

# **SEARCH WARRANTS**

**Jan E. Pritchett**

**Schlosser & Pritchett**

**Greensboro, NC**

## **SEARCHING FOR CONTRABAND IN ALL THE WRONG PLACES.**

Introduction.

From a criminal defense lawyer's perspective, the wrong place to find contraband is the place where it is found. Perhaps the only right place to find contraband would be in an area that is subject to a suppression motion based on the illegality of the search.

Many cases whether the stakes are great or small begin with our client's initial encounter with the police. Often times the question is whether or not an officer had probable cause to seize contraband from our clients; or if our clients have given the officer informed consent to search.

To protect your client's rights, it is important that you critically examine the details of the initial encounter and make a determination as to whether your client's Fourth Amendment rights have been violated. If you make a determination that you may have a valid Motion to Suppress, the next step is ensuring that the search is not valid under some exception to warrant requirement.

In the brief discussion that follows, we will examine various aspects of search warrants and exceptions to the warrant requirement. It is this writer's hope that at the materials in this manuscript will provide the reader with a basic framework of the law as it pertains to search warrants.

## **I. SEARCH WARRANT REQUIREMENTS**

As with all legal matters to garner a basic understanding of any subject matter, the best starting point is always the governing law. The focal point when preparing an initial attack on a search warrant is to make sure that the mandatory five (5) requirements have been met by the law enforcement officer who has obtained the search warrant. Over the years, this process has evolved into a fill in the blank exercise. However, because your client's liberty may be at stake, you have to take the time to assure that the State has complied with the law. Listed below is the Big Five (5) checklist. Because the language is "and" and not "may", failure to do any of the five mandates should result in the successful suppression of evidence.

### **§ 15A-246. Form and content of the search warrant.**

A search warrant must contain:

- (1) The name and signature of the issuing official with the time and date of issuance above his signature; and
- (2) The name of a specific officer or the classification of officers to whom the warrant is addressed; and
- (3) The names of the applicant and of all persons whose affidavits or testimony were given in support of the application; and
- (4) A designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched; and
- (5) A description or a designation of the items constituting the object of the search and authorized to be seized.

The legislature has also codified the duties of the judicial official to be followed in the issuance of search warrants. The duties delineated below are mandatory.

### **§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.**

(a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official. The information must be shown by one or more of the following:

- (1) Affidavit; or

- (2) Oral testimony under oath or affirmation before the issuing official; or
- (3) Oral testimony under oath or affirmation presented by a sworn law enforcement officer to the issuing official by means of an audio and video transmission in which both parties can see and hear each other. Prior to the use of audio and video transmission pursuant to this subdivision, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts.

(b) If the issuing official finds that the application meets the requirements of this Article and finds there is probable cause to believe that the search will discover items specified in the application which are subject to seizure under G.S. 15A-242, he must issue a search warrant in accordance with the requirements of this Article. The issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk. If he does not so find, the official must deny the application.

It is always a good idea to get a copy of the search warrant as soon as you become involved in a case. Although statutorily there is no discovery in district court, the search warrant is often useful in providing initial information that allows you to take an early glimpse at the potential witnesses against your client. It can also provide excellent information for cross examination of the law enforcement affiant.

Officers who routinely make application for search warrants use the same boiler plate language in their applications for search warrants. If the information that the law enforcement affiant is relying on is specific as to your client, shouldn't his application contain more than just generalities? Of course it should! To say that an officer expects to find ledgers and computer entries when searching a known crack house where the officer also avers that his source tells him that no one resides in the house and it is used solely for crack distribution defies logic and common sense. This is an example of an assertion that would be ripe for cross examination.

You could start by asking the officer if he relied on the information given to him by his informant. You could then ask if he was able to validate the informant as a confidential and reliable informant. Once he said yes, you could ask him if he believed that the house to be searched was used solely for the distribution of crack. And if it is true that he was not likely to find items that he would ordinarily find if the house were occupied by tenants. Now it's time to blind side him with the question as to whether crack heads are known to take items of value. When he replies yes, ask him if he was shocked that he didn't find items of value such as televisions digital cameras or computers. If he says he was not shocked, you have him on the ropes. You may now ask him why he stated under oath when he applied for the search warrant that he was likely to find ledgers or computer entries.

