ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

LAWRENCE A. DIBBLE,

Defendant-Appellee

Case No. 11-1569

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 10AP-648

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

There were three central points to the State's appeal below. First, the defense had characterized the hearing as a preliminary proceeding, a position which was adopted by the trial court, and the State was prejudiced when the court without notice proceeded directly to the full merits. Second, the detective's use of the word "victim" to describe one of the women involved was not intentionally or recklessly false, as shown by the trial court's concession that defendant's manipulation of that woman as a minor and young adult had reached a level of victimization. Third, evidence of the detective's sworn oral statements to the issuing judge could be considered in determining whether the detective acted in good faith and whether the warrant was supported by probable cause even without the "victim" characterization. The Tenth District majority erred in its assessment of these matters.

The police detective gave sworn oral information to the issuing judge that supported the issuance of the warrant and showed that the detective was acting in good faith. The detective's testimony about the sworn oral information was admitted without objection at the hearing, but the trial court later said it could not consider such unrecorded information.

The State's appeal directly challenged the constitutionality of Crim.R. 41(C), which excludes consideration of unrecorded sworn oral information. The State contended that the Fourth Amendment only requires that the information be given under oath or affirmation, and so the sworn oral information must be considered under the Fourth Amendment. The State also contended that Crim.R. 41(C) has an unconstitutional "substantive" effect in excluding evidence allowed by the Fourth Amendment. The Tenth District cited Crim.R. 41(C) but failed to mention or address the State's constitutional challenges to that rule.

Substantial reasons exist to review the State's first proposition of law. The federal Exclusionary Rule already imposes substantial costs on the truth-finding function of the courts. "The principal cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free * * *.'" *Montejo v. Louisiana* (2009), 129 S.Ct. 2079, 2090 (quoting *Herring v. United States* (2009), 129 S.Ct. 695). However, Crim.R. 41(C) multiplies those costs by preventing the full litigation of the Fourth Amendment issues. The guilty criminal gains a windfall twice over, with the courts refusing to consider sworn oral information, thereby tilting the case toward a finding of a Fourth Amendment violation that did not really occur, and then with the courts suppressing reliable evidence of guilt.

The truth suffered harm in other ways in this case. In its decision, the trial court *conceded* that E.K. had been victimized: "This Court would find few people, if any, who would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization." The dissent below correctly recognized that the majority and the trial court were applying an unduly legalistic understanding of "victim":

> {¶57} Here, the trial court interpreted the term "victim" to mean, and only to mean, "a person who is the object of a crime." I conclude, however, that it was improper for the trial court to apply such a limited definition. Specifically, it is improper for a court to invalidate warrants by interpreting the accompanying affidavits in a "hypertechnical" manner because the affidavits are drafted by nonlawyers in the midst and haste of a criminal investigation. *United States v. Ventresca* (1965), 380 U.S. 102, 108-09, 85 S.Ct. 741, 746.
>
> {¶58} Used more broadly, "victim" can mean (1) "a person who suffers from a destructive or injurious action," or (2) "a person who is deceived or cheated, as by his own emotions or ignorance, by the dishonesty of others, or by some impersonal

> agency." Webster's Encyclopedic Unabridged Dictionary (Random House 1997).
>
> {¶59} The trial court noted that few people "would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization." I agree. And, applying this characterization to what may have occurred between E.K. and appellee, an affiant could have reasonably concluded that E.K. was a "victim" under a definition broader than the one the court imposed. Therefore, the characterization of E.K. as a victim was not false, and the trial court erred by suppressing the evidence on that basis.

This issue is presented as the State's second proposition of law.

In the State's third proposition of law, the State addresses the Tenth District's mistakes about the course of proceedings in the trial court. According to the Tenth District, the State was contending that a *Franks* hearing must be bifurcated, but the State never made that contention. Instead, the State argued that, *in this particular case*, both the defense and the trial court had stated the hearing was preliminary in nature. And it was clear that the defense (and thus the court) were referring to the preliminary showing required by *Franks* in order to get a hearing. To be sure, the defense never should have obtained the hearing to begin with, having not yet made any substantial preliminary showing, but when the defense itself billed the hearing as preliminary, and when the court acquiesced, the State could rely on those statements. When the court later proceeded to the full merits without notice to the State, the State was prejudiced. Had it known the full merits were in play, the State could have called the issuing judge to confirm what the detective had told her under oath.

All three propositions of law warrant review, as the case presents substantial constitutional questions and questions of public or great general interest warranting

review. Review is also warranted upon leave in this felony case.

STATEMENT OF FACTS

Defendant was indicted on 20 counts of voyeurism and 1 count of sexual imposition. Sixteen voyeurism counts involved minor victims; there were 14 different minor victims. The evidence for the voyeurism counts had been discovered through the execution of a search warrant on February 3, 2010. The warrant affidavit stated the following:

> On February 2, 2010 Victim #1 reported to the Upper Arlington Police Department that while a student at The Wellington School one of her teacher's, Lawrence A. Dibble touched her inappropriately. Victim #1 stated that she was rehearsing line for a play with Dibble in the school when he asked for a reward for getting his lines correct. He asked to touch Victim #1's stocking on her leg. Upon touching the stocking Dibble then proceeded to run his hand up under Victim #1's skirt brushing his fingers across her vaginal area. Victim #1 stated she was shocked and froze as Dibble then ran his hands over her buttocks, and lower abdomen area. Victim #2 was with Victim #1 while she made the report. Victim#2 stated she also had inappropriate contact with Dibble. Victim #2 stated it was after she had graduated high school where Dibble had also been her teacher. Victim #2 stated that Dibble had taken photo's of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim #2 told investigators that Dibble used a digital camera to take the photo's, and made her wear a pillow case over her head while he took them.
>
> On February 2, 2010 Victim #1 went to The Wellington School at the direction of the Upper Arlington Police wearing a recording device. She had a conversation with Dibble about the inappropriate touching where he stated "I just wasn't thinking".
>
> Investigators from Upper Arlington believe Dibble's computers, camera's, media storage devices, etc. may contain correspondence, and photos to substantiate Victim #1 and Victim #2's claims.

