

ISSUE

Was there probable cause for a warrant to conduct thermal imaging on a residence?

FACTS

A narcotics officer with the Monterey County Sheriff's Department received a tip from an anonymous informant that Gotfried was growing marijuana inside a house trailer in space 21 at a certain trailer park in a remote section of the county. The informant also provided some details: Gotfried had been growing marijuana for three to four years in a 12' X 12' room at the rear of the trailer; he was currently growing 80-120 plants under four high pressure lights; that in order to power the lights without incurring a suspiciously-high electrical bill, he diverts electricity before the meter; he sells his marijuana for \$2,800 a pound to his "clients" in Santa Cruz; and he had recently been evicted from the trailer park and was moving to another location. In addition, the informant provided descriptions and license plate numbers of Gotfried's two cars.

Later that day, the officer and his partner drove to the trailer park. As they were nearing the park, they noticed a vehicle behind them that matched the description of one of Gotfried's cars. The driver of the car parked next to space 21, then "confronted" the undercover officers, asking what they were doing. They said they were looking for a friend. The man, later identified as Gotfried, said the person they were looking for had moved out, adding they should leave "due to the fact we were bothering the neighbors."

Based on this information, the officer obtained a warrant authorizing a thermal imaging scan of the outside of the trailer.¹ The scan revealed a "large" amount of radiated heat, while neighboring homes radiated none. Based on the scan result and the information furnished by the informant, the officer obtained a warrant to search the trailer. The search turned up, among other things, 106 marijuana plants growing under high pressure lights.

DISCUSSION

Gotfried contended the warrant authorizing the thermal scan was invalid because there was insufficient reason to believe the anonymous informant or his information were reliable. Consequently, he argued the marijuana should be suppressed because the warrant to search his trailer was based mainly on the thermal scan results.

Although thermal scanning does not physically intrude into a house, the United States Supreme Court has ruled that scanning requires a search warrant.² And, like any other search warrant based mainly on information from an anonymous or untested

¹ **What is thermal imaging?** "Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images."]; *Kyllo v. United States* (2001) 533 US ___ [150 L.Ed.2d 94]. **ALSO SEE:** *U.S. v. Nueva* (1st Cir. 1992) 979 F.2d 880, 882 ["All objects emit heat, in the form of infrared radiation, which can be observed and recorded by thermal imaging devices. Specifically, thermal imagers detect energy radiated from the outside surface of objects, and internal heat that has been transmitted to the outside surface of an object, which may create a differential heat pattern.].

² *Kyllo v. United States* (2001) 533 US 27. **ALSO SEE** *People v. Deutsch* (1996) 44 Cal.App.4th 1224.

informant, a warrant for thermal scanning must provide reason to believe the informant or his information were reliable.³

The most common method of establishing such reliability is by corroborating some of the informant's information. The theory here is that if some of it is proven accurate, officers might reasonably conclude the rest is accurate.⁴ It is not, however, sufficient to merely corroborate information that was widely known or easily obtained, such as the suspect's name, address, physical description, or vehicle description.⁵ Instead, the corroborated information should pertain to the suspect's criminal activity. In other words, the degree of suspicion generated by corroborated information depends largely on the extent to which it reasonably suggested the suspect committed a certain crime.⁶

Applying these principles, the court in *Gotfried* noted that the only corroborated information pertained to the location of Gotfried's trailer and the descriptions of his cars. Thus, the corroboration was insufficient and the warrant for the thermal scan was invalid.

The People argued that, even if probable cause did not exist, the warrant should be upheld under the Good Faith Rule.⁷ Under this rule, if evidence is discovered during a search authorized by a warrant that was later determined to be invalid, the evidence may be admissible if officers reasonably believed the warrant was valid. The court, however, ruled that any reasonable and well-trained officer would have known that a warrant based on uncorroborated information from an anonymous informant was unlawful. Consequently, the evidence was suppressed.

