

IN THE SUPREME COURT OF OHIO

08-2466

STATE OF OHIO

Plaintiff-Appellee

v.

RICO E. KING

Defendant-Appellant

On Appeal from the  
Court of Appeals,  
Twelfth Appellate District  
Butler County, Ohio

Court of Appeals  
Case No. CA2008-03-085

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT RICO E. KING**

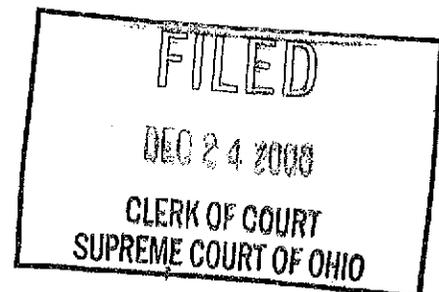
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**IN ADDITION TO INVOLVING A FELONY, THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST BECAUSE IT INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED.**

Search warrants are still required when entering the home. The United States and Ohio constitutions continue to recognize the sanctity of the home and require law enforcement to follow certain rules or risk the exclusion of any contraband recovered. However in this case, the Twelfth District Court of Appeals has taken a dangerous step toward permitting the police to use unproven and unreliable confidential informants in securing search warrants for the home.

This case raises a substantial constitutional question. When a search warrant affidavit gives absolutely no indication of the reliability of the confidential informant it cannot survive a constitutional challenge and the exclusionary rule. The exclusionary rule is not dead and continues to "safeguard Fourth Amendment rights generally through its deterrent effect."<sup>1</sup> Yet with its decision, the Twelfth District Court of Appeals has eroded any deterrent effect the exclusionary rule may have by allowing law enforcement to enter the sanctity of the home based on an unreliable and unproven confidential informant. Establishing such a dangerous precedent raises a substantial constitutional question and is a question of great public interest.

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<sup>1</sup> United States v. Clandra (1974), 414 U.S. 338, 348, 94 S.Ct. 613.

## **PROCEDURAL POSTURE**

Appellant Rico King was indicted on October 13, 2006 for one count of trafficking in cocaine, one count of escape, one count of obstructing official business, two counts of tampering with evidence, two counts of possession of cocaine, one count of permitting drug abuse, and one count of resisting arrest.<sup>2</sup>

On July 2, 2007 the trial court held a suppression hearing.<sup>3</sup> On July 3, 2007 the trial entered an order denying Mr. King's motion to suppress.<sup>4</sup> On November 8, 2007, Mr. King entered a plea of no contest to all counts as charged.<sup>5</sup> Mr. King was sentenced to five years on January 22, 2008.<sup>6</sup>

Mr. King appealed the trial court's order denying his motion to suppress.<sup>7</sup> The Twelfth District Court of Appeals affirmed the trial court decision. See Appendix, November 10, 2008 Opinion and Judgment Entry of the Twelfth District Court of Appeals, attached.

## **STATEMENT OF FACTS**

On September 21, 2006 law enforcement applied for and received a search warrant for the premises located at 710 Symmes Avenue, Apartment Number Three,

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<sup>2</sup> T.d. 1.

<sup>3</sup> T.d. 45.

<sup>4</sup> T.d. 53.

<sup>5</sup> T.d. 60.

<sup>6</sup> T.d. 62 and 66.

<sup>7</sup> T.d. 73.

Hamilton, Butler County, Ohio.<sup>8</sup> When law enforcement applied for the search warrant he imparted no information to the issuing judge that was not contained within the affidavit itself.<sup>9</sup> However, the same officer did expand and explain the information in the affidavit to the trial court.<sup>10</sup>

Acknowledging the importance of including the reliability of a reliable confidential informant in an affidavit<sup>11</sup> to allow an issuing judge to make an objective and independent determination of probable cause,<sup>12</sup> Agent Sorrell admitted no such information was provided in this affidavit.<sup>13</sup> There was absolutely no language in the entire affidavit discussing the reliability of the confidential informant from which the issuing judge could determine probable cause.<sup>14</sup>

The affidavit in support of the search warrant contains the following averment: in mid September 2006 Agent Sorrell with the use of Confidential Informant made a controlled Crack Cocaine purchase from Rico King; within the past 72 hours Agent Sorrell with the use of Confidential Informant purchased Cocaine from the residence of 710 Symmes Ave. Apt. #3, the residence in which the Cocaine was purchased from is the residence of Rico King; Agent Sorrell obtained the criminal history report of Rico

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<sup>8</sup> T.p. 6 and State's Exhibit Number 1.

