



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**PEOPLE OF GUAM,**  
Plaintiff-Appellee,

**v.**

**JOHN ANTHONY GALLO,**  
Defendant-Appellant.

Supreme Court Case No.: CRA16-006  
Superior Court Case No.: CF0213-13

**OPINION**

**Cite as: 2017 Guam 24**

Appeal from the Superior Court of Guam  
Argued and submitted on March 3, 2017  
Hagåtña, Guam

Appearing for Defendant-Appellant:

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

**MARAMAN, C.J.:**

[1] Defendant-Appellant John Anthony Gallo was the target of a law enforcement investigation involving three controlled-buy operations conducted using a confidential informant. A Superior Court judge issued a search warrant of Gallo's home based on an affidavit filed with the court, and evidence was seized during the search. Gallo was subsequently charged with three counts of Delivery of a Schedule I Controlled Substance (as a first degree felony) and with Possession with Intent to Deliver a Schedule I Controlled Substance (as a first degree felony). Gallo brought a motion to suppress the evidence seized from his home before a different Superior Court judge. Gallo argued that the search warrant lacked sufficient probable cause. The reviewing judge denied the motion to suppress.

[2] Gallo pleaded guilty to the charge of Possession with Intent to Deliver a Schedule I Controlled Substance (as a first degree felony). In his plea agreement, he preserved his right to appeal the denial of his motion to suppress the evidence seized from the search of his home. He now brings this appeal, arguing that the trial court erred in denying his motion because the search warrant lacked sufficient probable cause.

[3] We find that a Superior Court judge has the authority to review a probable cause determination made by another Superior Court judge under a clear error standard of review. We further find that the trial court did not err in its review, and we therefore affirm the denial of Gallo's Motion to Suppress.

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## **I. FACTUAL AND PROCEDURAL BACKGROUND**

[4] On April 23, 2013, Drug Enforcement Agency Guam Police Department (DEA/GPD) Task Force Officer Jimmy B. Manglona filed an affidavit in support of an application seeking a search warrant to search Gallo's house and car. The affidavit included the following information.

[5] On April 22, 2013, at approximately 3:50 p.m., Officer Manglona participated in a controlled-buy operation conducted by Air Force Office of Special Investigations (AFOSI) Special Agent Julian Wynn. This operation involved the use of a confidential informant to purchase marijuana from Gallo at Gallo's Tumon residence. Officer Manglona attended the informant's briefing, where he/she was wired and provided with \$50 in marked currency. According to Special Agent Wynn, the informant had prearranged the purchase with Gallo via text message. At about 4:20 p.m., Officer Manglona, Special Agent Wynn, and other officers followed the informant to Gallo's residence, arriving at about 4:25 p.m. Officer Manglona and fellow DEA/GPD Task Force Officer John Asuncion observed the informant approach the side entrance door of Gallo's apartment. Officer Manglona observed the informant return one minute later and proceed back to his/her vehicle. At about 4:30 p.m., Officer Manglona and Special Agent Wynn met with the informant at a prearranged location, and the informant produced a small clear plastic zip lock bag containing a green leafy substance. Special Agent Wynn initially seized the substance, which was later transferred to GPD custody.

[6] At the debriefing, the informant informed the officers that he/she arrived at Gallo's residence and met with Gallo, who was at the side entrance of his apartment. The informant handed Gallo the \$50, and Gallo handed him/her the small zip lock bag. The informant then

went back to his/her vehicle and departed the area. According to the informant, he/she did not engage in any conversation with Gallo during the transaction, which was “unusual.”

[7] At approximately 5:30 p.m., while at the AFOSI office, Officer Manglona conducted a field test of a sample of the substance provided by the informant. The results were presumptive positive for the presence of marijuana.

[8] During the investigation, Special Agent Wynn informed Officer Manglona that the controlled-buy operation of April 22 was the third successfully executed operation. The two prior operations had been conducted on March 1, 2013, and March 25, 2013, using the same informant to purchase marijuana from Gallo at his Tumon residence. Special Agent Wynn informed Officer Manglona that a sample of the substance received from the March 1 operation, a \$20 marijuana cigarette joint weighing approximately 0.7 gross grams, tested presumptive positive for marijuana. During the March 25 operation, the informant arranged for a purchase of a \$100 bag of marijuana weighing approximately 2.5 gross grams. A sample of the substance retrieved by the informant also tested presumptive positive for the presence of marijuana. AFOSI initially stored the evidence, but later transferred it to GPD custody via Officer Manglona.

