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Senate Bill 80 (Substitute S-1 as reported)

Sponsor: Senator Nick Smith

Committee: Judiciary

Date Completed: 10-30-87

RATIONALE

The Fourth Amendment of the U.S. Constitution, and Article I, Section 11 of the Michigan Constitution, guarantee the right to be free from unreasonable search and seizure. As a rule, in order for a search to be reasonable, a warrant must be issued by a magistrate or judge—to interpose the neutral judgment of a disinterested third party between the privacy of the citizen and the governmental intrusion on that privacy. The Federal and State Constitutions also provide that no warrant may be issued without probable cause, supported by oath or affirmation.

Michigan law also provides that, in issuing a search warrant, a magistrate's finding of reasonable or probable cause must be based upon all the facts related within the affidavit, and the affidavit may be based upon reliable information supplied to the complainant from a credible person, named or unnamed, as long as the affidavit contains affirmative allegations that the person had personal knowledge of the matters contained in the affidavit. The latter standard, permitting an affidavit to be based upon reliable information from a credible person, conforms to the U.S. Supreme Court decisions in *Aguilar v Texas* (378 US 108 (1964)) and *Spinelli v United States* (393 US 410 (1969)). Those cases established a two-pronged test for the issuance of a warrant sought on the basis of an informant's tip: 1) the affidavit must present underlying circumstances to enable the magistrate independently to judge the validity of the informant's conclusions; and 2) the affidavit must support the affiant officer's conclusion that the informant was credible or his or her information reliable.

Although this test was recently abandoned at the Federal level, in favor of a "totality of the circumstances" approach, this State adheres to a three-pronged version of the *Aguilar-Spinelli* test, as articulated by the Michigan Supreme Court in 1984 in *People v Sherbine* (421 Mich 502). According to that case, State law requires that an affidavit based upon an informant's tip contain affirmative allegations that the informant spoke with personal knowledge, and that both the credibility of the informant and the reliability of the information be shown in every case—whereas *Aguilar* allowed a choice between a showing of informant credibility and information reliability. Thus, *Sherbine* is cited as creating a standard much more difficult to meet than the *Aguilar-Spinelli* test. As *Sherbine* was based upon a construction of the statute, rather than the Constitution, it has been suggested that the statute be amended to conform to a more traditional and less rigorous two-pronged test.

CONTENT

The bill would amend Public Act 189 of 1966, which establishes the procedure for obtaining a search warrant,

to provide that a magistrate's finding of reasonable or probable cause would have to be based upon facts related within an affidavit (as current law requires), and if the affidavit were based upon information supplied to the complainant, the affidavit would have to contain one of the following:

- If the informant were named, affirmative allegations from which the magistrate could conclude that the person spoke with personal knowledge of the information.
- If the person were unnamed, affirmative allegations from which the magistrate could conclude that the person spoke with personal knowledge of the information and either that the unnamed person was credible or that the information was reliable. This would amend the existing provision under which the affidavit may be based upon "reliable information" supplied to the complainant.

MCL 780.653

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

ARGUMENTS**Supporting Argument**

The bill would return Michigan to a more traditional approach toward determining whether there is probable cause to issue a search warrant on the basis of an informant's tip. By removing the statutory language relied upon by the Michigan Supreme Court in the *Sherbine* case to require both credibility of the witness and reliability of the information, the bill would reduce the burden imposed on courts and complaining officers when a warrant is sought. At the same time, the bill would not impinge on the constitutional protections of individuals.

Supporting Argument

While the original *Aguilar-Spinelli* test was considered impractical by the U.S. Supreme Court, the Michigan Supreme Court's expansion of that test as dictated by *People v Sherbine* has made it virtually impossible to meet in some cases, especially in the event of an anonymous tip. And, as the dissent in *Sherbine* concluded, requiring proof of the informant's credibility in each and every case could lead to the remarkable conclusion that, if one of the justices gave the police information that he or she had received a series of threatening phone calls and expected to receive another, a magistrate would not be justified in issuing a warrant unless the affiant officer also provided proof that the justice was credible and that the information was reliable. As the dissent continued, this construction of

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the statute also would prevent issuance of a search warrant when the affiant was communicating incriminating statements made to him or her by a third person. If the communication were, "I will have the drugs at my home tonight", that would surely be reliable information, but it is doubtful that the speaker could be independently shown to be a credible person. Under the approach proposed in the bill, however, it is likely that a warrant could properly be issued in either scenario.

Opposing Argument

The standard for issuing a search warrant on the basis of an informant's tip should be the same for both named and unnamed informants. That is, both tests, rather than just the test for unnamed informants, should require that either the unnamed person is credible or the information is reliable. (This approach would still depart from *Sherbine*, which required both credibility and reliability.) Merely naming an informant would not mean that the person was credible or the information was reliable. While consideration of those factors may be implicit in the test proposed for named informants, it would be more prudent to articulate those criteria expressly.

Response: When police officers are investigating a criminal offense, they simply don't have the time it takes to conduct a full-blown investigation of the credibility of a witness. Further, the law already prescribes a criminal penalty of up to one year's imprisonment or a fine of up to \$1,000 for a person who procures a search warrant maliciously and without probable cause. These penalties are sufficient to protect citizens against a violation of their constitutional rights.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.