ORIGINAL

No. 11-0109

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *ex rel.*, Michelle BENNER, Mary Pratt, Kara Mumford, Nicole Montecalvo, Trisha Narkum, Shannon Surrena, Stephanie Yash, Tiffany Smith, Brandi McNair, Amanda Wallace, Loni Fredenburg, Jessica Scarsella, Amanda Barbe, Jasmin Roque, April Ellis and Erica Jackson

Relators

vs.

MAHONING COUNTY COURT #4 IN AUSTINTOWN OHIO
6000 Mahoning Avenue
Austintown, Ohio 44515

and

HONORABLE JUDGE DAVID A. D'APOLITO
6000 Mahoning Avenue
Austintown, Ohio 44515

Respondents

FILED
JAN 20 2011
CLERK OF COURT
SUPREME COURT OF OHIO

BRIEF IN SUPPORT OF COMPLAINT FOR ORIGINAL WRIT OF PROHIBITION

James Vitullo (OH Bar No. 0015388)
5232 Nashua Drive, Suite 5
Austintown, Ohio 44515-5122
(330) 270-9027
jamesavitullo@gmail.com
Counselor for Relators

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I. INTRODUCTION.

The Fourth Amendment guarantees that "No Warrants shall issue, but upon probable cause." Criminal complaints stating only the charging officer's conclusions that the accused committed the crime cannot support an independent probable-cause determination. The facts must be stated in the complaint to permit the issuing official to independently make this determination. The Relators are sixteen women charged with forty misdemeanor complaints which state only the charging officer's conclusion that they committed the offense. There is no statement of personal knowledge or facts allowing an independent determination of probable cause thereby denying the trial court of jurisdiction.

The facially defective complaints are then issued by deputy clerks untrained in the nuances of probable cause. The affidavits and complaints never pass the scrutiny of a judge or magistrate. The extent of this defective process is evidenced by the five arrest warrants that are unsigned.

Relators have been arrested without an independent determination of probable cause. They seek a Writ of Prohibition to avoid being tried, and perhaps convicted, without a prior determination of probable cause to initiate the prosecution in the first instance. A writ to prohibit the prosecution of these cases is necessary to prevent continuing Fourth Amendment violations.

II. FACTUAL BACKGROUND.

On April 24, 2010 Austintown Township Sargent Jeff Solic filed forty misdemeanor complaints accusing the sixteen women of misdemeanor sex crimes in Mahoning County Court #4 ("Austintown County Court"). The alleged conduct occurred one year prior to the

filing of the complaints and outside of the sergeant's presence. The custom of the Township police officers is the filing of complaints stating only the officer's conclusion that the accused perpetrated the offense and reciting only the elements of the crime. All forty complaints are identical to the one filed against Michelle Benner, *Ohio v. Benner* 10crb367 stating that on "[date] at the county aforesaid [defendant] at [location] did engage in sexual activity for hire in violation of [statute] a third degree misdemeanor." (Exhibit 1 pg 1).

There are thirty-four judges and magistrates in Mahoning County available to review affidavits and complaints; instead, arrest warrants are routinely presented to deputy clerks for approval. The deputy clerks approve the warrants as a clerical function without making any independent probable cause determination. They sign the warrants as a clerical function without analyzing the complaint for probable cause. The neglect of the Fourth Amendment is evidenced by the warrant for Relator April Ellis, which is unsigned. See *Ohio v. Ellis*, 10crb419 (Exhibit 2 page 2). The return of this warrant was signed by a sheriff's deputy and included a ten dollar charge for the arrest. The warrant for Amanda Wallace (10crb408), Erica Jackson (10crb420), Mary Pratt (10crb370), Stephanie Yash (10crb388) and Trisha Narkum (10crb384) are also unsigned. (Exhibit 2 pages 3-12).