The warrant was approved on February 3rd and authorized the seizure of, inter alia, computers, memory devices, and storage media. The warrant was executed the same day. The search resulted in the seizure of a laptop computer and other storage devices.

The defense filed a motion to suppress evidence seized from defendant's home. The motion contended that the inclusion of information regarding "Victim #2" had been intentionally false, as the person identified as "Victim #2" had been a consensual sex partner with defendant. The motion contended that the sole basis for seeking media storage devices in the warrant had been the false allegation that "Victim #2" was a "victim."

The State later filed a memorandum opposing the motion. The State contended, inter alia, that the "Victim #2" reference had not been false because the detective believed that she had been victimized. "Victim #2" had given specific details of defendant's actions that "consisted of manipulation and grooming that began while she was an impressionable student under his supervision at the Wellington School. This manipulation continued through her graduation and eventually resulted in her submitting to the defendant's deviant sexual demands in taking photographs of her vagina."

The court later convened a hearing. At the commencement of the hearing, defense counsel conceded he needed to make a preliminary showing: "I think initially, Judge, I do need to make a preliminary showing for the specific issue I've raised here * * *."

Counsel then called Detective Andrew Wuertz, who testified that he was involved in an investigation involving Wellington School in February 2010. Wuertz filed a criminal complaint for gross sexual imposition on February 3, 2010, and the only victim listed in that complaint was E.S. ("Victim #1").

Wuertz presented a request for a search warrant to Judge Peeples on February 3rd. Wuertz conceded that the search warrant affidavit did not describe the use of computers or picture taking regarding Victim # 1. Wuertz conceded that, as it applied to Victim #1, there was no probable cause to search the home of defendant, with Wuertz stating, "**[a]s far as what's written here, correct**." (Emphasis added)

Wuertz identified "Victim #2" as E.K. (also referred to as L.K. in the court's later decision). Wuertz testified that E.K. had described touching and other activities that occurred after she graduated from Wellington School and turned 18.

When questioned by the defense about whether E.K.'s activities had been consensual, Wuertz contended that the consensual nature was "debatable" and that he thought she had been a victim, although he did not file any charges in relation to E.K.

The gist of the defense questioning was that E.K. had permitted defendant to take the pictures. Wuertz responded, "Presenting it the way you're presenting it is not a full comprehension of what exactly their relationship was."

Defense counsel stated that he thought he had "gotten through, well through the window I need to get through." The court then asked the prosecutor whether the prosecutor was conceding that the preliminary showing had been made:

> THE COURT: Just so that we're clear here, I mean, Mr. Weisman made a comment that he's met his burden, so to speak.
>
> Are you admitting that and moving on to the State's part of their case, or are you just simply cross-examining this witness to rebut this burden that he needs to make?
>
> MR. HAWKINS: I'm simply cross-examining this witness.

THE COURT: Okay. Thank you.

Under the prosecutor's cross-examination, Wuertz indicated that the investigation began on February 2, 2010, when E.K., E.S., and E.S.'s mother came to the police to report what had happened to E.S. E.S. said that defendant was theater director at Wellington, and every year he picks a student to be his "right-hand" aide to assist him. Wellington is a K-12 school, and she had been involved in theater since 7th grade. He had become a father figure.

In April of her senior year, E.S. was working as that aide, rehearsing lines with defendant. She was wearing a skirt and stockings. Defendant commented that he liked how the stockings felt. "[A]s they were rehearsing lines, he said, 'As a reward every time I get my lines correct, I get to touch your stockings.' And she allowed him to do that." But the events that followed resulted in unwanted sexual contact, as defendant forced his hand up underneath her skirt, brushing his fingers against her vaginal area, and feeling her buttocks.

Wuertz testified about the unusual relationship between E.S. and defendant:

> A. Part of – part of her role as being an aide to him, I found to be kind of strange, was that she had to give him back massages. The back massages turned out to be – they would be in his office. He would close the door. He would remove his shirt back so that she could touch her hands against his skin, and she would have to rub his back basically any time he asked her to do so.
>
> Q. Did she indicate any other activity, either photographs or touching or otherwise?
>
> A. She did. She relayed that she felt kind of strange. There were times that Mr. Dibble took pictures of them in kind of – she described them as unitard suits in order for costumes for plays and that in describing those she said he would have them specific instructions to wear nothing underneath these unitard suits, and he would then take pictures of them wearing these unitard suits in some way to aid in the creation of costumes for

them.

> Q. And these unitards, they were somewhat see-through, you indicated?
>
> A. Correct. She described them as practically see-through, if not see-through.

Wuertz viewed E.S. as having been "brain-washed" or manipulated "to basically get her to do whatever he asked her to do."