[9] Special Agent Wynn also informed Officer Manglona that recent and prior intelligence from the informant revealed several details regarding Gallo’s drug activity. In particular, Gallo sold marijuana cigarettes on numerous occasions to military personnel at different nightclubs and gentlemen’s clubs in the Tumon area. Gallo smoked on numerous occasions with civilian and military personnel at his apartment. During the March controlled buys, the informant observed several ounces of marijuana being split up into \$20, \$50, and \$100 bags ready for sale. Gallo

sold marijuana in these denominations only. Gallo stored marijuana in small glass jars and would carry around a small camera bag to transport his ready-to-sell marijuana.

[10] In his affidavit, Officer Manglona included information about his background as a police officer and as a DEA/GPD Task Force officer, including his relevant experience and training and his work in conjunction with other law enforcement personnel specializing in the area of detecting drug-trafficking suspects and organizations. The premises to be searched—including the apartment name, apartment number, and building description—were described in the affidavit. The affidavit also included as an attachment a list of items expected to be discovered during the search.

[11] A Superior Court judge (the “issuing court”) issued the warrant, which was executed. Based on the information gathered during the investigation of Gallo and the evidence seized during the search of his home, Gallo was charged with three counts of Delivery of a Schedule I Controlled Substance and with Possession with Intent to Deliver a Schedule I Controlled Substance.

[12] Gallo filed a motion to suppress the evidence obtained from the search of his home, before a different Superior Court judge (the “reviewing court”), arguing that there was no probable cause to issue the search warrant.<sup>1</sup> The People opposed the motion.

[13] The court heard arguments and subsequently denied the motion to suppress, finding that “[u]nder a deferential review of the previous court’s finding of probable cause,” there was no “compelling reason to conclude that such finding was invalid.” Record on Appeal (“RA”), tab 55 at 4 (Dec. & Order, June 26, 2015). Furthermore, the court identified that “the issuing court

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<sup>1</sup> Gallo gave a copy of the motion to the People prior to filing the motion officially, thus allowing the People to file a response before the actual filing of the motion had taken place. Appellee’s Br. at 5 n.1 (Oct. 28, 2016).

relied on the totality of [the] circumstances surrounding the affidavit.” *Id.* at 5. The court noted that “contrary to [Gallo’s] belief, probable cause was not premised on the informant’s statements, alone, but also upon Officer Manglona’s affidavit detailing the investigation and the controlled buy.” *Id.* Thus, the court held, “[w]hether the information is unreliable, as [Gallo] argues, is not dispositive of the issue of a Fourth Amendment violation to support a motion to suppress.” *Id.*

[14] The parties then entered into a plea agreement wherein Gallo agreed to plead guilty to the second charge of Possession with Intent to Deliver a Schedule I Controlled Substance (as a first degree felony); the first charge of Delivery of a Schedule I Controlled Substance (as a first degree felony) was dismissed. In the agreement, Gallo preserved his right to appeal the trial court’s denial of his motion to suppress. A Judgment of Conviction was filed. A Reinstatement of Judgment with Incorporation of Certification of Probable Cause was filed and entered on the docket pursuant to 8 GCA § 130.15(e). Gallo timely filed a notice of appeal.

## II. JURISDICTION

[15] This court has jurisdiction over the appeal from a final judgment in a criminal case. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-90 (2017)); 7 GCA §§ 3107,3108(a) (2005); *see also* 8 GCA § 130.15(e) (2005) (permitting appeal after plea of guilty and issuance of a certificate of probable cause).

## III. STANDARD OF REVIEW

[16] We review a trial court’s decision on a motion to suppress *de novo*. *People v. Cundiff*, 2006 Guam 12 ¶ 14. Where a motion to suppress is based on a challenge to the initial finding of probable cause, we review the trial court’s legal analysis under a *de novo* standard of review. *People v. Chargualaf*, 2001 Guam 1 ¶ 12. As discussed below, we find that to the extent that

consideration of the legal analysis requires a review of the initial probable cause finding, such finding is subject to a deferential review for clear error. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983); *United States v. Spears*, 965 F.2d 262, 269-70 (7th Cir. 1992).

