



## Informer's Privilege



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Understandably, Plaintiff Melvin E. Brimage was not happy that he had been arrested. Accordingly, Brimage sued certain Chicago police officers, under 42 U.S.C. § 1983, alleging that the officers had violated his Fourth Amendment rights. During the discovery period, Brimage propounded discovery requests upon the officers in an attempt to learn the identity of the informant who had provided the information that led to his arrest. The officers objected, and Brimage filed a motion asking the United States Court District Court for the Northern District of Illinois to compel the officers to provide him with the information that he sought. *Brimage v. Fowler*, 2019 WL1619967 (N.D. Ill. Apr. 16, 2019). Brimage's motion to compel and the informer's privilege is the subject of this article.

In his pro se amended complaint, Brimage alleged that the Defendants violated his Fourth Amendment rights by improperly executing a search warrant on his residence in Chicago, Illinois, and by committing judicial deception by omitting material information in the affidavit submitted by Defendant Officer Terrence Fowler ("Fowler") to support that search warrant. Only the second claim (i.e., the claim of judicial deception against Fowler and another Defendant, Zoe Batzer) was relevant to Brimage's motion to compel.

On January 19, 2013, Cook County Circuit Court Judge Nicholas Ford issued a search warrant, finding that there was probable cause to search Brimage and his residence and to seize a "[s]ilver colored medium sized semi-automatic handgun with a black colored grip, to wit a firearm in the possession of a convicted Felon and any documents showing residency, and any other firearms or illegal contraband on the premises." The search warrant was based on a Complaint for Search Warrant submitted by Fowler ("the Affidavit"). In the Affidavit, Fowler averred that he had several conversations with a confidential informant called "J. Doe," who wished to remain confidential for "reasons of personal safety." According to Fowler, J. Doe claimed to have seen a silver semi-automatic handgun with a black colored grip at Brimage's residence on multiple occasions. The most recent occasion had occurred on January 2, 2013, when J. Doe said that Brimage had retrieved the gun from a closet located next to the front door of the residence, showed it to J. Doe, and then placed it back in the closet. J. Doe also told Fowler that she had been in Brimage's residence on more than one occasion, and that on each occasion, Brimage removed the gun from the aforementioned closet and, then, returned it to the same place. Fowler reported that J. Doe described Brimage to him, had known Brimage for many years, and identified Brimage in a photograph. The Affidavit also stated that J. Doe's criminal history had been presented to Judge Ford and that J. Doe "was presented to [Judge Ford], sworn to the contents of the complaint, and was made available for questioning."

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Brimage claimed that J. Doe is his daughter, Monique Brimage Robinski. Brimage alleged that Fowler was aware of additional information that would undermine the credibility and reliability of Brimage's daughter but that Fowler omitted that information from the Affidavit. Specifically, Brimage averred that Fowler withheld evidence regarding J. Doe's "[a]nimus and bias" toward Brimage. In his motion to compel, Brimage stated that he is "convinced that Fowler handled a domestic abuse complaint filed several weeks earlier by [Brimage's] daughter against Brimage," and failed to disclose the strained family relationship to Judge Ford. Brimage asserted that this omission constituted a reckless or intentional omission of material information by Fowler, which led to a warrant being issued that was not based on probable cause, thereby violating Brimage's right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment.

Without knowing the true identify of J. Doe, Brimage believed that it would be difficult for him to prove his claim because he could not be certain that Fowler relied on information that Brimage's daughter supplied because the Affidavit only identifies the confidential informant as "J. Doe." As such, Brimage issued several interrogatories aimed at confirming his suspicion that J. Doe is his daughter. Most of the Defendants responded by claiming that they lacked sufficient knowledge to respond or did not have any communications with Brimage's daughter. However, Defendants Fowler and Batzer invoked the informer's privilege and provided limited responses to the interrogatories subject to that privilege. Brimage, then, filed a motion seeking an order compelling Defendants Batzer and Fowler to respond to his interrogatories in full.