Wuertz also interviewed E.K., whom he had described as "Victim # 2." Wuertz viewed E.K. as a victim:

> Q. * * * What did she tell you for you to think that she could in your mind at that time still be a victim?
>
> A. She described a very similar situation to what [E.S.] had described, starting in the 7th grade had been involved in theater, had been close with Mr. Dibble. She's a year older than [E.S.], had been his aide, had had to teach [E.S.] how to give massages to Mr. Dibble. She said that she had basically no father figure in her life, that she considered him as a father. In fact, I believe he would refer to himself to her as her stepdad or some kind of a situation like that.
>
> It was just all very similar to the way that he had kind of cultivated [E.S.] along.
>
> Q. Did she indicate any photographs or sexual relationship that took place when she was a student at Wellington?
>
> A. No. She confirmed about the photos that were taken of them in the unitard suits, but she did not say there was any inappropriate contact while she was in school.

When Wuertz went to see Judge Peeples seeking the search warrant, she swore him in and asked him to describe other things about the case:

> A. I believe I went back to a little more detail about how the relationship with these girls was started in 7th grade, how they

were cultivated to the point to where they were.

> I told her about the photographs of the unitards and the see-through unitards that they felt uncomfortable about, some just different things to give her a little bit more background than what was actually typed in the search warrant.
>
> I believe in that I said due to the possible see-through of the unitards I was very concerned about where those photos were and what exactly those were being used for.

When he typed the affidavit, Wuertz thought there was still a chance that defendant would be charged regarding E.K. "But, yes, as of today I still consider her a victim."

The court heard arguments from counsel at the conclusion of the hearing and took the matter under advisement. (T. 52) The hearing ended without the Court making a ruling on the question of whether the requisite preliminary showing had been made.

On July 1, 2010, the court filed a decision and entry addressing the full merits of the motion and granting the motion to suppress. The court found that the "victim" reference to E.K. was false, that Detective Wuertz knowingly and intentionally made the false statement, and that Wuertz used the false characterization of E.K. as "victim" in order to create probable cause to search defendant's home. The court refused to consider Wuertz' testimony that he had provided additional sworn oral information to Judge Peeples, stating that such information could not be considered because it was not transcribed.

The State filed a motion to reconsider or reopen the hearing on July 8, 2010. The State contended that the court had prematurely reached the merits. The State tendered the affidavit of Judge Peeples as to how she would have testified if called as a witness at the hearing. Judge Peeples confirmed that there was a conversation between herself and Wuertz:

> 6. When police or law enforcement officers apply for a search

> warrant there is always introductory and substantive information discussed in connection with the search warrant application. The applicant and court both understand that to be admissible at a subsequent motion to suppress that information must be transcribed. In this case there was conversation with Det. Wuertz when the search warrant application was submitted regarding the teacher, students who did not have a father figure in the home, that the court was generally familiar with Wellington school. The court concluded that based on the information contained in the search warrant affidavit that it was not necessary to have the search warrant reissued. Nor was it necessary to take the extraordinary step of seeking a court reporter to take down the additional comments or discussion with Det. Wuertz. The fact that such information was not taken down and transcribed does not mean that such discussion did not occur.

The Tenth District later rejected the State's appeal and affirmed in a 2-1 ruling.

ARGUMENT

Proposition of Law # 1: Sworn oral information provided to the issuing magistrate contemporaneous to the magistrate's review of a search warrant must be considered in determining the validity of the warrant under the Fourth Amendment and in determining the good faith of the officer, regardless of whether such information was recorded at the time. Criminal Rule 41(C) is unconstitutional in excluding unrecorded sworn oral information from later suppression hearings.

Wuertz testified that he gave sworn oral information to the issuing judge that defendant had photographed E.S. and E.K. in see-through unitards. Such photographs would have provided evidence relevant to the grooming of these two students and to defendant's long-term sexual purposes, including when he touched E.S. Such information readily provided probable cause for a search of defendant's computers etc. that would store such images. A warrant can issue for "mere evidence" that is relevant to a criminal prosecution. *Warden v. Hayden* (1967), 387 U.S. 294, 306.

Thus, even with the "victim" characterization removed, the warrant and subsequent

search could be upheld if such sworn oral information were considered. But the trial court and the Tenth District refused to consider such information based on Crim.R. 41(C).

The lower courts erred. Because the defense raised the *Franks* issue of Wuertz' state of mind, and because the good-faith exception was also relevant, the sworn oral statements were relevant to the determination of whether Wuertz acted intentionally or recklessly regarding the use of the word "victim" as to E.K. "[I]n determining whether the good faith exception to the exclusionary rule applies, numerous courts have held a trial court may look beyond the four corners of the affidavit and consider unrecorded oral testimony to determine whether the officer executing the search warrant did so in good faith reliance on the judge or magistrate's issuance of the search warrant." *State v. Oprandi*, 5th Dist. No. 07 CA 5, 2008-Ohio-168, ¶ 45; *State v. O'Connor*, 12th Dist. No. CA2001–08–195, 2002-Ohio-4122, ¶¶ 21-22; *United States v. Perez* (C.A. 4, 2004), 393 F.3d 457, 462.