#### IV. ANALYSIS

[17] Gallo challenges the trial court's denial of his motion to suppress evidence seized during a search of his home. Appellant's Br. at 4-9 (Oct. 21, 2016). He argues that there was insufficient probable cause to support the issuance of the search warrant because the affidavit in support of the warrant application relied on information from a confidential informant and the affiant did not establish the informant's reliability. *Id.* at 4. The People argue in opposition that the affidavit submitted with the application for the search warrant sufficiently established probable cause. *See* Appellee's Br. at 15-19 (Oct. 28, 2016).

[18] Before addressing the substance of Gallo's appeal, we must first determine a threshold issue raised by the People. In this case, a Superior Court judge made the initial probable cause determination. *See generally* RA, tab 40, Ex. A (Notice of Mot. & Memo. Supp. Def.'s Mot. Suppress, May 13, 2014). A different Superior Court judge, in denying Gallo's motion to suppress, independently reviewed this initial probable cause determination. RA, tab 55 at 4 (Dec. & Order). Both parties recognize that there is no explicit grant of authority under Guam law for one Superior Court judge to review probable cause determinations of another Superior Court judge. *See* Appellee's Br. at 10; Appellant's Suppl. Br. at 1 (Feb. 17, 2017). The parties seek clarification as to whether this authority exists, and if so, what standard of review applies. *See* Appellee's Br. at 10-12; Appellant's Suppl. Br. at 1-2.

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**A. A Superior Court Judge May Review a Probable Cause Determination Made by Another Superior Court Judge**

[19] Under 8 GCA §§ 35.10 and 35.20, the Superior Court has the authority to issue search warrants where there has been a sufficient showing of probable cause. *See* 8 GCA § 35.10 (2005) (“A search warrant is a written order issued by *a judge of the Superior Court . . .*” (emphasis added)); 8 GCA § 35.20 (2005) (explaining when warrant may be issued and executed). More broadly, the Superior Court is vested with jurisdiction over criminal proceedings in Guam pursuant to 7 GCA § 4101(a) and 48 U.S.C.A. § 1424-1(d). *See* 7 GCA § 4101(a) (2005) (granting Superior Court original jurisdiction over all matters not reserved for the Supreme Court of Guam or the federal district court); 48 U.S.C.A. § 1424-1(d); *see also* 8 GCA § 15.10 (2005) (requiring criminal complaint to be filed in Superior Court). Within the context of such criminal proceedings, defendants are permitted to move to suppress evidence. *See* 8 GCA § 65.15 (2005). There is no explicit grant of authority, however, that permits one Superior Court judge to review the decision of another Superior Court judge when the motion to suppress evidence is based on the argument that there was insufficient probable cause to support the issued search warrant. *See* 7 GCA § 7107 (2005) (listing incidental powers and duties of Superior Court); 7 GCA § 4102 (2005) (granting the Superior Court “appellate jurisdiction” over certain matters).

[20] Despite this apparent gap in Guam’s statutory law, the Superior Court nevertheless has authority to exercise its jurisdiction by all necessary means. In particular, when jurisdiction of the Superior Court is established, 7 GCA § 7117 provides that

all the means necessary to carry [the court’s jurisdiction] into effect are also given; and in the exercise of this jurisdiction, if the course of the proceeding be not specifically pointed out by law or by rules of procedure adopted by the Supreme Court, any suitable process or mode of proceedings may be adopted which may appear most conformable to the spirit of this Title.

7 GCA § 7117 (2005).

[21] We find that these provisions, when read together, provide the authority for a Superior Court judge to review the probable cause determination of another Superior Court judge when considering a motion to suppress evidence obtained via search warrant.

**B. A Court’s Probable Cause Determination in Issuing a Warrant Must Be Supported by a Substantial Basis, and a Court Reviews Such Determination For Clear Error**

[22] To be valid, a search warrant “must be supported by an affidavit establishing probable cause.” *United States v. Stanert*, 762 F.2d 775, 778 (9th Cir. 1985), *as amended on denial of reh’g*, 769 F.2d 1410 (9th Cir. 1985). “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Gates*, 462 U.S. at 236; *see also People v. Santos*, 1999 Guam 1 ¶ 37 (citation omitted). For this reason, in *Gates*, the United States Supreme Court rejected a formalistic test based upon an informant’s veracity, reliability, or “basis of knowledge” to determine whether a warrant application was supported by probable cause. 462 U.S. at 230. These elements are not to be thought of “as entirely separate and independent requirements to be rigidly exacted in every case.” *Id.* Rather, these elements “should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is ‘probable cause’ to believe that contraband or evidence is located in a particular place.” *Id.*; *see also People v. Rico*, No. 79-00008A, 1992 WL 91184, at \*2 (D. Guam App. Div. Mar. 6, 1980) (citation omitted). Thus, “[t]he task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him[,] . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Gates*, 462 U.S. at 238.

