



## Can an anonymous tip support a finding of probable cause for purposes of issuing a search warrant?



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In *United States v. Pelfrey*, 2018 WL 2207137 (S.D. W.Va. May 10, 2018), the Defendant David Ray Pelfrey asked the United States District Court for the Southern District of West Virginia to suppress the evidence that law enforcement found at his apartment pursuant to a search warrant. Pelfrey argued that the District Court should suppress the evidence against him because the factual basis provided in the application for that search warrant was insufficient to support a finding of probable cause. Central to his argument, Pelfrey claimed that the factual basis supporting the warrant application predominately relied upon an anonymous tip that was electronically submitted to the National Center for Missing and Exploited Children (“NCMEC”). Because the tip was given anonymously, Pelfrey argued that it lacked the necessary reliability to support the probable cause required for the issuance of the search warrant for his home. The relevant facts are as follows.

This case began on June 4, 2017, with an anonymous tip received by the NCMEC via its CyberTipline. The tip identified, by name, a sixteen-year-old female (“Minor Female 1”) that it said had been missing from Chicago, Illinois, since May 9, 2017. The tip asserted that Minor Female 1 was being “sex trafficked” and that “[s]he is currently . . . confined by David Pelfrey (approx. age 39).” Further, the tip identified where Minor Female 1 would be located: “his home 925 18th Street West, Huntington, West Virginia 25704.” The tip also provided that Minor Female 1 had “been there since at least 5/13/17 having been transported across state lines for the purpose of prostitution.”

The tip then continued by providing information and links regarding both Minor Female 1’s and Pelfrey’s various social media sites and by pointing out that the two were “friends” on Facebook. Included among the links was one to Minor Female 1’s supposed page on a site called SeekingArrangement.com. According to the tipster, Minor Female 1 was “shopped around” on the website. SeekingArrangement.com is a forum where “members” seek a relationship, which typically involves some financial support being given. The website refers to those “supporters” as “Sugar Daddies” or “Sugar Mommas,” and the site also defines “Sugar Babies” as “[a]ttractive people looking for the finer things in life.” On the member page of Minor Female 1, her “Lifestyle Expectations” were listed as “Moderate.”

Despite the length of the tip, the tipster did not provide his or her name, location, or contact number. Investigators at the NCMEC attempted to locate the anonymous tipster using an IP address search. That search indicated that the IP address, from which the tip originated, traced back to Poland. But, the search also indicated that the tipster had intentionally sought to hide his/her IP address by using a datacenter proxy to “mask” the real IP address and a TOR browser that enables internet users to largely hide their IP address by providing layers of encryption and IP address redirection.

Over the course of multiple hours, individuals with the NCMEC sought to confirm the abundance of information contained within the anonymous tip. The next day, the NCMEC forwarded the tip, with supplemental notes from the NCMEC’s confirmatory investigation (together referred to as “Cybertip Report” or “Cybertip”), to the FBI detachment in West Virginia. The local FBI detachment then sent the Cybertip Report to the Huntington Police Department (“HPD”).

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After receiving the Cybertip Report, the HPD reviewed it and confirmed some of the on-line information noted in the tip. Specifically, HPD officers located Minor Female 1's profile on SeekingArrangement.com. With that confirmation of the Cybertip information, Sgt. Matt Null, Cpl. Jason Davis, and Sgt. Eddie Prichard of the HPD went to Pelfrey's home to conduct a "knock and talk." After a few knocking attempts, Pelfrey answered the door.

The HPD officers told Pelfrey that they were looking for a missing girl who was reported to be at his residence. Pelfrey gave the officers permission to enter his home and to speak with Minor Female 1 who Pelfrey acknowledged was in the residence. Upon entering, Sgt. Null and Cpl. Davis located Minor Female 1, confirmed her identity, and engaged in a lengthy conversation with her. Sgt. Prichard remained outside with Pelfrey while the other two officers spoke with Minor Female 1. Later, officers at Pelfrey's residence relayed information to Detective Backus so that he could apply for a search warrant for the home. At roughly the same time, officers asked Pelfrey to go with them down to the police station to answer questions. Pelfrey complied with this request and later provided an incriminating statement after being Mirandized.