The lower courts also erred in refusing to consider the sworn oral statements in assessing probable cause. Even if the "victim" reference was false, the search could be upheld under *Franks* if probable cause still supported the warrant. Defendant only invoked the Fourth Amendment, and he could obtain suppression thereunder only if the Fourth Amendment was violated. But the Fourth Amendment by its plain terms only requires *sworn* information for the issuance of a warrant: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, * * *." "[T]he Fourth Amendment does not forbid supplementation of written warrant affidavits with sworn, unrecorded oral testimony * * *." *United States v. Clyburn* (C.A. 4, 1994), 24 F.3d 613, 614. "The Fourth Amendment does not require that the basis for probable cause be established in a written affidavit; it merely

requires that the information provided the issuing magistrate be supported by 'Oath or affirmation.'" Id. at 617. "Moreover, the Amendment does not 'require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit.'" Id. (quoting *United States v. Shields* (C.A. 6, 1992), 978 F.2d 943, 946; also citing three other federal circuits).

Ohio statutory law also allows the consideration of unrecorded sworn oral information. See R.C. 2933.23 ("The judge or magistrate may demand other and further evidence before issuing the warrant."); *State v. Misch* (1970), 23 Ohio Misc. 47, 48; *State v. Hendricks* (1974), 70 Ohio Op.2d 421, 423.

While the use of unrecorded sworn testimony violates Crim.R. 41(C), see *State v. Shepcaro* (1975), 45 Ohio App.2d 293, 298, a violation of a mere state rule does not provide a basis for suppression. It was the *Fourth Amendment* exclusionary rule the defense was invoking, and "[t]he exclusionary rule has been applied by this court to violations of a constitutional nature only." *State v. Wilmoth* (1986), 22 Ohio St.3d 251, 262, quoting *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 234-235. "[T]he exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights." *Hollen*, 64 Ohio St.3d at 235.

A violation of Crim.R. 41 does not itself justify exclusion of evidence. *Wilmoth*, 22 Ohio St.3d at 262; *State v. Downs* (1977), 51 Ohio St.2d 47, 63-64. "Only a 'fundamental' violation of Rule 41 requires automatic suppression, and a violation is 'fundamental' only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards." *Wilmoth*, at 263 (quoting another case).

Also, a mere rule cannot create a "substantive" right. This Court's rule-making authority is limited to "procedural" matters. Article IV, Section 5(B), Ohio Constitution. "Substantive" is that "body of law which creates, defines and regulates the rights of the parties. The word substantive refers to common law, statutory and constitutionally recognized rights." *State v. Slatter* (1981), 66 Ohio St.2d 452, 455. Under such definition, the creation of an exclusionary rule would be a matter of "substantive" law. See *State v. Hennessee* (1984), 13 Ohio App.3d 436, 437. Criminal Rule 41(C) simply cannot amend the Constitution or create an exclusionary rule.

Although the rule is couched in terms of the admission of evidence at a subsequent suppression hearing, even a "procedural" rule can have a "substantive effect" if it is "so restrictive as to constitute a *de facto* abrogation or modification of the right itself." *State v. Greer* (1988), 39 Ohio St.3d 236, 246. Criminal Rule 41(C) would have such a substantive effect as its ultimate effect is to cut off the ability of the State to support the warrant with unrecorded sworn information allowed by the Fourth Amendment and by statute.

Proposition of Law # 2: The issue of falsity in a search warrant affidavit must be judged in light of the non-technical language used by nonlawyers.

The State adopts Judge French's dissent by reference here. Search warrant affidavits are drafted by nonlawyers and should be interpreted as such. *Ventresca*, 380 U.S. at 108.

The State also adopts the trial court's finding that "few people, if any, * * * would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization." The manipulation here was much more involved, and the grooming and manipulation of E.K. went back to her time as a student aide for defendant.

The judge reviewing the affidavit would have understood the "victim" reference to be a reference to a broader understanding of "victim," broader than just criminal victims.

> Proposition of Law # 3: When a court adopts the position that a hearing is preliminary in nature, the court shall give notice to the parties before proceeding to the full merits.

When moving to suppress based on the claim that a search warrant affidavit was knowingly or recklessly false, the defense must make a "substantial preliminary showing" by submitting "affidavits or sworn or otherwise reliable statements." *Franks v. Delaware* (1978), 438 U.S. 154, 171; *State v. Roberts* (1980), 62 Ohio St.2d 170, 177-78.

Defendant's motion referred to the need to make a "preliminary showing" but did not make it. Even so, the court convened a hearing, at the outset of which defense counsel conceded that the hearing was preliminary in nature: "I think initially, Judge, I do need to make a preliminary showing for the specific issue I've raised here * * *." After his direct examination of Wuertz, counsel contended that he had "gotten through, well through the window I need to get through." An exchange then occurred between the court and the prosecutor (see page 6-7, supra), indicating that the court was "okay" with the case being in "preliminary" mode. The hearing ended without a ruling on the preliminary-showing issue.

When litigation is proceeding in discrete stages, special care must be devoted to such stages so that the litigants have sufficient notice that the court is moving from one stage to the next. For example, converting a motion to dismiss into a motion for summary judgment without notice is erroneous. *Petrey v. Simon* (1983), 4 Ohio St.3d 154; see, also, *State v. Weaver* (2001), 141 Ohio App.3d 512, 516.