DA's COMMENT

There is one thing about this decision that is disturbing. As noted, the anonymous informant furnished the officer with a large number of details concerning Gotfried's marijuana operation. Specifically:

- He was growing the marijuana at the rear of the trailer in a room 12' X 12'.
- He had been growing marijuana for three to four years.
- He was currently growing 80-120 plants.
- He was providing heat and light for the plants by means of four high pressure lights.

³ See *Alabama v. White* (1990) 496 US 325; *Adams v. Williams* (1972) 407 US 143, 147; *Florida v. J.L.* (2000) 529 US ___ [146 L.Ed.2d 254, 260]; *People v. Saldana* (2002) 101 Cal.App.4th 170, 174; *People v. Ramirez* (1996) 41 Cal.App.4th 1608, 1616-20; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1580. **ALSO SEE** *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 946 (conc. opn. of Crosby, J.) ["There are few principles of human affairs more self-evident than this: The unverified story of an untested informer is of no more moment than a fairy tale on the lips of a child . . ."].

⁴ See *Illinois v. Gates* (1983) 462 US 213, 243, fn.13; *Massachusetts v. Upton* (1984) 466 US 727; *Alabama v. White* (1990) 496 US 325, 331-2; *People v. Andrino* (1989) 210 Cal.App.3d 1395, 1402; *People v. Costello* (1988) 204 Cal.App.3d 431, 446; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1207.

⁵ See *Illinois v. Gates* (1983) 462 US 213 244-5; *Florida v. J.L.* (2000) 529 US ___ [146 L.Ed.2d 254, 260]; *Whitely v. Warden* (1971) 401 US 560, 567; *People v. Johnson* (1990) 220 Cal.App.3d 742, 749; *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 939; *People v. Gallegos* (1964) 62 Cal.2d 176; *People v. Fein* (1971) 4 Cal.3d 747, 752-3.

⁶ See *Massachusetts v. Upton* (1984) 466 US 727, 734; *Illinois v. Gates* (1983) 462 US 213, 243; *People v. Carvajal* (1988) 202 Cal.App.3d 487, 498; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 758-60; *People v. Ramirez* (1984) 162 Cal.App.3d 70; *People v. Rooney* (1985) 175 Cal.App.3d 634; *People v. Childress* (1979) 99 Cal.App.3d 36; *People v. Spears* (1991) 228 Cal.App.3d 1; *People v. Glenos* (1992) 7 Cal.App.4th 1201.

⁷ See *United States v. Leon* (1984) 468 US 897.

- He was powering the lights by diverting electricity before the meter.
- He sells his marijuana for \$2,800 a pound “to his clients in Santa Cruz.”

Even though these details were not corroborated, the fact that the informant provided so much detailed information about Gotfried’s marijuana operation is something the court should have considered—especially in determining whether the Good Faith Rule applied. As the U.S. Supreme Court observed in *Illinois v. Gates*: [E]ven if we entertain some doubt as to an informant’s motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitled his tip to greater weight than might otherwise be the case.⁸

In *Gotfried*, not only were the details “explicit and detailed,” they were the type of details that would probably be known only by someone who had actually been inside the trailer. For this reason, we think a reasonably well-trained officer would have believed the warrant was sufficient and, therefore, the warrant should have been upheld under the Good Faith Rule.⁹

⁸ *Illinois v. Gates* (1983) 462 US 213, 233. ALSO SEE *People v. Hansborough* (1988) 199 Cal.App.3d 579, 584; *People v. Costello* (1988) 204 Cal.App.3d 431, 446-7; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 758.

⁹ See *Illinois v. Gates* (1983) 462 US 213, 245-6 [“(Even though) the character of the details in the anonymous letter might well not permit a sufficiently clear inference regarding the letterwriter’s ‘basis of knowledge’ . . . probable cause does not demand the certainty we associate with former trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gateses or someone they trusted.” **NOTE:** The Superior Court judge who denied the motion to suppress suggested that the officers knew they did not have probable cause for the thermal-scan warrant. If so, the Good Faith Rule could not have been applied. There were, however, no facts reported in the case that would have supported the judge’s conclusion.