause. The amendment created an "either/or" situation. The search warrant must state the grounds or incorporate the affidavit.

As can be seen, the requirement to state the grounds for the issuance of the warrant on the face of the warrant has been with our law since at least 1967. It may have also been in the old Revised Code of Nevada books previous to the 1967 creation of Nevada Revised Statutes.

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ASSEMBLY JUDICIARY

DATE: 5-07-03 ROOM 3138 EXHIBIT G

SUBMITTED BY: Jack Bullock

**THE FOLLOWING PAGES SHOW THE STATUTE AS
AMENDED BY THE VARIOUS SESSIONS OF THE
LEGISLATURE**

The 1967 original version of the statute is shown in the 1975 Statutes of the State of Nevada with the added language shown in italics and the deleted original language in bold brackets.

Senate Bill No. 54—Committee on Judiciary

CHAPTER 34

AN ACT relating to search warrants; specifying that a search warrant shall be served between 7 a.m. and 7 p.m., unless the magistrate directs otherwise.

[Approved March 4, 1975]

*The People of the State of Nevada, represented in Senate and Assembly,
do enact as follows:*

SECTION 1. NRS 179.045 is hereby amended to read as follows:

179.045 1. A search warrant shall issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he must issue a warrant identifying the property and naming or describing the person or place to be searched.

2. The warrant shall be directed to a peace officer in the county where the warrant is to be executed. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified.

3. The warrant shall direct that it be served **[in the daytime,]** *between the hours of 7 a.m. and 7 p.m.*, unless the magistrate, upon a showing of good cause therefor, inserts a direction that it be served at any time.

4. It shall designate the magistrate to whom it shall be returned.

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**THE FOLLOWING PAGES SHOW THE STATUTE AS
AMENDED BY THE VARIOUS SESSIONS OF THE
LEGISLATURE**

The 1975 version of the statute is shown in the 1975 Statutes of the State of Nevada with the added language shown in italics and the deleted original language in bold brackets.

Senate Bill No. 54—Committee on Judiciary

CHAPTER 34

AN ACT relating to search warrants; specifying that a search warrant shall be served between 7 a.m. and 7 p.m., unless the magistrate directs otherwise.

[Approved March 4, 1975]

*The People of the State of Nevada, represented in Senate and Assembly,
do enact as follows:*

SECTION 1. NRS 179.045 is hereby amended to read as follows:

179.045 1. A search warrant shall issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he must issue a warrant identifying the property and naming or describing the person or place to be searched.

2. The warrant shall be directed to a peace officer in the county where the warrant is to be executed. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified.

3. The warrant shall direct that it be served **[in the daytime,]** *between the hours of 7 a.m. and 7 p.m.,* unless the magistrate, upon a showing of good cause therefor, inserts a direction that it be served at any time.

4. It shall designate the magistrate to whom it shall be returned.

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**THE FOLLOWING PAGES SHOW THE STATUTE AS
AMENDED BY THE VARIOUS SESSIONS OF THE
LEGISLATURE**

The 1981 version of the statute is shown in the 1981 Statutes of the State of Nevada with the added language shown in italics and the deleted original language in bold brackets.

Assembly Bill No. 405—Committee on Judiciary

CHAPTER 685

AN ACT relating to search warrants; authorizing magistrates to issue search warrants based on oral statements; authorizing magistrates to give oral authorization to peace officers to sign the magistrate's name to a search warrant; and providing other matters properly relating thereto.

[Approved June 14, 1981]

*The People of the State of Nevada, represented in Senate and Assembly,
do enact as follows:*

SECTION 1. NRS 179.045 is hereby amended to read as follows:

179.045 1. A search warrant **[shall]** *may* issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant **[.]** *or as provided in subsection 2.* If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he **[must]** *shall* issue a warrant identifying the property and naming or describing the person or place to be searched.

2. *In lieu of the affidavit required by subsection 1, the magistrate may take an oral statement given under oath, which must be recorded in the presence of the magistrate or in his immediate vicinity by a certified shorthand reporter or by electronic means, transcribed, certified by the reporter if he recorded it, and certified by the magistrate. The statement must be filed with the clerk of the court.*

3. *After a magistrate has issued a search warrant, whether it is based on an affidavit or an oral statement given under oath, he may orally authorize a peace officer to sign the magistrate's name on a duplicate original warrant. A duplicate original search warrant shall be deemed to be a search warrant. It must be returned to the magistrate who authorized the signing of his name on it. The magistrate shall endorse his name and enter the date on the warrant when it is returned to him. Any failure of the magistrate to make such an endorsement and entry does not in itself invalidate the warrant.*

4. The warrant **[shall]** *must* be directed to a peace officer in the county where the warrant is to be executed. It **[shall]** *must* state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It **[shall]** *must* command the officer to search forthwith the person or place named for the property specified.