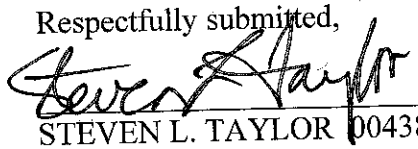
This concept also applies when the parties are proceeding in reasonable reliance that

the litigation is proceeding in stages. In *State v. Whiting* (1998), 84 Ohio St.3d 215, the trial court had originally ruled that the defense bore the burden of production on the "justifiable reason" issue. But the court later concluded that the State bore the burden and dismissed the charge. When the appellate court later agreed that the prosecution bore the burden, the appellate court still remanded for a further hearing, since the State had relied on the trial court's original ruling. This Court did not dispute the premise that reliance on the trial court's ruling would have warranted a reopened hearing, but the Court concluded that the State had not been misled in this particular case.

In the present case, the *defense* had billed the proceeding as a defense effort to make its preliminary showing. The court *adopted* that stance later when it questioned the prosecutor. In the end, the court *never* made the threshold finding that the necessary preliminary showing had been made, converting the preliminary issue into a decision on the merits without notice to the State. Unlike in *Whiting*, the State did not cause any confusion of the need for a preliminary showing and determination; the defense conceded that point.

The State's subsequent motion to reopen or reconsider confirms that it was prejudiced by the premature conversion. The State could have called Judge Peeples to testify about the sworn oral statements given by Wuertz at the time she approved the warrant.

Respectfully submitted,



STEVEN L. TAYLOR 0043876 (Counsel of Record)
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 16th day of Sept., 2011, to David H. Thomas, 511 South High Street, Columbus, Ohio 43215, counsel for defendant.

STEVEN L. TAYLOR

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	Horton
Plaintiff-Appellant,	:	No. 10AP-648
v.	:	(C.P.C No 10CR-03-1958)
Lawrence A. Dibble,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 4, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellant.

R. William Meeks Co., LPA, and *David H. Thomas,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiff-appellant, state of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to suppress of defendant-appellee, Lawrence A. Dibble. Because the trial court's findings of fact support the applicable legal standard for suppressing evidence, and thus also the trial court's decision to suppress the evidence the state obtained through the warrant at issue, we affirm.

A-1

I. Facts and Procedural History

{¶2} On February 3, 2010, Upper Arlington Police Detective Andrew Wuertz asked a Franklin County municipal court judge to approve a search warrant for defendant's home. Detective Wuertz sought the warrant after speaking with two young women, E.S. and E.K., who reported their past experiences with defendant, a theater instructor at a private school for students enrolled in kindergarten through twelfth grade. In the affidavit supporting the warrant, Detective Wuertz referred to E.S. as Victim #1 and E.K. as Victim #2.

{¶3} According to the warrant affidavit, defendant "inappropriately" touched the vaginal area and buttocks of his student, Victim #1, while they were at school. (Defense Ex. 1, Attachment 1.) Victim #1 later confronted defendant about the incident, and defendant said, "I just wasn't thinking." (Defense Ex. 1, Attachment 1.) Victim #2 "stated she also had inappropriate contact with" defendant. (Defense Ex. 1, Attachment 1.) The incident regarding Victim #2 occurred after Victim #2 graduated from the school where defendant was her teacher, and it involved defendant's taking photographs "of her nude vaginal area during one of their meetings where inappropriate touching was involved." (Defense Ex. 1, Attachment 1.) Detective Wuertz claimed he needed to search defendant's home because defendant's "computers, camera[s], media storage devices, etc. may contain correspondence, and photos to substantiate Victim #1 and Victim #2's claims." (Defense Ex. 1, Attachment 1.)

{¶4} The municipal court judge approved the warrant, and when it was executed, police seized a laptop computer, camera, and several tapes and DVDs from defendant's home. Based on the evidence obtained from that search, defendant was

indicted on 20 counts of voyeurism; he also was charged with one count of sexual imposition for sexually touching E.S. None of the charges pertained to E.K.

{¶5} Defendant filed a motion to suppress evidence obtained from the search of his home, arguing Detective Wuertz improperly referred to E.K. as a victim in the search warrant affidavit when E.K. was an adult and their sexual activity was consensual. The trial court held a hearing on the motion on June 29, 2010. At the commencement of the hearing, defense counsel noted, "I think initially, Judge, I do need to make a preliminary showing for the specific issue I've raised here." (Tr. 3.) The defense then called Detective Wuertz to testify.

{¶6} Detective Wuertz began by conceding the information he possessed regarding E.S. gave him no probable cause to search defendant's home. The subsequent questioning thus focused on E.K., or Victim #2. Defense counsel inquired of Detective Wuertz about using the term "Victim #2" to refer to E.K., which the detective admitted was used six times in the affidavit "in order to get a search warrant." (Tr. 17.) In response to the questions, Detective Wuertz agreed that, although E.K. told him defendant took pictures of her and sexually touched her, E.K. said those incidents occurred after she turned 18 and was no longer a student at the school where defendant taught. Detective Wuertz, however, stated that whether E.K. consented to the activity was "debatable." (Tr. 15.) Detective Wuertz testified defendant and E.K. were "consenting adults" only in a "strict definition" of that phrase. In response to counsel's asking whether E.K. was merely a "jilted lover" whose concern about her relationship with defendant arose only after she learned of defendant's incident with E.S., Detective Wuertz replied, "I think it's inaccurate to call her a lover." (Tr. 18.) The detective

nonetheless acknowledged that E.K. said defendant visited her at her home in Maine, went to New York City with her to see a Broadway show, and shared a carriage ride in Central Park. Detective Wuertz did not file any charges pertaining to E.K.