<sup>9</sup> T.p. 6.

<sup>10</sup> T.p. 23-25.

<sup>11</sup> T.p. 17.

<sup>12</sup> T.p. 15.

<sup>13</sup> T.p. 19.

<sup>14</sup> T.p. 19-20.

King and within the report it shows that Rico King has been arrested and convicted for having weapons while under disability. Ironically, the affidavit contained no mention of any past drug convictions.

On September 21, 2006 law enforcement illegally entered Mr. King's residence and vehicle located at 710 Symmes Road.<sup>15</sup> Upon arrival law enforcement waited outside the apartment complex for Mr. King to exit.<sup>16</sup> Law enforcement followed Mr. King while no officers remained to watch the apartment complex.<sup>17</sup> As Mr. King was exiting his parked vehicle, Detective Hackney approached and opened Mr. King's door and pulled him out of the vehicle.<sup>18</sup> After removing Mr. King and a bag from underneath the seat of the vehicle, law enforcement went into the apartment complex and began executing the search warrant.<sup>19</sup>

#### **PROPOSITION OF LAW NO. 1**

#### **THE TWELFTH APPELLATE DISTRICT ERRED WHEN IT HELD THE CONFIDENTIAL INFORMANT DID NOT LACK RELIABILITY AND COULD BE THE BASIS FOR PROBABLE CAUSE.**

The Fourth Amendment of the United States Constitution and Article I Section 14 of the Ohio Constitution secure "the right to be free from unreasonable searches and

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<sup>15</sup> T.p.

<sup>16</sup> T.p. 7.

<sup>17</sup> T.p. 20.

<sup>18</sup> T.p. 29.

<sup>19</sup> T.p. 30.

seizures and requires warrants to be particular and supported by probable cause." In the instant case the confidential informant used to establish probable cause completely lacked qualification as reliable and therefore could not establish probable cause for the search warrant.

In determining whether probable cause exists to justify a warrant "law enforcement officials must present evidence from which the magistrate judge can conclude from the totality of the circumstances, 'including the "veracity" and "basis" of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'"<sup>20</sup>

"Where the affidavit submitted in support of a search warrant is based solely upon hearsay information provided by an informant, and where that affidavit fails to set forth any facts or circumstances from which the issuing judge could conclude that the informant was credible or his information was reliable, that affidavit is insufficient to provide the issuing magistrate a substantial basis for determining that probable cause for a search exists."<sup>21</sup> An affidavit may be found to not provide probable cause if it "fail[s] to indicate any basis for believing that the informants were credible" and "provides virtually nothing from which one might conclude that the informants are

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<sup>20</sup> *United States v. Williams*, 224 F.3d 530, 532 (6<sup>th</sup> Cir. 2000) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)), *cert. denied*, 531 U.S. 1095 (2001).

<sup>21</sup> *State v. Klosterman*, 1995 Ohio App. LEXIS 2222 (2nd Dist. Greene County (1995)) (citing *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)).

honest or their information reliable.”<sup>22</sup>

Here, the search warrant is exclusively dependent on the confidential informant’s information, but the information in the affidavit is not sufficient to allow the issuing judge to conclude the confidential informant was truthful. The affidavit, prepared by Agent Sorrell, contains information concerning the use of a “Confidential Informant” to conduct two controlled drug buys. However, there was nothing to support the reliability of the confidential informant. Both statements concerning the controlled drug buys describe the use of a confidential informant, but neither describes whether the confidential informant was patted down before each buy, whether anyone else was present or whether the buy occurred behind closed doors.

The Twelfth Appellate District Court of Appeal suggests law enforcement in this case made one of the controlled buys. However, the affidavit states both alleged buys were made “with the use of Confidential Informant.” It seems obvious that if law enforcement made the purchase themselves they would indicate this in the search warrant. Such an assertion would undoubtedly go further toward establishing probable cause. This is similar to *State v. Davis* where the state failed to convince the trial court reasonable inferences could overcome the lack of a reliable confidential

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<sup>22</sup> *State v. Wesseler*, 2001 Ohio 8638 (citing *State v. Sharp* (1996), 109 Ohio App.3d 757, 760, discretionary appeal not allowed, (1996), 76 Ohio St.3d 1491).

informant.<sup>23</sup>

Furthermore, the affidavit does not contain the usual language indicating the reliability of the confidential informant. The confidential informant is not even identified in the search warrant affidavit with the traditional language of a "reliable confidential informant." There is no indication this confidential informant has ever worked with police in the past or the police attempted to independently verify the information outside the presence of the confidential informant. The affidavit contains no information from which a neutral and detached magistrate could have substantial reason to believe the informant was credible or the information reliable.<sup>24</sup> In the absence of such information probable cause to issue a warrant can not exist.