Some of the Relators were arrested during routine traffic stops. Others turned themselves in and were issued summons after being interrogated. Relators filed a motion to dismiss their charges arguing that the Court lacks jurisdiction to proceed on these complaints for the reasons stated in this brief (Exhibit 3 page 2-9). On January 12, 2011 without any written opposition from the prosecutors the Hon. David D'Apolito denied the motion to dismiss for lack of jurisdiction to proceed on these complaints (Exhibit 3 page 1).

III. LAW AND ARGUMENT (REASONS WHY WRIT SHOULD ISSUE).

"[J]urisdiction is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." *State ex rel. Jones v. Suster* (1998), 84 Ohio St. 3d 70, 75. If the trial "court patently and unambiguously lacks jurisdiction to proceed in a case, prohibition" will "issue to prevent any future unauthorized exercise of jurisdiction" and Relators "need not establish the lack of an adequate remedy at law because the availability of alternate remedies like appeal would be immaterial." *State ex rel. Duke Energy Ohio, Inc. v. Hamilton County Court* (2010), 126 Ohio St. 3d 41, 45.

A. Respondents Lacks Jurisdiction over Facially Insufficient Complaints.

The Fourth Amendment's requirements impose important limitations on a trial court's jurisdiction. The Fourth Amendment provides: "No Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing" the "persons" to "be seized." Ohio Const. Article I § 14 provides the identical guarantee and confirms that this is a "right of the people" that "shall not be violated."

The Supreme Court in *Whiteley v. Warden* (1971), 401 U.S. 560 overturned an arrest warrant supported by a complaint stating that "on [date], in [location], the [defendants] did then and there unlawfully break and enter a locked and sealed building [location and ownership of building]." *Id.* at 563. The court found that the "complaint consists of nothing more than the complainant's conclusion that the individuals named therein perpetrated the offense described in the complaint." *Id.* at 565. The conclusory complaint used to support the warrant "could not support a finding of probable cause by the issuing magistrate." *Id.* at 568.

The Supreme Court in *Giordenello v. United States* (1958), 357 U.S. 480, overturned an arrest warrant supported by a complaint stating that "on [date], at [location], [defendant] did receive" and conceal "heroin" with "knowledge of unlawful importation; in violation of [federal statute]." *Id.* at 481. Reciting "no more than the elements of the crime charged" is insufficient support for an arrest warrant. *Id.* at 484. The complaint contains no "allegation that the affiant spoke with personal knowledge" it "does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made." *Id.* at 486. The court found that the complaint used to support the warrant is "defective in not providing a sufficient basis upon which a finding of probable cause could be made." *Id.* at 485.

Ohio Criminal Rules 3 and 4 implement the Fourth Amendment's mandates by allowing arrest warrants only upon a sworn complaint setting forth the "essential facts" and a "factual basis" showing "that there is probable cause to believe that an offense has been committed and that the defendant has committed it." Ohio Crim. Rules 3 and 4(A)(1).

If the complaint fails to list the source of the information, either personal observations or hearsay, the "determination of probable cause is in effect made by the affiant" rather than "a neutral and detached magistrate as required by the United States and Ohio Constitutions." *Ohio v. Sharp* (1996), 109 Ohio App.3d 757, 760. See *Ohio v. Gill* (1977), 49 Ohio St. 2d 177, 178 ("assertion of a police officer that the informant is reliable" provides the issuing magistrate "nothing upon which to base his determination of credibility but the officer's conclusion."); *Ohio v. Dalpiaz* (2002), 151 Ohio App.3d 257 (finding officer's failure to

attribute information in affidavit to a source, and complete absence of any indication of the reliability of sources, fatal to probable cause determination); *City of Dayton v. Perkins* (Feb. 9, 1983), 1983 Ohio App. Lexis 12695 (complaint "did not set forth that the affiant spoke from, personal knowledge, knowledge gained from other officers, or knowledge gained from an informant or citizen" and therefore insufficient to support finding of probable cause).