The aforementioned discussion provides an example how reviewing the search warrant can be beneficial to your case. Depending on the detail in the warrant, your client may be able to help you identify the "snitch" early so that you can develop information that will aid you at trial. Furthermore, you may be able to gain some ground on cross examination with your law enforcement officer.

Once the reviewing judicial official reviews the application for the search warrant, it is the examiner's duty to determine whether or not there exists probable cause for the issuance of the warrant. If the judicial official finds probable cause, the search warrant is issued. The law enforcement officer will now have forty-eight (48) hours to execute the warrant. Ordinarily, the officer will return the warrant within the forty-eight (48) hours after it was issued.

If the warrant is not executed within forty-eight (48) hours nothing else appearing, then it is invalid. This would subject any contraband found as a result of the delayed execution to a

suppression motion. Equally important, judicial officials should not rely on information that appears to be too vague or remote in time. These are all matters you should examine when taking your initial look at the search warrant.

## **II. JUDICIAL REVIEW OF SEARCH WARRANTS**

Unfortunately, when an officer is attempting to establish probable cause to obtain a search warrant, the only check on the officer's judgment is the issuing official's review of the officer's basis for probable cause. In practice, these proceedings are as one sided as a law enforcement officer's presentation of facts to the grand jury (which almost always results in the establishment of probable cause). Could you imagine if the magistrate heard our unchallenged argument as to why the issuance of a search warrant should be denied? Even more interesting would be if the grand jury heard our client's uncontroverted assertions as to their innocence. Although none of the aforementioned makes much sense, we have to work within the framework of our legal system.

If upon review of the search warrant you find that the information on the face of the application and accompanying affidavit to be thin, you should file a Motion to Suppress and or a Motion to Dismiss based on the lack of probable cause for the issuance of the warrant. The reviewing court cannot receive information from the issuing official that was not a part of the official's basis for finding probable cause. Furthermore, these findings must be written or recorded in order for them to be considered a part of the basis for finding probable cause. Unlike some challenges where we are faced with new memories or details that were inadvertently not made a part of the record, these excuses will not carry the day if the judicial official fails to record his reasons for finding probable cause to issue the search warrant.

In preparation for this manuscript I decided to interview several magistrates and law enforcement officers who are routinely involved in matters involving search warrants. Both magistrates and the law enforcement officers that I interviewed seemed to have a keen awareness that if they did not have a strong showing in the warrant that they would be scrutinized at a later proceeding. One magistrate remembered denying a search warrant twice for the same officer. The magistrate's first denial of the search warrant was that the information that the officer was relying on was too vague. When the officer came back, he based his search warrant on a trash pull from a month prior that revealed marijuana seeds and stems. According to the magistrate, although the officer was less than happy, he did not present the request a third time.

### **III. EXECUTION OF THE SEARCH WARRANT**

#### **a. The Who and the What**

In general, most of the search warrants that you encounter will be search warrants that pertain to the search of property and people that are likely to be found at a given place. As discussed above, the search warrant should state with some specificity who or what is to be searched. It should also establish the evidence that is likely to be found as a result of the search. In examining the probable cause and the degree of specificity or the lack thereof, this can establish your basis for a challenge to the warrant. If the information of what the officers state they will find is specific, but the actual detail is lacking, this certainly could lead to a challenge as to whether the officers were merely on a fishing expedition.

Once the officers actually execute the search warrant, they are not entitled to search everything within sight. Their search is legally limited to the places where they might find the

evidence sought to be found in the request for the search warrant. North Carolina General Statute §15A-253 sets forth the limitations and allowances for items to be seized.

**§ 15A-253. Scope of the search; seizure of items not named in the warrant.**

The scope of the search may be only such as is authorized by the warrant and is reasonably necessary to discover the items specified therein. Upon discovery of the items specified, the officer must take possession or custody of them. If in the course of the search the officer inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. 15A-242, he may also take possession of the items so discovered.

If the officer exceeds the four corners of the search warrant and yields some booty as a result of the search, the contraband should be the basis of a suppression motion.

As a general rule, once the search warrant is issued, officers have a right to search the dwelling, sheds, barns or other structures where the contraband that is sought could possibly be found. This authority also applies to vehicles if the officer has probable cause to believe that the contraband that is sought could likely be found in that vehicle.