{¶7} Despite such activity, the detective stated he thought E.K. was a victim. Defense counsel explored that statement, inquiring of other paperwork the detective completed in the case. The detective's testimony revealed he did not include E.K. as a victim in any other form he completed on the case, including the complaint and the U-10.100, both of which were completed either the same day or the day before the affidavit supporting the search warrant request was presented to the court. The detective conceded he had no basis to charge defendant with a crime as to E.K.

{¶8} When defense counsel finished his direct examination of Detective Wuertz, he said he thought he had "gotten through * * * the window I need to get through." (Tr. 22.) The trial court asked the prosecutor if he was "admitting" the defense met its burden and "moving on to the State's part of their case," or if he was "simply cross-examining this witness to rebut [the defense's] burden." (Tr. 22-23.) The prosecutor said, "I'm simply cross-examining the witness." (Tr. 23.)

{¶9} Detective Wuertz first testified on cross-examination about defendant's sexual activity with E.S. According to the detective, E.S. had been defendant's student since seventh grade, and E.S. considered defendant a father figure. In April of her senior year, E.S. was working as defendant's aide and rehearsing lines with him. Defendant told E.S., " 'As a reward every time I get my lines correct, I get to touch your stockings.' And she allowed him to do that." (Tr. 25.) Another time, after defendant correctly recited his lines, he said, "I believe I deserve a reward for that." (Tr. 25.) E.S.

was standing in front of him, and he brushed his fingers against her vaginal area and felt her buttocks. E.S. told Detective Wuertz that the sexual contact was unwanted, and she wrote defendant a letter about it. Defendant tore the letter and threw it away, saying, "You can't tell anyone about this, or it will ruin my life." (Tr. 28.)

{¶10} Defendant also required E.S. to give him back massages, lifting his shirt for her to "touch her hands against his skin." (Tr. 26-27.) Although not included in the affidavit supporting the warrant, Detective Wuertz' testimony included information that defendant also took pictures of her and other students in unitard suits, instructing the students not to wear anything underneath the suits, which were "practically see-through, if not see-through." (Tr. 27.) Detective Wuertz concluded defendant "brain washed" or manipulated E.S. so she would do whatever he asked of her. (Tr. 27.)

{¶11} Detective Wuertz thought E.K. was also a victim of defendant because "[s]he described a very similar situation to what [E.S.] had described." (Tr. 29.) Detective Wuertz stated E.K.'s relationship with defendant started when she became involved in theater in the seventh grade. She, too, considered defendant a father figure, and defendant would even refer to himself as her stepfather. She also was a former aide to defendant who taught E.S. how to give him massages. Detective Wuertz said he thought E.K. was a victim because defendant deceived her into allowing him to photograph her vaginal area under the guise of wanting to study her "internal energy." (Tr. 36.)

{¶12} Detective Wuertz testified that, when he was writing the warrant affidavit, he thought defendant might be charged with a crime for his conduct with E.K., and he stated that, "as of today I still consider her a victim." (Tr. 37.) According to Detective

Wuertz, he described, in the warrant affidavit, defendant's touching E.K. as "inappropriate" because "it was very evident she was very conflicted about what had happened, that although she would reluctantly say it was consensual, she also would say she wasn't comfortable with it, and that the way that he touched her in order to take some of the pictures, she wasn't completely comfortable with." (Tr. 35.)

{¶13} Detective Wuertz went to the municipal court judge to obtain a search warrant, where she swore him as a witness and asked him about his investigation. Detective Wuertz testified at the suppression hearing that he told the judge about defendant's relationship with E.K. and E.S. Detective Wuertz mentioned not only that defendant took pictures of them while they were in unitards but that they were uncomfortable with such activity.

{¶14} On redirect examination, defense counsel presented the detective with yet another document he completed, the Ohio Uniform Incident Report, completed on Februrary 2, 2010, and reviewed by his sergeant on February 3, 2010, the day the detective sought the search warrant. Not only did the form not include E.K. as a victim, but Detective Wuertz specifically noted on the form only one victim. Although Detective Wuertz stated he later could have added a victim to the report, he did not add E.K. as a victim to the form because he lacked probable cause that defendant committed a crime against E.K. Defense counsel asked the detective why, given that admission, he referred to E.K. as a victim in the search warrant affidavit, and Detective Wuertz replied, "At the time that I typed the search warrant, we were still continuing the investigation. I believed that [E.K.] could potentially still be a victim." (Tr. 44.)

{¶15} The trial court inquired whether the parties had any further evidence to present. When both declined, the state requested the opportunity to present a closing argument that, as given, addressed the merits of defendant's motion to suppress evidence; defendant responded. After ascertaining neither party had anything further, the court stated it would take the matter under advisement, explaining it would not rule from the bench but would issue a "brief" decision later. (Tr. 52.)

{¶16} On July 1, 2010, the trial court issued a written decision and entry granting defendant's motion to suppress. Although acknowledging defendant's behavior was reprehensible, the court concluded Detective Wuertz "lacks credibility in regards to his reasoning" for referring to E.K. as a victim in the search warrant affidavit. The court decided Detective Wuertz knowingly and intentionally made a false statement when he characterized E.K. as a victim in the search warrant affidavit, and he used the false characterization to create probable cause to search defendant's home. The court declined to consider Detective Wuertz' testimony about the oral statements made to the municipal court judge, noting not only that no "record" of the statements existed, but that Detective Wuertz' testimony about the statements also lacked credibility. Lastly, the court concluded Detective Wuertz' references to E.S. as a victim in the search warrant affidavit did not create probable cause for the search of defendant's home.