In *City of Centerville v. Reno* (July 3, 2003), 2003 Ohio 3779 the complaint stated that defendant "on or about [date], [defendant] did unlawfully in [location] "violate" the city ordinance by engaging in "home occupation" in "violation" of [city code]. *Id.* at P 22-24. The court reversed the trial courts denial of defendants motion to dismiss because the "defendant has a constitutional right to a finding of probable cause before a warrant or summons is issued for him to answer." *Reno,* 2003 Ohio 3779 at P16 (citing *Giordenello*). The complaint only listed the "conclusion" that defendant committed the "violation without any reference to the source of the affiant's information." *Id.* at P18. The "complaint failed to comply with Crim. R. 4(A)(1), and thus no summons could be properly issued based on the complaint." *Id.* The "trial court should have dismissed the complaint." *Id.* at P28.

"There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence thereof the court acquires no jurisdiction, and if it assumes jurisdiction, a trial and conviction are a nullity." *Ohio v. Brown* (1981), 2 Ohio App. 3d 400, 402. "The filing of the affidavit is prerequisite to the issuing of the warrant, and without the filing of a proper affidavit no jurisdiction is acquired." *Ohio v. Atwood* (1990), 61 Ohio App. 3d 650, 655 (citation omitted). If the affidavit is void "the court was without

jurisdiction, and the entire proceeding was a nullity. The case should have been dismissed for lack of jurisdiction." *Columbus v. Jackson* (1952), 93 Ohio App. 516, 519. In a search warrant context, if the affidavit's "content is insufficient to establish probable cause, the search warrant must be voided." *Franks v. Delaware* (1978), 438 U.S. 154, 156.

These forty criminal complaints (see Exhibit 1) charge an offense in summary language without any facts indicating the source of the complaining officer's information. The forty complaints fail to answer the hypothetical question: "What makes you think that the defendant committed the offense charged?" *U.S. v. Fachini* (6th Cir. 1972), 466 F.2d 53, 56. These complaints are identical to the conclusory allegations found insufficient in *Whiteley*, *Giordenello* and *Reno* and demonstrate defects of a jurisdictional nature. See *Giordenello*, 357 U.S. at 488 ("petitioner's conviction accordingly must be set aside."); *Reno*, 2003 Ohio 3779 at P28 ("trial court should have dismissed the complaint.")

The filing of a proper complaint is a prerequisite to the finding of probable cause. See, *Ohio v. Landis* (July 10, 2006), 2006 Ohio 3538, P20 (failure to identify source of information "deprived the issuing magistrate of any information on which to determine whether the statements were personal observations or hearsay, or to determine the credibility or reliability of the hearsay."); *Ohio v. White-Barnes* (Dec. 8, 1992), 1992 Ohio App. Lexis 6261 ("complaint alleging an offense by stating the statutory language is not sufficient to serve as the sole basis for the issuance of an arrest warrant"); *City of Dayton v. Perkins* (Feb. 9, 1983), 1983 Ohio App. Lexis 12695 (finding no probable cause because the complaint consisted of "nothing more than the complainant's conclusion that the individuals named in the complaint committed the offenses set forth in the complaint"); *Ohio v. Kahn* (April 29,

1980), 1980 Ohio App. Lexis 9767 ("complaint charging an offense in summary language is constitutionally invalid when it contains no affirmative statement that the complaining officer had personal knowledge of the facts constituting the offense and does not indicate the source of the officer's information or its reliability."); *Worthington v. U.S.* (6th Cir 1948), 166 F.2d 557, 563 ("A complaint not based upon the complainant's personal knowledge confers no jurisdiction upon the commissioner to issue a warrant.")

The filing of a proper complaint is a prerequisite to the finding of probable cause necessary to first arrest the accused and commence criminal proceedings. Since the complaints are facially insufficient to establish probable cause, Respondents lack jurisdiction to prosecute Relators of the underlying charges.

B. **Respondents Lack Jurisdiction Over Warrants Issued By Clerks Incapable of Determining Probable Cause.**

An arrest warrant "represent[s] an independent assurance" that an "arrest will not proceed without probable cause to believe that a crime has been committed" and that the accused committed the crime. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972). The "issuing magistrate *must meet two tests*. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest." *Id.*

The Supreme Court upheld arrest warrants for breach of municipal ordinances by municipal court clerks in *Shadwick* after finding that the clerks satisfied the two part test. The clerks were independent of the police and "able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen guilty of . . . offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish." *Shadwick,* 407 U.S. at 351.