## **PROPOSITION OF LAW NO. 2**

**THE APPELLATE COURT ERRED WHEN IT HELD THERE WAS A NEXUS BETWEEN THE ALLEGED CRIMINAL CONDUCT, THE ITEMS TO BE SEIZED AND THE PLACE TO BE SEARCHED.**

"The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is a reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property which entry is sought."<sup>25</sup> Coupled with the lack of information supporting the veracity of the confidential informant, the affidavit only provides one alleged contact between the

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<sup>23</sup> 2006-Ohio-1592.

<sup>24</sup> *State v. Ingram*, 1994 Ohio App. LEXIS 4260 (12th Dist. Butler County (1994)).

<sup>25</sup> *Zurcher v. Stanford Dailey* 436 U.S. 547, 556, 98 S. Ct. 1970 (1978).

confidential informant and the place to be searched.

The affidavit alleges that within 72 hours a confidential informant, with no known veracity or basis of knowledge, bought cocaine from 710 Symmes Avenue Apt. #3. The apartment is only accessible through a shared main entrance door. After entering the building a visitor is free to visit any tenant and would be completely out of sight of any law enforcement. In fact, officers waited to execute the search warrant because it was an apartment building with more than one tenant and there were concerns about the main entrance door being locked.<sup>26</sup>

One alleged purchase out of the sight of law enforcement in a multi-unit secured apartment building does not provide the required nexus. The affidavit contains no mention of any other independent verification of any illegal activity at the place to be searched. The criminal history report, indicating a conviction for a weapon under disability, does not aide the magistrate in establishing a nexus between the alleged criminal conduct, possession and trafficking of drugs, the items to be seized, drugs and drug paraphernalia, and the place to be search, 710 Symmes Avenue Apt. #3 or the vehicle.

With no evidence to support the reliability of the confidential informant and no nexus between the alleged criminal conduct, the items to be seized or the place to be searched, there was not sufficient evidence for a neutral and detached magistrate to

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<sup>26</sup> T.p. 7.

conclude that there was probable cause to believe that contraband was present at the residence. Accordingly, the warrant was issued without probable cause.

### **PROPOSITION OF LAW NO. 3**

#### **THE TWELFTH APPELLATE DISTRICT COURT OF APPEALS ERRED WHEN IT HELD THE WARRANT COULD BE SALVAGED BY A CLAIM OF GOOD FAITH.**

Nor can the warrant be salvaged by a claim of "good faith." In the context of a probable cause hearing, good faith is irrelevant.<sup>27</sup> The inquiry is confined to the "four corners" of the document.<sup>28</sup> In the present matter there is no indication within the affidavit as to the reliability of the confidential informant.

While the Twelfth District has allowed a reviewing court to go beyond the four corners of the affidavit to determine the officer's good faith,<sup>29</sup> such an expansive review cannot be supported here. In making its decision, the trial court relied on *Wesseler*, *O'Connor* and *Landis* which are easily distinguished. Here unlike in the those cases, Agent Sorrell testified no information outside the four corners of the affidavit was provided to the issuing judge nor was there any reason for the other officers to believe such information had been given to the issuing judge. Therefore, Agent Sorrell testimony expanding and explaining the information submitted to the issuing judge cannot properly be considered or relied upon in finding a good faith exception.

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<sup>27</sup> *State v. Klosterman* (1996), 114 Ohio App.3d 327.

<sup>28</sup> *Id.*

<sup>29</sup> *State v. Wesseler*, 2001 Ohio 8638; *State v. O'Connor*, 2002-Ohio-4122; *State v. Landis*, 2006-Ohio-3538

Even if it is determined the trial court was correct in going beyond the four corners of the affidavit, the good faith exception is still inapplicable. The good faith exception to the exclusionary rule permits the introduction of evidence obtained by officers reasonably relying on a search warrant issued by a detached and neutral magistrate, where no deterrent purpose would be served by excluding evidence under the circumstances presented.<sup>30</sup>

However, the good faith exception will not apply in four specific situations:

- (1) Where the affidavit contains information the Affiant knows or should have known to be false;
- (2) Where the issuing magistrate wholly abandoned his or her judicial role;
- (3) Where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable or where the warrant application was supported by nothing more than a bare bones affidavit; and
- (4) Where the warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid.<sup>31</sup>

The exceptions apply in the instant case. The affidavit does not establish a “minimally sufficient nexus” between the property and the illegal activity. While the good faith exception will apply when an affidavit “contain[s] a minimally sufficient

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<sup>30</sup> See, *United States v. Leon*, 468 U.S. 897, 922 (1984); *Carpenter*, 360 F.3d at 595.