[23] Because an initial probable cause determination is “ill-suited” to the application of “[r]igid legal rules” and is to be based upon “the totality of the circumstances,” *id.* at 232, 238, such a determination is generally entitled to “great deference” by any reviewing court, *id.* at 236. “[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review.” *Id.* (citations omitted); *see also Rico*, 1992 WL 91184, at \*2 (finding trial court erred by “substitut[ing] his own view of the facts for that of the issuing” judge). Rather, the *Gates* court made clear that “the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.” *Gates*, 462 U.S. at 238 (citations and internal quotation marks omitted); *see also Rico*, 1992 WL 91184, at \*1 (“[H]earsay evidence may properly be considered by a magistrate in issuing a search warrant, *so long as there is a substantial basis* for believing the hearsay to be credible.” (emphasis added)). This is a “flexible, easily applied standard.” *Gates*, 462 U.S. at 238.

[24] A number of courts throughout the country have “interpreted the substantial basis standard as so deferential that it has equated it to a clearly erroneous standard.” *United States v. Conley*, 4 F.3d 1200, 1205 n.2 (3d Cir. 1993) (citing *Spears*, 965 F.2d at 269-71). As articulated by the Ninth Circuit, for example, a court reviewing the issuing court’s probable cause determination “may not reverse” that decision “unless the [issuing court’s] decision is clearly erroneous.” *Stanert*, 762 F.2d at 779; *see also United States v. Washburn*, No. 97-10512, 1998 WL 822746, at \*1 (9th Cir. Nov. 17, 1998); *State v. Neher*, 213 S.W.3d 44, 49 (Mo. 2007) (en banc) (“The court will only reverse if the issuing magistrate or judge clearly erred in initially determining, based on the totality of the circumstances, that probable cause existed.”). We find this analogy to be appropriate given that “the determination that probable cause exists is predominantly a factual analysis.” *United States v. Fox*, 902 F.2d 1508, 1513 (10th Cir. 1990);

*see also Gates*, 462 U.S. at 236. We have previously adopted the clearly erroneous standard when reviewing factual findings. *See Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶¶ 21-22; *cf. Santos*, 1999 Guam 1 ¶ 32 (“Normally deference is given to a judge’s findings of fact because credibility issues are involved.”). Moreover, the District Court of Guam, Appellate Division, previously held in the civil context in a malicious prosecution case that a “trial court’s determinations on the probable cause issues will be reversed only if clearly erroneous.” *Lucero v. Stewart*, DC Civ. No. 88-0010A, 1988 WL 242612, at \*1 (D. Guam App. Div. 1988).

[25] Accordingly, we expressly hold that a Superior Court judge reviewing a probable cause determination by another judge on the same court should ensure that the issuing judge had a substantial basis for concluding that probable cause existed. A reviewing court may not suppress evidence based upon a lack of probable cause unless the issuing court’s probable cause determination was clearly erroneous.

### **C. The Reviewing Court Properly Denied Gallo’s Motion to Suppress**

[26] Having established the correct standard of review, we apply it to the review of the trial court’s denial of Gallo’s motion to suppress. Whether the reviewing court applied the proper test in resolving Gallo’s motion to suppress is a legal decision that we review *de novo*. *See Chargualaf*, 2001 Guam 1 ¶ 12. In reviewing the issuing court’s initial probable cause determination, however, we too provide deference and review for clear error. *See Gates*, 462 at 236; *Spears*, 965 F.2d at 269-70.