The clerks in *Shadwick* were capable of determining probable cause and actually performed a probable cause analysis. Here, the deputy clerks are not capable of, and in fact do not, determine if probable cause exists to issue a warrant. They instead rely on the officer's conclusion that the accused should be arrested. "The Fourth Amendment requires that magistrates determine probable cause for themselves and that they not rely on the conclusions of the police. Where a magistrate has only the sworn, but otherwise unsupported, assertion of a police officer that the informant is reliable, he has nothing upon which to base his determination of credibility but the officer's conclusion." *Ohio v. Gill* (1977), 49 Ohio St. 2d 177, 178. "The purpose of the complaint, then, is to enable the appropriate" clerks to "determine whether the 'probable cause' required to support a warrant exists." *Giordenello*, 357 U.S. at 486. The deputy clerks "must judge" for themselves the "persuasiveness of the facts relied on by a complaining officer to show probable cause. [They] should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." *Id.* The deputy clerks cannot "serve merely as a rubber stamp for the police." *Aguilar v. Texas* (1964), 378 U.S. 108, 111.

Respondents' jurisdiction is limited to lawfully issued warrants. Arrest warrants issued by deputy clerks without reviewing the complaints are void. These warrants are void if the "issuing judge never read it." *U.S. v. Decker* (8th Cir. 1992), 956 F.2d 773, 777. If the complaints were not reviewed then no determination of probable was "ever made by the judge" who "never saw" nor "examined the tickets." *U.S. v. Evans* (6th Cir. 1978), 574 F.2d 352, 354-55. The deputy clerks "lack[] the legal authority" to issue warrants without actually

performing a probable cause review and any warrants issued without a probable cause review are "*void ab initio*." *U.S. v. Scott* (6th Cir. 2001), 260 F.3d 512, 515. The deputy clerks abandoned the necessary probable cause review and are not "capable of the probable-cause determination required of them." *Shadwick*, 407 U.S. at 354. The warrants they issued are without a finding of probable cause and therefore invalid.

C. **Respondents Lack Jurisdiction Pursuant to Ohio Criminal Rule 4 and 5.**

Criminal Rule 4 permits a "warrant for the arrest of the defendant" to issue if "it appears from the complaint" that "there is probable cause to believe that an offense has been committed, and that the defendant has committed it." Crim. R. 4(A)(1). As shown above, it does not "appear from the complaint" that "there is probable cause" to issue the warrant. See *Reno*, 2003 Ohio 3779 at P18 ("complaint failed to comply with Crim. R. 4(A)(1), and thus no summons could be properly issued based on the complaint."); *Whiteley*, 401 U.S. at 565 ("complainant's conclusion" that the accused "perpetrated the offense" is inadequate support for arrest warrant); *Giordenello,* 357 U.S. at 484 (complaint reciting "no more than the elements of the crime charged" is insufficient support warrant). Additionally, since the deputy clerks did not actually review the complaint they did not make the required probable cause determination and failed to comply with Crim. R. 4(A)(1).[1]

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[1] The arrest warrants (see Exhibit 1) do not comply with the specific form requirements provided by the Criminal Rules, including "a description of the offense charged in the complaint" and "the numerical designation of the applicable statute or ordinance." Ohio Crim. Rules 4(C)(1). The "warrants would still be invalid because they do not state the grounds upon which they were issued." *U.S. v. Evans*, 574 F.2d at 355

The prosecution could have attempted to determine probable cause under Crim. R. 4(E)(2) for persons "arrested without a warrant." This would have required the court to hold a hearing to "find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial." Crim. R. 5 (B)(4)(b). This Court has repeatedly held that as "an officer may not make a warrantless arrest for a misdemeanor unless the offense is committed in the officer's presence." *State v. Henderson* (1990), 51 Ohio St. 3d 54, 56. A "law enforcement officer may arrest for a misdemeanor" only "when that officer has observed the commission of the offense." *Ohio v. Darrah* (1980), 64 Ohio St. 2d 22, 25. "Police officers in Ohio" can effect "a warrantless arrest for misdemeanor only where the offense has been committed in the officer's presence." *Ohio v. Mathews* (1976), 46 Ohio St. 2d 72, 76. In this case, the alleged criminal conduct occurred one year before the charges were filed and outside the arresting officer's presence.