<sup>31</sup> See, *United States v. Van Shutters*, 163 F.3d 331, 337 (6th Cir. 1998), cert. denied, 526 U.S. 1077 (1999).

nexus between the illegal activity and the place to be searched to support an officer's good faith belief in the warrant's validity, even if the information provided [did not] establish probable cause,"<sup>32</sup> no such minimal nexus exists here. The facts in *Carpenter* are distinguishable when, as here, the facts asserted to create the nexus are "so vague as to be conclusory or meaningless."<sup>33</sup> This affidavit contains merely conclusory statements that an unreliable confidential informant alleged purchased drugs at some undisclosed location and somewhere in Mr. King's apartment complex. This is not sufficient to allow the executing officer to rely on the search warrant.<sup>34</sup>

Facts that just "pad" an affidavit but do not materially contribute to a finding of probable cause will also fail the good faith reasonable reliance test.<sup>35</sup> Here the fact Mr. King allegedly sold drugs at an undisclosed location, rented one of the apartments at 710 Symmes Avenue, and he had been convicted for having a weapon under disability is the type of padding that does not contribute to a finding of probable cause or satisfy the good faith reasonable reliance test. Affidavits, such as the one in this case, simply do not allow a reasonable reliance on the warrant.<sup>36</sup>

## CONCLUSION

For the foregoing reasons, Mr. King request this Court accept jurisdiction and

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<sup>32</sup> *Carpenter*, 360 F.3d at 596.

<sup>33</sup> *Id.*

<sup>34</sup> *State v. Harrell*, 65 O.S. 3d37, 599 N.E. 2d 695 (1992).

<sup>35</sup> *Toledo v. McHugh*, 1987 WL 19971 (Ohio Ct App. 6<sup>th</sup> Dist. Lucas County 1987).

<sup>36</sup> *State v. Rodriguez*, 640 App. 3d 183, 580 N.E. 2d 1127 (6<sup>th</sup> Dist. Wood County (1989)).

grant leave to appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify a copy of this Brief was served on the Butler County Prosecuting Attorney by United States Mail on December 23, 2008.

Hal R. Arenstein

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IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

RICO E. KING,

Defendant-Appellant.

CASE NO. CA2008-03-085

OPINION  
11/10/2008

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR2006-10-1858

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Arenstein & Gallagher, Hal R. Arenstein, 114 East Eighth Street, Cincinnati, OH 45202, for defendant-appellant

**POWELL, J.**

{¶1} Defendant-appellant, Rico King, appeals the Butler County Court of Common Pleas decision denying his motion to suppress. We affirm the decision of the trial court.

{¶2} In September 2006, as part of an ongoing investigation, Agent Aaron Sorrell, an undercover narcotics agent working for the Butler County Sheriff's Office, Drug and Vice Investigations Unit, purchased crack cocaine from appellant. A few days later, a confidential

informant went to appellant's apartment and made another cocaine purchase. Based on this information, Agent Sorrell obtained a warrant to search appellant's apartment for, among other things, drugs and drug paraphernalia.

{13} On September 21, 2006, several members of the Drug and Vice Investigations Unit went to appellant's apartment to execute the warrant. Prior to executing the warrant, Agent Mike Hackney, the unit's supervisor, approached appellant who was sitting in his car and told him about the warrant. Thereafter, while appellant was getting out of his car, Agent Hackney saw a clear plastic bag, containing what he believed to be cocaine, partially sticking out from underneath the driver's seat. Agent Hackney removed the plastic bag from appellant's car and placed it on the hood. Appellant was then handcuffed so that his apartment could be safely searched.

{14} A short time later, appellant, still in handcuffs, grabbed the plastic bag off the hood of his car and ran to a nearby sewer drain located in the parking lot. Once appellant got to the sewer drain, he began to scrape the plastic bag on the grate in an apparent attempt to break the bag and dispose of its contents. After a brief struggle, appellant was arrested and placed in a police cruiser.