[27] Gallo argues on appeal that the reviewing court erred in denying his motion to suppress because the affiant was required in his affidavit to establish the informant’s reliability, but failed to do so. *See Appellant’s Br.* at 4. In particular, Gallo points to the fact that the affidavit indicated the affiant worked with this informant on only one occasion (*i.e.*, during the April 22,

2013, controlled-buy operation). *See* RA, tab 41 at Ex. 1 (People’s Opp’n to Def.’s Mot. Suppress, May 14, 2014). This same informant provided the additional information relied on by the affiant regarding the two controlled-buy operations in March 2013 conducted by the Air Force. *See id.* Gallo argues the additional information does not establish reliability because reliability cannot be established based on a single informant making the same accusation multiple times. *See* Appellant’s Br. at 4-10.

[28] As noted above, it is well-settled law that a showing of reliability is but one factor for consideration in determining probable cause; it is not itself a specific requirement that must be separately analyzed. *See Gates*, 462 U.S. at 232.

[29] Where an affidavit relies on hearsay, particularly from an informant, the issuing court may consider things such as the veracity or basis of knowledge of the informant. *See id.* at 232-33. These considerations are not mutually exclusive; a weak showing of one can be balanced against a strong showing of the other. *Id.* at 233. When considering veracity, a reviewing court can weigh such factors as whether the informant provided reliable information in the past, offered first-hand knowledge, was willing to reveal his or her identity, provided detailed predictive information about future events, offered admissions against penal interest, and whether there was independent corroboration by the affiant. *See generally id.*; *see also United States v. Quitugua*, No. 16-00004, 2016 WL 3620727, at \*3 (D. Guam June 29, 2016); *United States v. McCraven*, 401 F.3d 693, 697 (6th Cir. 2005). When considering the basis of affiant’s knowledge, a court can weigh whether the informant is speaking from first-hand knowledge or is offering hearsay. *Quitugua*, 2016 WL 3620727, at \*3. Ultimately, facts supporting the reliability of an informant “need not take any particular form.” *McCraven*, 401 F.3d at 697.

[30] Here, the reviewing court properly applied a deferential standard of review to Gallo’s challenge to the initial probable cause determination and correctly found that the issuing court had a substantial basis for its decision. RA, tab 55 at 4 (Dec. & Order).

[31] First, while the reviewing court did not expressly state that the issuing court had a “substantial basis” to find probable cause, the reviewing court did cite to the proper standard of its review and found that there was no constitutional violation. *See id.* at 2-5. The court therefore implicitly recognized that the issuing court had a “substantial basis” for its finding of probable cause. The fact that the reviewing court did not separately analyze the informant’s reliability does not create reversible error because reliability is only one factor, and not a stand-alone requirement, in determining probable cause. *See Gates*, 462 U.S. at 232. The reviewing court therefore did not commit legal error.

[32] In reviewing the totality of the circumstances, and with proper deference to the issuing court, the reviewing court recognized that the affiant did not rely solely on the confidential informant’s statement but also included information regarding the affiant’s background knowledge and expertise, personal observations, and information gathered through the investigation. RA, tab 55 at 4-5 (Dec. & Order).

[33] Upon a review of the warrant application and supporting affidavit, we find, like the reviewing court below, that there was no clear error in the issuing court’s initial probable cause determination. *See Rico*, 1992 WL 91184, at \*1-2; *see also People v. Chargualaf*, Crim. Nos. 78-00066A, 79-00015A, 1979 WL 15100, at \*3 (D. Guam App. Div. Sept. 20, 1979) (finding that “purchase of heroin at the [searched] residence within forty-eight hours of the making of the affidavit of probable cause in support of the search warrant,” along with “facts within the personal knowledge of the informant . . . [and] the generalizations pertaining to drug-related

activity based upon the personal experience of the affiant” sufficiently established probable cause).

[34] For these reasons, the reviewing trial court properly denied Gallo’s motion to suppress.

#### V. CONCLUSION

[35] Based on the foregoing, we hold that a Superior Court judge has the authority to review the initial probable cause determination of another Superior Court judge. We also hold that when reviewing such determinations, a court must ensure that the issuing court had a “substantial basis” for reaching its probable cause determination. Finally, we hold that a reviewing court may not suppress evidence based upon a lack of probable cause unless the issuing court’s probable cause determination was clearly erroneous. Accordingly, we **AFFIRM** the trial court’s denial of Gallo’s Motion to Suppress Evidence and the Judgment of Conviction.

/s/

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F. PHILIP CARBULLIDO  
Associate Justice

/s/

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ROBERT J. TORRES  
Associate Justice

/s/

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KATHERINE A. MARAMAN  
Chief Justice