In his motion to compel, Brimage argued that Defendants Fowler and Batzer lacked standing to invoke the informer's privilege. To support this argument, Brimage noted that Defendants Fowler and Batzer were being sued in their individual capacities, whereas most cases discussing the informer's privilege hold that it is the government's privilege. According to Brimage, only a government entity, such as the City of Chicago, would have standing to invoke the informer's privilege.

The District Court rejected Brimage's argument as being too restrictive. The District Court relied primarily on the fact that one of the elements in all § 1983 claims is that the defendant must be acting under color of law i.e., that the defendant was acting as an agent of the government. The District Court reasoned that, even though Brimage had sued the officers in their individual capacities, it did not mean that they were being sued for actions that they took as private citizens. Otherwise, Brimage's claim would fail because Defendants would not be acting under color of state law.

As for the District Court's consideration of the informer's privilege itself, the District Court noted that the United States Supreme Court has recognized a limited privilege of law enforcement to withhold the identity of confidential informants from discovery. *Roviaro v. United States*, 353 U.S. 53, 60 (1957). "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement" by preserving the anonymity of citizens who come forward with information about criminal activity, thereby "encourag[ing] them to perform that obligation." *Id.* at 59.

However, the informer's privilege is qualified, not absolute. As such, "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61. There is no bright line rule for determining when the privilege applies. *Id.* at 62. Instead, courts are to balance "the public interest in protecting the flow of information against the individual's right to prepare his [case]," by considering "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* The informer's privilege applies in both criminal and civil contexts, but the United States Court of Appeals for the Seventh Circuit has noted that the privilege "is arguably greater" in the civil context "since not all constitutional guarantees which inure to criminal defendants are similarly available to civil defendants." *Dole v. Local 1942, IBEW*, 870 F.2d 368, 372 (7th Cir. 1989).

Furthermore, search warrants are invalid where police officers provide the issuing court with false, material information in order to secure the warrant. Evidence seized pursuant to a warrant must be suppressed where: (1) the affidavit supporting the warrant contains false statements or misleading omissions; (2) the false statement or omissions were made deliberately or with reckless disregard for the truth; and (3) probable cause would not have existed with the false statements and/or omissions (i.e., the omissions or misrepresentations were material). This test applies to Fourth Amendment claims brought pursuant to § 1983. Regarding the third prong, the District Court stated that it must determine whether a hypothetical affidavit with the false statements removed or the omitted information added would still support a probable cause finding.

The District Court did not believe that confirming the identity of J. Doe as Brimage's daughter was necessary to the fair litigation of his case. Fundamentally, the District Court stated that it harbored significant doubts about the viability of Brimage's Fourth Amendment claim based on judicial deception. Even assuming that Brimage was correct that his daughter was the confidential informant, even assuming that the Affidavit contains misleading omissions, and even assuming that Fowler made those omissions with reckless disregard for the truth, the District Court did not believe that the omissions were material. Specifically, the District Court opined that a hypothetical affidavit that included the information regarding Brimage's estranged relationship with his daughter and her potential motivations to lie would almost certainly not have led to a different result, nor would it have caused a neutral judicial officer to find that there was not probable cause to issue the search warrant at issue in this case.

In sum, the District Court held that it could not say that disclosing the identity of J. Doe was "essential to the fair determination" of Brimage's § 1983 claim because the District Court believed that Brimage's claim may likely be dismissed or otherwise disposed of on summary judgment without determining whether the confidential information is his daughter. More importantly, the District Court held that most of Brimage's claim could be determined without disclosing that information by assuming that Brimage's allegations were completely true, by drawing all inferences in his favor, and by determining the cause of action as a matter of law. As such, the District Court denied Brimage's motion to compel and declined his request to require Defendants Fowler and Batzer to supplement their discovery responses that would have identified their confidential informant, J. Doe.