{15} These acts, along with other evidence obtained from appellant's apartment, led the police to charge him with one count of trafficking in cocaine, one count of escape, one count of obstructing official business, one count of permitting drug abuse, one count of resisting arrest, two counts of tampering with evidence, and two counts of possession of cocaine. Appellant filed a motion to suppress, which the trial court denied. Appellant entered a plea of no contest and was found guilty of all charges.

{16} Appellant appeals the trial court's decision overruling the motion to suppress, raising one assignment of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED WHEN IT DENIED [APPELLANT'S] MOTION TO SUPPRESS SINCE THE AFFIDAVIT FOR THE SEARCH WARRANT FAILED TO ESTABLISH PROBABLE CAUSE AND CANNOT BE SALVAGED BY A CLAIM OF GOOD FAITH."

{¶9} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 329, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact, and therefore, is in the best position to resolve factual questions and evaluate witness credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. A reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Bryson* (2001), 142 Ohio App.3d 397, 402. The appellate court then determines, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *Id.*

{¶10} The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The exclusionary rule, while not an express mandate found in the Fourth Amendment, is inherent in the Fourth Amendment's protective language and "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *State v. Cobb*, Butler App. No. CA2007-06-153, 2008-Ohio-5210, ¶22; *United States v. Leon* (1984), 468 U.S. 897, 906, 104 S.Ct. 3405, citing

*United States v. Clandra* (1974), 414 U.S. 338, 348, 94 S.Ct. 613. As a result, the exclusionary rule requires evidence seized as a result of an illegal search to be suppressed. *Cobb* at ¶22.

{¶11} However, the exclusionary rule is not needed when police properly execute a legal warrant issued by a detached magistrate and supported by probable cause. *State v. George* (1989), 45 Ohio St.3d 325. A search warrant may be issued upon a showing of probable cause based upon the totality of the circumstances presented in an affidavit. *State v. Goins*, (Jan. 6, 2006), Morgan App. No. 05-8, 2006-Ohio-74, ¶12, citing *George*. In determining the sufficiency of probable cause in an affidavit, the issuing judge need only make a practical, common sense decision using a totality of the circumstances approach. *Illinois v. Gates* (1983), 462 U.S. 213, 232, 103 S.Ct. 2317; *State v. Akers*, Butler App. No. CA2007-07-163, 2008-Ohio-4164. Probable cause "does not require a prima facie showing of criminal activity; rather, it only requires a showing that a probability of criminal activity exists." *State v. Young*, Clermont App. No. CA2005-08-074, 2006-Ohio-1784, ¶19.

{¶12} When reviewing the decision to issue a warrant, neither a trial court nor an appellate court will conduct a de novo determination as to whether the affidavit provided sufficient probable cause. *Cobb* at ¶24. Instead, a reviewing court need only ensure that the issuing judge had a substantial basis for concluding that the probable cause existed based on the information contained in the four corners of the affidavit filed in support of the warrant. *Id.*; *State v. Landis*, Butler App. No. CA2005-10-428, 2006-Ohio-3538, ¶12. Therefore, the trial court's finding of probable cause should be given great deference and any "doubtful or marginal cases should be resolved in favor of upholding the warrant." *Cobb* at ¶15, citing *George*, 45 Ohio St.3d at paragraph two of the syllabus.

{¶13} Appellant argues that the trial court erred in denying his motion to suppress evidence obtained during the execution of a search warrant because the warrant was not supported by probable cause. Appellant raises three issues with respect to the trial court's decision to deny his motion to suppress. Specifically, appellant argues that (1) "the confidential informant completely lacked reliability and cannot be the basis for probable cause," (2) "there was no nexus between the alleged criminal conduct, the items to be seized and the place to be searched," and (3) "the warrant cannot be salvaged by a claim of good faith." These arguments lack merit.

{¶14} First, appellant argues that the trial court erred in denying his motion to suppress because the search warrant "is exclusively dependent on the confidential informant's information," and such information "completely lacked reliability." We disagree.

{¶15} Pursuant to Crim.R. 41(C), "the finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished." In turn, "hearsay information may be considered in determining probable cause so long as the affiant presents the magistrate with the affiant's basis of knowledge and some underlying circumstances supporting the affiant's belief that the informant is credible" *Goins* at ¶14, citing *George*, 45 Ohio St.3d at 329.