[3.] 5. The warrant **[shall]** *must* direct that it be served between

SIXTY-FIRST SESSION

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the hours of 7 a.m. and 7 p.m., unless the magistrate, upon a showing of good cause therefor, inserts a direction that it be served at any time.

[4. It shall] 6. *The warrant must designate the magistrate to whom it [shall] is to be returned.*

SEC. 2. NRS 179.095 is hereby amended to read as follows:

179.095 The magistrate who has issued a search warrant shall attach to the warrant *the duplicate original warrant, if any, and* a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the court having jurisdiction where the property was seized.

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**THE FOLLOWING PAGES SHOW THE STATUTE AS
AMENDED BY THE VARIOUS SESSIONS OF THE
LEGISLATURE**

The 1993 version of the statute is shown in the 1993 Statutes of the State of Nevada with the added language shown in italics and the deleted original language in bold brackets.

Sec. 29. NRS 179.045 is hereby amended to read as follows:

179.045 1. A search warrant may issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant or as provided in subsection 2. If the magistrate 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.

2. In lieu of the affidavit required by subsection 1, the magistrate may take an oral statement given under oath, which must be recorded in the presence of the magistrate or in his immediate vicinity by a certified [shorthand] court reporter or by electronic means, transcribed, certified by the reporter if he recorded it, and certified by the magistrate. The statement must be filed with the clerk of the court.

3. After a magistrate has issued a search warrant, whether it is based on an affidavit or an oral statement given under oath, he may orally authorize a

Ch. 438

SIXTY-SEVENTH SESSION

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peace officer to sign the magistrate's name on a duplicate original warrant. A duplicate original search warrant shall be deemed to be a search warrant. It must be returned to the magistrate who authorized the signing of his name on it. The magistrate shall endorse his name and enter the date on the warrant when it is returned to him. Any failure of the magistrate to make such an endorsement and entry does not in itself invalidate the warrant.

4. The warrant must be directed to a peace officer in the county where the warrant is to be executed. It must state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It must command the officer to search forthwith the person or place named for the property specified.

5. The warrant must direct that it be served between the hours of 7 a.m. and 7 p.m., unless the magistrate, upon a showing of good cause therefor, inserts a direction that it be served at any time.

6. The warrant must designate the magistrate to whom it is to be returned.

Sec. 30. Section 25 of this act becomes effective at 12:01 a.m. on October 1, 1993.

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THE FOLLOWING PAGES SHOW THE STATUTE AS
AMENDED BY THE VARIOUS SESSIONS OF THE
LEGISLATURE

The 1997, and current, version of the statute is shown in the 1997 Statutes of the State of Nevada with the added language shown in italics and the deleted original language in bold brackets.

Ch. 213

SIXTY-NINTH SESSION

741

Assembly Bill No. 458-Committee on Judiciary

CHAPTER 213

AN ACT relating to search warrants; authorizing a magistrate to order certain affidavits and recordings of oral statements concerning search warrants to be sealed; and providing other matters properly relating thereto.

[Approved June 30, 1997]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 179.045 is hereby amended to read as follows:

179.045 1. A search warrant may issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant or as provided in subsection 2. If the magistrate 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.

2. In lieu of the affidavit required by subsection 1, the magistrate may take an oral statement given under oath, which must be recorded in the presence of the magistrate or in his immediate vicinity by a certified court reporter or by electronic means, transcribed, certified by the reporter if he recorded it, and certified by the magistrate. The statement must be filed with the clerk of the court.

3. *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.*

4. After a magistrate has issued a search warrant, whether it is based on an affidavit or an oral statement given under oath, he may orally authorize a peace officer to sign the [magistrate's] name *of the magistrate* on a duplicate original warrant. A duplicate original search warrant shall be deemed to be a search warrant. It must be returned to the magistrate who authorized the signing of his name on it. The magistrate shall endorse his name and enter the date on the warrant when it is returned to him. Any failure of the magistrate to make such an endorsement and entry does not in itself invalidate the warrant.

[4.] 5. The warrant must be directed to a peace officer in the county where the warrant is to be executed. It must [state] :

(a) *State the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof [. It] ; or*

(b) *Incorporate by reference the affidavit or oral statement upon which it is based.*

The warrant must command the officer to search forthwith the person or place named for the property specified.

[5.] 6. The warrant must direct that it be served between the hours of 7 a.m. and 7 p.m., unless the magistrate, upon a showing of good cause therefor, inserts a direction that ~~it be served at any time.~~

[6.] 7. The warrant must ~~designate the magistrate~~ to whom it is to be returned.

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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.

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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

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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*****

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[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

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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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