In applying for the warrant, Detective Backus provided the following factual recitation:

On today's date a tip from the National Center for missing [sic] and Exploited Children [sic] that the defendant was in possession of the victim (K.G.) [Minor Female 1] a missing 16yr old, who was reported as a missing and endangered juvenile from Chicago, Illinois. The victim was declared missing on 05/09/2017 & tip said the victim was transported across state lines for the purposes of prostitution ... Upon being asked how she met the defendant, the victim stated they met on the computer.

According to the affidavit that Detective Backus submitted to the reviewing judge, these facts supported probable cause to search Pelfrey's home under suspicion for a violation of West Virginia law. The reviewing judge agreed that this recitation supported probable cause and issued the search warrant.

Pursuant to the warrant, police officers retrieved various items from Pelfrey's apartment. Most relevant, officers seized two cell phones as well as other provocative costumes and toys. Officers obtained separate warrants for the cell phones and, after a subsequent forensic analysis, found various images and videos of Minor Female 1 and Minor Female 2 as well as various text message conversations between Pelfrey and Minor Female 1 and between Pelfrey and Minor Female 2.

On April 9, 2018, Pelfrey filed a motion to suppress the evidence against him and requested that the District Court, not only suppress all the evidence emanating from the search of Pelfrey's home, but also suppress the statement that he gave to the police. Pelfrey argued that the District Court should suppress the evidence and his statement because the factual predicate for the search warrant could not provide the probable cause necessary for the search warrant. Pelfrey offered two arguments in support of his motion to suppress. First, Pelfrey argued that the affidavit "misidentified" the tip as coming from the NCMEC instead of the anonymous source who actually submitted the tip and that this materially misled the reviewing/issuing judge. Second, Pelfrey asserted that the anonymous tip lacked sufficient reliability to substantiate a finding of probable cause. The District Court rejected both of Pelfrey's argument and denied his motion suppress.

As for Pelfrey's argument regarding the misidentification of the source of the tip, the District Court noted that even anonymous tips may supply probable cause if shown to be reliable. Here, the District Court found that the supporting details contained in the anonymous tip provided a sufficient measure of reliability. The tip provided all of the pertinent information, and the NCMEC investigated and confirmed the tip. Based upon the extensive investigatory efforts performed by the NCMEC (and even treating the cyber tip as a purely anonymous tip), the District Court determined that the officers had a reasonable basis to characterize the tip as

coming from the NCMEC. Only two pages of the Cybertip Report consisted of the information reported by anonymous tipster. Conversely, the NCMEC's investigatory notes comprised ten pages of the Cybertip Report. Regardless, the District Court found that the attesting officer's characterization of the origin of the tip could not be termed so misleading as to require nullification of probable cause that was supplied by the affidavit.

As for Pelfrey's argument that the anonymous tip lacked sufficient reliability to substantiate a finding of probable cause, the District Court explained that the corroboration of the details of the search warrant application provided indicia of reliability for the allegation of criminal conduct sufficient to support a finding of probable cause to issue the search warrant. Notably, the District Court opined that anonymous tips can support the finding of probable cause when corroborated through investigation and shown to be reliable. In this case, the District Court held that the extensive corroboration of the detailed information provided in the anonymous tip demonstrated the reliability of its information.

Finally, the District Court noted that, even if the affidavit had not properly supplied sufficient probable cause, it would deny Pelfrey's motion because suppression of the evidence would be inappropriate due to the application of the Leon good faith exception. Under the good faith exception to the exclusionary rule, evidence obtained pursuant to a search warrant issued by a neutral judge does not need to be excluded if the officer's reliance on the warrant was objectively reasonable. In other words, even if a warrant is subsequently invalidated, a court should not suppress the fruits of a search conducted under the authority of a warrant unless a reasonably well-trained officer would have known that the search was illegal despite the judge's authorization.

There are four instances in which the Leon good faith exception will not prevent the suppression of evidence: (1) if the judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) if the issuing judge wholly abandoned his judicial role; (3) if the affidavit supporting the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) if, under the circumstances of the case, the warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

In this case, the District Court held that none of the four instances that prohibit the application of the Leon good faith exception existed. Accordingly, the District Court denied Pelfrey's motion to suppress.