{¶16} However, where the "affidavit submitted in support of a search warrant is based *solely* upon hearsay information provided by an informant, and where that affidavit fails to set forth any facts of circumstances from which the issuing judge could conclude that the informant was credible or his information was reliable, that affidavit is insufficient" to provide a substantial basis for determining probable cause for a search exists. *State v. Klosterman* (May 24, 1995), Greene App. No. 94 CA 44, 1995 WL 324624 at \*3 (emphasis added)(finding

no probable cause to support the issuance of a warrant where the affidavit relied "exclusively on information provided by other persons, including informants, for its assertion that appellant was selling drugs from his home").

{¶17} In this case, our review of the affidavit submitted to the issuing judge reveals that it is not "exclusively dependent on the confidential informant's information" as appellant claims. Here, the affiant, Agent Sorrell, was directly involved in appellant's investigation and had personally observed some of appellant's drug activities. As his affidavit indicates, Agent Sorrell, along with a confidential informant, "made a controlled Crack Cocaine purchase from [appellant]" in "mid September 2006." Subsequent to Agent Sorrell's personal observations, the confidential informant again purchased cocaine from appellant "within the past 72 hours" at the "residence of 710 Symmes Ave. Apt. #3 City of Hamilton Butler County, Ohio," where appellant lived with his girlfriend.

{¶18} Appellant highlights the fact that Agent Sorrell's affidavit did not provide any indication as to why the confidential informant could be considered reliable. However, the absence of such information does not render an affidavit fatally defective. See *Illinois v. Gates*, 462 U.S. at 238-239 (repudiating the previously required element of proof of the confidential informant's reliability in favor of a totality of the circumstances approach); see, also, *State v. Smith* (Sept. 26, 2006), Ashtabula App. No. 2004-A-0088, 2006-Ohio-5186 (finding an affidavit was supported by probable cause even though affiant did not state the reasons why confidential informant could be considered reliable). As a result, because the issuing judge was able to accept as factually accurate every fact in Agent Sorrell's affidavit, i.e. that Agent Sorrell made a crack cocaine purchase from appellant and that a confidential informant made another cocaine purchase at appellant's apartment "within the past 72 hours," we defer to that determination. Therefore, by analyzing the totality of the circumstances

under a common sense view, we find that the issuing judge did not err by concluding that probable cause existed for the issuance of the search warrant.

{¶19} Second, appellant argues that the trial court erred in denying his motion to suppress because the affidavit submitted by police in support of the search warrant failed to establish a "nexus" between the place to be searched and the items to be seized, and therefore, failed to establish probable cause. This argument lacks merit.

{¶20} Pursuant to Crim.R. 41(C), an affidavit submitted by police in an effort to obtain a search warrant must state, among other things, "the factual basis for the affiant's belief" that "the property to be searched for and seized" is at "the place to be searched."

{¶21} In this case, the affidavit provided by Agent Sorrell stated that he, along with a confidential informant, "made a Crack Cocaine purchase" from appellant in "mid September 2006," and further, that a confidential informant again purchased "[c]ocaine from the residence of 710 Symmes Ave. Apt. #3," appellant's residence, "within the past 72 hours." Agent Sorrell also noted in his affidavit that he believed a search of appellant's apartment would lead to the discovery of "[c]rack [c]ocaine, other drugs of abuse, drug paraphernalia, items used to process and package illegal drugs, [and] \* \* \* any weapons used to protect said contraband." Based on the foregoing, the trial court determined that a proper "nexus" existed between the place to be searched and the items to be seized.<sup>1</sup> We find no error in this conclusion.

{¶22} Third, in addition to asserting that the warrant lacked probable cause, appellant also argues that the trial court erred in finding that the warrant, even if insufficient, could be

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1. {¶a} Specifically, the trial court stated:

{¶b} "The residence in which the cocaine was purchased is the residence of [appellant]. I think [that] give[s] us the proper nexus that we need to relate [appellant] to the drugs, and [appellant] to the residence, and [appellant] to selling drugs, all of this within a relatively short period of time."

"salvaged by a claim of 'good faith.'" However, we find that even if we were to find the affidavit did not provide the issuing judge with probable cause, we would still uphold the trial court's decision overruling appellant's motion to suppress based on the "good faith exception" to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897.