This Writ is about the right guaranteed by the Fourth Amendment that prosecutions will not be undertaken without a prior probable cause determination. The Criminal Rules require probable cause under Crim. R. 4 (with arrest warrant) or under Crim. R. 5 (warrantless arrest). The Rules do not permit a trial without a prior probable cause determination. See Crim. R. 4(A)(1); Crim. R. 5 (B)(4)(b). Since the deputy clerks did not make probable cause determinations, Relators prosecution are proceeding in violation of the Fourth Amendment.

IV. CONCLUSION.

Relators suffered injuries by being arrested pursuant to an invalid warrant. If these cases proceed to trial, the injuries will be multiplied by forcing them to trial without a prior judicial determination of probable cause.

The trial court had assumed jurisdiction over these improperly commenced prosecutions. The Writ is necessary to correct the continuing Fourth Amendment violations. The custom at issue in this Complaint is longstanding and poses an ongoing risk to Realtors and the people of Mahoning County. It is a simple matter to correct the conduct of the police and prosecutor. Strangely, the Fourth Amendment is not ignored when the government seeks a search warrant, but only when the government seeks to arrest, a much more serious intrusion on our liberties. Police officers outside Austintown file criminal complaints throughout Ohio with sufficient facts to permit an independent probable cause determination. If deputy clerks must issue arrest warrants, then they should be trained and actually conduct probable cause reviews. The custom of abandoning the probable cause warrant for the rubber stamp warrant has forced thousands to be arrested, charged and tried without ever having a judicial officer determine if probable cause to arrest the accused ever existed.

Relators have sufficiently alleged an injury of a type to properly conclude that they lack an adequate remedy at law. "When a lower court totally lacks jurisdiction, the availability or adequacy of a remedy of appeal to prevent the resulting injustice is immaterial to the exercise of supervisory jurisdiction by a superior court to prevent usurpation of jurisdiction by the inferior court." *State ex rel. Connor v. McGough* (1989), 46 Ohio St. 3d 188, 192.[2]

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[2] *State ex rel. Connor v. McGough* (1989), 46 Ohio St. 3d 188 held that "Prohibition can be an important remedy to vindicate fundamental due process rights despite the existence of an appeal process. . . . [¶] the respondent trial judge is attempting to exercise personal jurisdiction not sanctioned by the United States Constitution or Ohio statutes. By issuing a writ of prohibition, we will stop needless, fruitless and protracted litigation when the end result is not in doubt. Respondent, having no personal jurisdiction over [Relator], is directed to dismiss [the civil] action." *Id.* at 192 (citations and internal quotations omitted)

WHEREFORE, Relators pray that this Court issue a peremptory writ of prohibition, or at a minimum an alternative writ of prohibition, followed by a final writ of prohibition, forbidding Respondents from exercising jurisdiction over these forty criminal complaints.

Respectfully submitted

James Vitullo (OH Bar No. 0015388)
5232 Nashua Drive, Suite 5
Austintown, Ohio 44515-5122
(330) 270-8571
(330) 270-9027
jamesavitullo@gmail.com

CERTIFICATE OF SERVICE

A copy of the forgoing Memorandum, the Complaint and Affidavits were hand delivered by the undersigned on January 19, 2011 to the Honorable Judge David D'Apolito of Mahoning County's Austintown County Court, at 6000 Mahoning Avenue, Austintown, Ohio 44515, and to the clerk of the Austintown County Court, at 6000 Mahoning Avenue, Austintown, Ohio 44515 Court.

James Vitullo (OH Bar No. 0015388)