

Probable Cause: What to Consider

Proper considerations.

- The experience level of the officer involved, if any. *State v. Barnhardt*, 92 N.C. App. 94 (1988).
- The credibility of any witnesses, including officers. *State v. Harris*, 25 N.C. App. 404 (1975).
 - See the discussion of citizen witnesses, confidential informants, and anonymous tipsters on the reverse.
 - Factors courts have recognized as relevant to credibility:
 - Inconsistencies. “Contradictions and inconsistencies in a witness's testimony are credibility factors the jury considers.” *State v. Thaggard*, 168 N.C. App. 263 (2005).
 - Vague or non-detailed statements. *Elzour v. Ashcroft*, 378 F.3d 1143 (10th Cir. 2004).
 - Bias/incentive to lie. *State v. Murphy*, 152 N.C. App. 335 (2002) (witnesses’ close relationship to defendant justified court’s decision to discount information provided by witnesses).
 - Nervousness. *State v. Jacobs*, 162 N.C. App. 251 (2004) (officer appropriately considered a suspect’s nervousness in doubting the suspect’s version of events and detaining the suspect for further investigation).
 - Lack of eye contact. *United States v. Dillard*, 43 F.3d 299 (7th Cir. 1994).
 - Pauses/interrupted speech. *Cf. Casey v. O’Bannon*, 536 F. Supp. 350, 354-55 (D. Pa. 1982).
 - Demeanor generally. *Yurek v. Shaffer*, 198 N.C. App. 67 (2009) (“[W]hen acting as the finder of fact, the trial court has the opportunity to observe the demeanor of the witnesses and determine their credibility.”).
 - Caution: social science research suggests that it is difficult to determine whether a witness is telling the truth based on the witness’s demeanor.
- Evidence that is inadmissible at trial, such as hearsay. *Brinegar v. United States*, 338 U.S. 160 (1949).
- Evidence that may have been obtained illegally.
 - Legally may consider such evidence. *Cf. United States v. Calandra*, 414 U.S. 338 (1974) (grand jury may consider evidence obtained illegally, and “the validity of an indictment is not affected by the character of the evidence considered”); G.S. 15A-611 (at probable cause hearing, judge “not required to exclude” illegally obtained evidence).
 - Practically, attempting to “exclude” such evidence is problematic.
 - Magistrates are not trained in the law of search and seizure.
 - No prosecutor is present to argue that the evidence in question was obtained legally.
 - Possible exception for evidence that was manifestly obtained illegally?
- Possibly the seriousness of the crime?

Improper considerations.

- Defenses.
 - The burden is on the defendant to present these in court.
 - Possible exception for “slam dunk” defenses, e.g., the two-year statute of limitations for misdemeanors, self-defense in certain domestic violence cases?

Probable Cause: Types of Witnesses

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Citizen witnesses.

- May presume that they are truthful. *United States v. DeQuasie*, 373 F.3d 509, 523 & n.21 (4th Cir. 2004); *Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir. 1985) ("[W]hen examining informant evidence used to support a claim of probable cause for a warrant . . . the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness.").
- Therefore, if they have first-hand information that is sufficiently detailed, it will normally amount to probable cause.

Confidential informants.

- May not presume that they are truthful.
- If they have first-hand information that is sufficiently detailed, it may amount to probable cause if
 - An officer has corroborated enough of their information, or
 - They have a track record of reliability. *State v. Arrington*, 311 N.C. 633 (1984).
 - An officer's naked assertion that an informant is reliable, without supporting detail, is inadequate to establish the informant's reliability. *State v. Hughes*, 353 N.C. 200 (2000); *State v. Roark*, 83 N.C. App. 425 (1986).
 - A single instance of previous reliability may not be sufficient to establish the informant's reliability. *State v. Wallace*, 111 N.C. App. 581 (1993).

Anonymous tipsters.

- Even less reliable than known informants. *Florida v. J.L.*, 529 U.S. 266 (2000).
- If they have first-hand information that is sufficiently detailed, it may amount to probable cause if
 - An officer has corroborated enough of their information. *State v. Bone*, 354 N.C. 1 (2001).
- A witness who has placed his or her anonymity at risk should normally be considered a citizen witness, not an anonymous tipster. *State v. Maready*, 362 N.C. 614 (2008).