{¶23} In *Leon* the United States Supreme Court held that "the Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *George*, 45 Ohio St.3d at 330, citing *Leon* at 918-923, 926. As a result, when the executing officers rely in good faith on the warrant issued by a detached and neutral magistrate, the exclusionary rule will not be applied to bar the use of evidence obtained by officers without a legal search warrant, even if the warrant is not supported by probable cause. *Cobb* at ¶37, citing *State v. Macke*, Clinton App. No. CA2007-08-033, 2008-Ohio-1888. Therefore, if the executing officers' reliance on the search warrant is objectively reasonable, the evidence will not be suppressed. *Id.*

{¶24} However, the good faith exception is not automatically triggered anytime an officer relies on a search warrant, but instead, there are several circumstances in which the good faith exception to the exclusionary rule set forth in *Leon* will not apply. For example, an executing officer cannot reasonably rely upon a search warrant when the officer knows that the supporting affidavit the magistrate relied on is false or misleading, the issuing judge wholly abandoned his judicial role, the warrant is facially deficient, or where the executing officers rely "on [a] warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon* at 923.

{¶25} Appellant argues that all four of the circumstances in which the *Leon* good faith

exception does not apply are present in this case. We disagree.

{¶26} Initially, appellant, although not explicitly stated in his brief, apparently claims that the issuing judge was misled by the affidavit submitted in support of the warrant, and that the judge wholly abandoned his judicial role by issuing the warrant. However, appellant failed to raise these issues to the trial court during the motion to suppress hearing, and also failed to provide any evidence to support his claim to this court. As the trial court stated, "[t]here is no evidence to indicate that the judge or magistrate was misled by the information in the affidavit, and that the magistrate or judge wholly abandoned his judicial role \* \* \*." We find no error in the trial court's conclusion.

{¶27} Next, this is not a case where the warrant was "so facially deficient-i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid." *George* at 331, quoting *Leon* at 923. The warrant in this case particularized the place to be searched, which was appellant's apartment located at "710 Symmes Ave. Apt. #3 City of Hamilton Butler County, Ohio," and the things to be seized: "[c]rack [c]ocaine, other drugs of abuse, drug paraphernalia, items used to process and package illegal drugs, monies associated with the sale of illegal drugs, documents or other ledgers used for the sale of drugs, and any weapons used to protect said contraband." As a result, the warrant was not facially deficient, let alone "so facially deficient \* \* \* that the executing officers [could not] reasonably presume it to be valid."

{¶28} Finally, this case does not qualify as one where the officers involved relied upon a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923. As we have stated previously, the affidavit supplied by Agent Sorrell indicated that he recently purchased crack cocaine from appellant, and further, that a confidential informant went to appellant's

apartment and purchased cocaine "within the past 72 hours." The personal observations of Agent Sorrell, as well as the recent purchase of cocaine by a confidential informant at appellant's apartment, rendered the police officers' belief in the validity of the search warrant reasonable. See, e.g., *Akers*, 2008-Ohio-4164, ¶¶27-37.

{¶29} Accordingly, the trial court did not err in its decision to deny appellant's motion to suppress. Therefore, appellant's sole assignment of error is overruled.

{¶30} Judgment affirmed.

WALSH, P.J. and YOUNG, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

FILED

IN THE COURT OF APPEALS

2008 NOV 10 PM TWELFTH APPELLATE DISTRICT OF OHIO

CINDY CARPENTER  
BUTLER COUNTY  
CLERK OF COURTS

BUTLER COUNTY

IN THE BUTLER CO.  
COURT OF APPEALS

NOV 10 2008

CINDY CARPENTER  
CLERK OF COURTS

CASE NO. CA2008-03-085

STATE OF OHIO,

Plaintiff-Appellee,

JUDGMENT ENTRY

- vs -

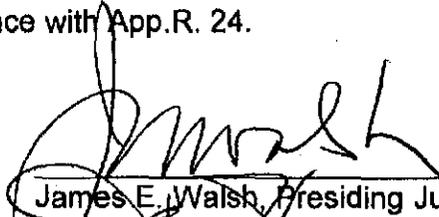
RICO E. KING,

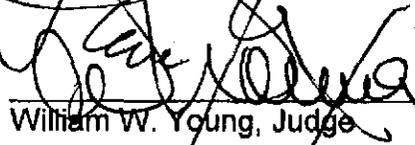
Defendant-Appellant.

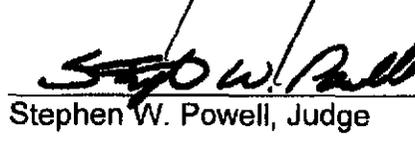
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

  
James E. Walsh, Presiding Judge

  
William W. Young, Judge

  
Stephen W. Powell, Judge

H. Arenstein  
**PRIORITY**

**COURT OF COMMON PLEAS  
 BUTLER COUNTY, OHIO**

STATE OF OHIO

Plaintiff

vs.