{¶17} The state filed a motion for reconsideration, arguing that although the June 29, 2010 hearing "was represented to be limited to the threshold question of whether the defense made a sufficient preliminary showing of the need for a full hearing," the court's "decision and entry prematurely reached the full merits of the issues, rather than merely determining whether a full hearing should occur." The state

claimed that, had the court proceeded with a full hearing, the municipal court judge who issued the search warrant for defendant's home would have testified to the additional information set forth in an affidavit attached to the motion for reconsideration.

{¶18} According to the affidavit, the judge confirmed she had a conversation with Detective Wuertz about defendant when the search warrant was requested, but a court reporter did not record the conversation or transcribe it. (Affidavit, ¶6.) In addition, the judge surmised Detective Wuertz did not lie to her when he referred to E.K. as a victim in the search warrant affidavit. Relying on her experience as a former assistant city prosecutor who not only was familiar with how police conduct their investigations but worked with victims and witnesses herself, the judge said, "I believe that the word 'victim' and the reference to 'victim #2' is broader than a reference to someone who is the victim of a criminal act for whom a criminal complaint may be filed at that point against a named defendant." (Affidavit, ¶5.)

{¶19} The judge also noted from her experience that "a victim may or may not evolve into a prosecuting witness," and she "understood from the affidavit that 'victim #2' had graduated and there was a touching believed to be inappropriate that was under continuing investigation by the Detective." (Affidavit, ¶5.) The trial court declined to rule on the motion for reconsideration because the state had already filed an appeal.

II. Assignments of Error

{¶20} The state assigns the following errors on appeal:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT PREJUDICIALLY ERRED IN GOING BEYOND THE THRESHOLD QUESTION OF WHETHER THE DEFENSE HAD MADE A SUFFICIENT PRELIMINARY

SHOWING TO JUSTIFY A FULL HEARING ON THE MOTION TO SUPPRESS.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN CONCLUDING THAT THE DEFENSE HAD SHOWN INTENTIONAL OR RECKLESS FALSITY, ESPECIALLY IN LIGHT OF THE SWORN ORAL STATEMENTS MADE BY THE OFFICER CONTEMPORANEOUS TO THE JUDGE'S APPROVAL OF THE WARRANT.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN REFUSING TO FIND THAT THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIED.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN CONCLUDING THAT THE SEARCH WARRANT FOR DEFENDANT'S HOME COULD NOT HAVE ISSUED WITHOUT THE "VICTIM # 2" CHARACTERIZATION.

III. Motion to Strike

{¶21} Defendant filed a motion to strike sections of the state's brief that rely on the municipal court judge's affidavit, asserting the affidavit is not part of the appellate record since the trial court did not have it when it ruled on defendant's motion to suppress. Pursuant to App.R. 9(A), "[t]he original papers and exhibits thereto filed in the trial court * * * shall constitute the record on appeal in all cases." Here, the state submitted the affidavit to the trial court as part of its motion in response to the court's decision granting defendant's motion to suppress, and the affidavit was transmitted to this court as part of the record. Because the affidavit is part of the appellate record, we

deny defendant's motion to strike. We address later whether the evidence may be considered in determining the appeal.

IV. First Assignment of Error – Scope of Hearing

{¶22} The state's first assignment of error asserts the trial court erred when it granted defendant's motion to suppress following the June 29, 2010 hearing. The state contends the hearing was meant to address only whether defendant made a preliminary showing to justify a full evidentiary hearing.

{¶23} Defendant's motion to suppress asserted the warrant authorizing the search of his home was invalid because the accompanying affidavit contained false statements. In *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, the United States Supreme Court established the procedure for challenges to the veracity of a search warrant affidavit. The defendant initially must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and * * * the allegedly false statement is necessary to the finding of probable cause." Id. at 155-56, 98 S.Ct. at 2676. At this preliminary stage, the defendant must provide "an offer of proof which specifically outlines the portions of the affidavit alleged to be false, and the supporting reasons for the defendant's claim." *State v. Roberts* (1980), 62 Ohio St.2d 170, 178, cert. denied, 449 U.S. 879, 101 S.Ct. 227. "This offer of proof should include the submission of affidavits or otherwise reliable statements, or their absence should be satisfactorily explained." Id. If the defendant satisfies his or her preliminary burden, the defendant is entitled to a hearing on his motion to suppress. *Franks,* 438 U.S. at 156, 98 S.Ct. at 2676.

{¶24} The state urges us to construe the two-step procedure in *Franks* as requiring two separate evidentiary hearings. Although the state points to no case law indicating the *Franks* analysis requires such a bifurcated process, the state asserts it was prejudiced when the trial court combined the two prongs of the *Franks* analysis into a single hearing and resolved them in a subsequent decision and entry.

{¶25} To support its argument, the state notes defendant conceded at the beginning of the hearing that he did "need to make a preliminary showing for the specific issue I've raised here, so we would call Detective Andrew Wuertz from Upper Arlington Police Department." (Tr. 3.) After defendant presented Detective Wuertz' testimony, the trial court specifically asked the state whether it was "admitting" defendant satisfied its initial burden or whether the state intended to "simply cross-examinin[e] this witness to rebut his burden that [defendant] needs to make." (Tr. 22-23.) The state stated it was "simply cross-examining [the] witness." (Tr. 23.)

