STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 14-10

Magistrate's Communication to Officers Presenting Deficient Warrant Request

QUESTION

May a magistrate or judicial commissioner presented with a request for a warrant advise the requesting law enforcement officer on how to cure deficiencies in the affidavit or other sworn statement so it will support probable cause for a search or an arrest on a specific charge?

OPINION

Yes, a magistrate may identify deficiencies in a warrant application or affidavit and inform a requesting officer what is needed to cure such deficiencies without abandoning his or her judicial role as a neutral and detached magistrate.

ANALYSIS

The Fourth Amendment to the United States Constitution requires a magistrate issuing a warrant to be neutral and detached rather than "an adjunct law enforcement officer." *See United States v. Leon*, 468 U.S. 897, 914 (1984) (quoting from *Lo-Ji Sales, Inc., v. New York*, 442 U.S. 319, 327 (1979)); *United States v. Ramirez*, 63 F.3d 937, 941 (10th Cir. 1995). A magistrate's objectivity in the warrant process undoubtedly serves as an essential safeguard against the type of improper searches and seizures against which the Fourth Amendment was designed to protect. *See Lo-Ji Sales*, 442 U.S. at 325-26. Accordingly, a magistrate abandons his duty to be neutral and detached when he becomes too entangled in the investigation surrounding the warrant, has some personal interest in issuing the warrant, or becomes a "rubber stamp" for the police. *See, e.g., Leon,* 468 U.S. at 914 ("[C]ourts must also insist that the magistrate purport to 'perform his neutral and detached function and not serve merely as a rubber stamp for police.'") (quoting *Aguilar v. Texas*, 378 U.S. 108, 111 (1964)); *Lo-Ji Sales,* 442 U.S. at 326-27 (holding that town justice who issued an open-ended warrant and then became the leader of the police search-and-seizure operation at the scene was not neutral and detached); *Connally v. Georgia*, 429 U.S. 245, 250-51 (1977) (holding that justice of the peace who had a financial interest in issuing warrants for a fee was not neutral and detached); *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (holding that state

attorney general issuing the warrant, who was also the chief investigator and prosecutor on the case, was not a neutral and detached magistrate).

But being a gatekeeper for the warrant process does not require that a magistrate be completely uninvolved in the process. *See Ramirez*, 63 F.3d at 941-42 ("The Fourth Amendment does not require magistrates 'to maintain Sphinx-like inscrutability in passing on warrant applications.'") (citation omitted). Courts have recognized that a magistrate also has a duty to identify deficiencies in the warrant process and to ensure that the warrant comports with the supporting affidavit before issuing it. *See, e.g.*, *id.* at 941 ("[I]t is the duty of an issuing magistrate to ensure that a warrant corresponds to the content of the supporting affidavit."); *United States v. Loy*, 569 F.Supp.2d 601, 607 (N.D. W.Va. 2008) ("[I]t is a magistrate's responsibility to identify any deficiencies in a warrant application.").

Accordingly, when an officer presents a magistrate with a deficient affidavit for a warrant, the magistrate may tell the officer what is lacking without jeopardizing his judicial role. For example, the district court in *Loy* found that a magistrate's suggestions to officers that they needed to attach the informant's statement and include certain other information in an attachment to the search warrant application did not violate his duty of neutrality. *See Loy*, 569 F. Supp. 2d at 607 ("[I]n calling the officers' attention to potential deficiencies in the search warrant application, [the magistrate] did not breach his duty of neutrality."); *see also King v. State*, 438 S.E.2d 620, 623 (Ga. 1994) (holding that the issuing magistrate did not abandon his neutral and detached role by advising the officer what facts he could leave out of his written affidavit in support of the warrant).

On the other hand, a magistrate's making changes to an affidavit may call his or her neutrality into question because affidavits set out the required probable cause and generally fall within the exclusive province of law enforcement. *Ramirez*, 63 F.3d at 941. The danger in such an instance is that the magistrate may lose his or her neutral and detached posture by taking an active role in gathering and articulating probable cause. *See State v. Nolan*, 617 S.W.2d 174, 176 (Tenn. Crim. App. 1981). The question whether a magistrate acted in a neutral and detached manner in a particular case, however, is an individualized and contextual inquiry based on the attendant circumstances. *Lo-Ji Sales*, 442 U.S. at 326; *Ramirez*, 63 F.3d at 941.

While Tennessee courts do not expressly endorse the practice of a magistrate's altering an affidavit, neither do they prohibit such action when a magistrate is otherwise able to remain neutral and detached in determining whether probable cause exists. For example, in *Nolan* the Tennessee Court of Criminal Appeals rejected the defendant's argument that the issuing magistrate compromised his neutrality and took an active role in the probable-cause process by making deletions and additions to an affidavit. *Id.* at 175. In finding the

magistrate's alterations acceptable under the circumstances, the court quoted from *Albitez v. Beto*, 465 F.2d 954, 956 (5th Cir. 1972):

> Assistance by the magistrate in preparing an affidavit containing sufficient facts to make an independent judgment as to the existence of probable cause does not detract from his neutrality. It demonstrates it. His duty is not to "rubber stamp" conclusory allegations, but to require adequate factual details or underlying circumstances. Neither does "detached" mean that he must remain mute, and simply accept or reject an affidavit. Due process does not require the police officer to keep presenting affidavits until he hits the mark or the contraband sought disappears.

Nolan, 617 S.W.2d at 176.

The United States Court of Appeals for the Sixth Circuit took a similar approach in *United States v. Warren*, 365 Fed. Appx. 635, 637 (6th Cir. 2010) (unpublished). When a magistrate corrected boilerplate language in a form affidavit with the officer's approval and assistance, the court found that the magistrate's actions, though unconventional, did not depart from his neutral and detached role. In reaching its decision, the court observed: "On the contrary, by scrutinizing the veracity of the affidavit and making alterations to ensure its accuracy, [the magistrate] executed his Fourth Amendment duty 'with a critical eye.'" *Id.*; *see also Ramirez*, 63 F.3d at 941-42 (finding magistrate's adding to list of items to be searched or seized did not abrogate his duty to be neutral and detached when the additions were common-sense extensions of officer's affidavit).

Thus, a magistrate may identify deficiencies in a warrant application and affidavit and inform the requesting officer what is needed to correct or cure such deficiencies without jeopardizing his constitutional role in the search- or arrest-warrant process.

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