More problematic is the issue of what happens if people are present at the time of the execution of the search warrant that are not identified in the search warrant. This is an issue that must be evaluated on a case by case basis. However, law enforcement will likely be able to ask for identification from the people present during the execution of the warrant. Most courts reviewing police action would also allow law enforcement to perform a limited pat down for officer safety and a brief detention of the persons that are not the object of the search warrant.<sup>1</sup>

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<sup>1</sup> **§ 15A-255. Frisk of persons present in premises or vehicle to be searched.**

An officer executing a warrant directing a search of premises or of a vehicle may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapons by an external patting of the clothing of those present. If in the course of such a frisk he feels an object which he reasonably believes to be a dangerous weapon, he may take possession of the object. (1973, c. 1286, s. 1.)

Unlike many jurisdictions, North Carolina specifically authorizes the detention of persons found on premises to be searched. The statutory provision below delineates officer's rights when executing a search warrant on private property.

**§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched.**

An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person, but no property of a different type from that particularly described in the warrant may be seized or may be the basis for prosecution of any person so searched. For the purpose of this section, all controlled substances are the same type of property.

As it relates to this issue, if your client happened to be in the wrong place at the wrong time and is found to be in possession of contraband, your best argument is going to be that law enforcement lacked any information to search your client and that the unlawful seizure of your client led to a violation of your client's constitutional rights.

**b. The Underlying Basis for the Who and the What**

Many search warrants are based on information given to law enforcement by confidential informants. In order for this information to be reliable, the officer must be able to show that the person's information is likely to result in the seizure of contraband. To establish reliability, law enforcement officers use persons that have given information in the past that has proven to be

reliable. The confidential informant must also have recent information or personal observation that the officers can corroborate or in some way be assured of its' veracity.

Officers may also begin with information from a confidential informant and develop the information through their own observation to establish probable cause for a search warrant. One common example of this would be when officers receive information that drugs are being sold from a particular location. As opposed to applying for a search warrant immediately, they can watch the house, make a trash pull or stop someone leaving the suspected drug house to garner information that will lead to the successful procurement of a search warrant.

c. The Timeliness of the Underlying Information

A good rule of thumb to follow when attacking a search warrant on the staleness of the information contained in the affidavit is to think in terms of bread. If enough time has passed between the last occurrence and the search warrant application to render a loaf of bread stale, you should probably file a motion to suppress out of an abundance of caution. Essentially, the law enforcement officer will need to show on a challenge of the staleness that despite the delay in obtaining the search warrant that contraband was still likely to be found.

d. The timeliness of the Execution

Law enforcement officers have forty-eight (48) hours to begin execution of a search warrant from the time that it is issued.<sup>2</sup> In the rare event that the officers are unable to execute the search warrant within the statutorily prescribed time period, under certain circumstances, they

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<sup>2</sup> § 15A-248. **Time of execution of a search warrant.**

A search warrant must be executed within 48 hours from the time of issuance. Any warrant not executed within that time limit is void and must be marked "not executed" and returned without unnecessary delay to the clerk of the issuing court. (1973, c. 1286, s. 1.)

may be able to use the same information to apply for a new search warrant. The new application would give the officers a fresh forty-eight (48) hour period in which to execute the warrant. In these instances, as defense counsel you must make the analysis as to whether the initial information became stale between the first and second application for the search warrants.

**e. Officers Should Generally Knock and Announce Their Presence Before Executing a Search Warrant**

North Carolina requires that officers follow a knock and announce procedure before execution of a search warrant. The relevant statutory authority is highlighted below.

**§ 15A-249. Officer to give notice of identity and purpose.**

The officer executing a search warrant must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present.

In North Carolina, the knock and announce requirement is subject to certain exceptions. If the officer can show that by knocking and announcing his presence that evidence would likely be destroyed or that officer safety would be an issue, this would likely suffice to obviate the need for the officer to do the standard knock and announce.

From a practical standpoint, if an officer is aware of this exception, they are going to likely try to come in under this exception in every drug case and every violent case. There is also no statutory requirement that the knock and announce give the person more than a seconds worth of notice. Hence, the officers could say, “police, search warrant” and simultaneously kick the door in.

## **CONCLUSION**

You stand to protect your client's rights and guard the constitution. You may not win all of your battles, but you can't win any if you don't fight. Keep up the good fight!!!