RICO E. KING

Defendant

FILED BUTLER CO.  
 COURT OF COMMON PLEAS

MAR 06 2008

CINDY CARPENTER  
 CLERK OF COURTS

CASE NO. CR2006-10-1858

POWERS, J.

**JUDGMENT OF CONVICTION ENTRY**

On January 22, 2008 defendant's sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19. Defense attorney, Hal Arenstein and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court has considered the record, the charges, the defendant's No Contest Plea, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees and the court makes no finding at this time of the defendant's ability to pay attorney fees.

The Court finds that the defendant has been found guilty of:

**TRAFFICKING IN COCAINE** as to Count One, a violation of Revised Code Section 2925.03(A)(1) a fifth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 12 months.

Pay a fine in the amount of \$1,000.00 to the Butler County Clerk of Courts.

**ESCAPE** as to Count Two, a violation of Revised Code Section 2921.34(A)(1) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 4 years.

This sentence will be served **consecutive** to Count One.

**OBSTRUCTING OFFICIAL BUSINESS** as to Count Three, a violation of Revised Code Section 2921.31 a fifth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 12 months.

This sentence will be served **concurrent** with all other counts.

**TAMPERING WITH EVIDENCE** as to Count Four, a violation of Revised Code Section 2921.12(A)(1) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 4 years.  
This sentence will be served **concurrent** with all other counts.

**POSSESSION OF COCAINE** as to Count Five, a violation of Revised Code Section 2925.11 a fourth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 17 months.

Pay a fine in the amount of \$1,000.00 to the Butler County Clerk of Courts.

This sentence will be served **concurrent** with all other counts.

**POSSESSION OF COCAINE** as to Count Six, a violation of Revised Code Section 2925.11 a fifth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 11 months.

Pay a fine in the amount of \$1,000.00 to the Butler County Clerk of Courts.

This sentence will be served **concurrent** with all other counts.

**PERMITTING DRUG ABUSE** as to Count Seven, a violation of Revised Code Section 2925.13(A) a fifth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 11 months.

This sentence will be served **concurrent** with all other counts.

**TAMPERING WITH EVIDENCE** as to Count Eight, a violation of Revised Code Section 2921.12(A)(1) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 4 years.

This sentence will be served **concurrent** with all other counts.

**RESISTING ARREST** as to Count Nine, a violation of Revised Code Section 2921.33(A) a second degree misdemeanor. With respect to this Count, the defendant is hereby sentenced to:

Jail for a period of 90 days.

Pay a fine in the amount of \$750.00 to the Butler County Clerk of Courts.

This sentence will be served **concurrent** with all other counts.

Credit for 3 days served is granted as of this date.

An Order Forfeiting Vehicle has been filed this date.

**Intensive Programs Prison**

Admission into an Intensive Prison Program is specifically objected to unless affirmative written permission is subsequently given by the sentencing judge.

As to Count(s) One, Two, Three, Four, Five, Six, Seven, Eight and Nine:

The Court has notified the defendant that post release control is optional in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release

control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control. The defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction.

Defendant is ORDERED to pay:

Costs of prosecution, supervision and any supervision fees permitted pursuant to Revised Code Section 2929.18(A)(4). Attorney fees are not to be assessed as court costs.

The Court finds the defendant to be indigent and all fines are waived.

Restitution in the amount of \$196.00 to the Butler County Sheriff's Office, 705 Hanover Street, Hamilton, OH 45011.

It is FURTHER ORDERED, as to Counts One, Five, Six and Seven and pursuant to Revised Code 4507.16, that the defendant's pleasure driving, operator's license or any other driving permits or privileges shall be suspended for a term of 5 years. Said term will commence upon defendant's release from prison.

It is FURTHER ORDERED that the Clerk shall notify the Ohio Bureau of Motor Vehicles through form 2724.

The Court further advised the defendant of all of his/her rights pursuant to Criminal Rule 32, including his/her right to appeal the judgment, his/her right to appointed counsel at no cost, his/her right to have court documents provided to him/her at no costs, and his / her right to have notice of appeal filed on his behalf.

Directive to Ohio Department of Rehabilitation and Correction: Please notify the Butler County Court of Common Pleas of any major changes of incarceration status including but not limited to release, transfer, execution or death of the defendant.

APPROVED AS TO FORM:

ENTER

ROBIN N. PIPER  
PROSECUTING ATTORNEY  
BUTLER COUNTY, OHIO

\_\_\_\_\_  
POWERS, J.

JH/rln  
January 23, 2008