{¶26} Defendant responds to the state's argument by asserting the state waived its *Franks* argument. Defendant initially notes the state did not object in the trial court when the court combined the two *Franks* steps into one hearing. Secondly, defendant argues the state waived any objection when it argued the merits of defendant's motion to suppress both in its memorandum opposing defendant's motion and in its closing arguments during the hearing. The state argues it could not have waived its *Franks* argument in the trial court because the court was not clear that it intended to deviate from the *Franks* procedure until it issued its decision and entry granting defendant's motion to suppress.

{¶27} The procedure *Franks* outlined contemplates two distinct processes concerning an attack on a search warrant affidavit, one procedural and one more substantive. The first step in the *Franks* analysis requires a defendant to make a preliminary showing, presumably through a motion, that the search warrant affidavit contains intentionally false information. If the court determines the defendant made that preliminary showing, then defendant is entitled to a hearing on his motion. *Franks,* 438 U.S. at 155-56, 98 S.Ct. at 2676.

{¶28} The second step in the *Franks* analysis, the hearing, requires a defendant, in attacking the validity of a search warrant affidavit, not only to establish by a preponderance of the evidence that the affidavit contained intentionally or recklessly false information, but also to show that without that false information, the affidavit contained insufficient content to establish probable cause, meaning the fruits of the search must be suppressed. Id. The issue here is what the trial court intended when at the hearing it referred to defendant's initial burden.

{¶29} Defendant filed his motion to suppress on May 12, 2010, arguing the search warrant affidavit contained intentionally false information; the state opposed defendant's motion with a memorandum addressing the merits of defendant's arguments, but not referring to an initial showing under the procedural aspects of the first step of *Franks*. The trial court, through the act of granting a hearing on the matter, apparently concluded defendant satisfied his burden under the first step of *Franks* and was entitled to a hearing under the second step of *Franks*.

{¶30} Accordingly, when not only the trial court, but also defendant, consistent with his written motion that referred to a "preliminary showing" under the second step of

Franks, both mentioned defendant's "preliminary showing" and initial "burden" during the hearing, they referred to the second step of the *Franks* analysis requiring defendant to establish, by a preponderance of the evidence, that the affidavit contained intentionally false information. The trial court's decision and entry bolster such a conclusion by including the citation to, and explanation of, the second step of the *Franks* analysis in determining defendant, at the hearing, satisfied its initial burden of demonstrating the affidavit contained intentionally false information. (Decision and Entry, 3.)

{¶31} Further supporting the conclusion that the initial "burden" the trial court referred to was in the second step of the *Franks* analysis, the trial court's decision and entry specifically concluded that "the first prong of the *Franks* test has been satisfied," and then proceeded to determine whether "the remaining allegations in the warrant, without the false language, constitute probable cause." (Decision and Entry, 8.) Such language represents a straight-forward application of the two parts of the second step of the *Franks* analysis. The trial court properly complied with both steps of the two-step *Franks* analyses in granting defendant a hearing and then, based on the hearing, determining defendant's motion to suppress.

{¶32} Even if the trial court failed to comply precisely with the procedure in *Franks*, the state does not demonstrate prejudice. The state asserts only that it intended to call the municipal court judge, who issued the warrant, to testify about Detective Wuertz' sworn statements at the time he requested the warrant. A court, however, cannot rely on sworn testimony that was not properly recorded and transcribed. *State v. Shepcaro* (1975), 45 Ohio App.2d 293, 298 (concluding that pursuant to Crim.R. 41(C),

"supplemental testimony taken orally by the judge from an affiant" applying for a search warrant "will not be admissible at a hearing to suppress unless that testimony has been recorded by a court reporter or recording equipment, transcribed and made part of the affidavit"). Moreover, to the extent the municipal court judge would testify she believed Detective Wuertz was being truthful and his using the term "victim" was appropriate, such testimony would serve only to duplicate what is already known: the municipal court judge determined probable cause existed at the time she issued the search warrant. Had she not believed Detective Wuertz, she presumably would not have issued the warrant.

{¶33} For the stated reasons, the state's first assignment of error is overruled.

V. Second Assignment of Error – Intentional or Reckless Falsity

{¶34} The state's second assignment of error asserts the trial court erred in concluding defendant carried his burden to prove the affidavit supporting the search warrant contained intentional or reckless falsity.

{¶35} "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision granting the motion to suppress is twofold. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. Id., citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must independently determine, as a matter of law, whether the facts meet

the applicable legal standard. Id., citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627.

{¶36} In his motion to suppress, defendant argued Detective Wuertz intentionally or recklessly included false information in his affidavit to create probable cause for the search warrant. To "successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.' " *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶31, cert. denied, 548 U.S. 912, 126 S.Ct. 2940, quoting *State v. Waddy* (1992), 63 Ohio St.3d 424, 441, quoting *Franks,* 438 U.S. at 155-56, 98 S.Ct. at 441. " 'Reckless disregard' means the affiant had serious doubts about the truth of an allegation." Id., citing *United States v. Williams* (C.A.III., 1984), 737 F.2d 594, 602, cert. denied, 470 U.S. 1003, 105 S.Ct. 1354. "Omissions count as a false statement if 'designed to mislead, or * * * made in reckless disregard of whether they would mislead, the magistrate.' " Id., quoting *United States v. Colkley* (C.A.4, 1990), 899 F.2d 297, 301. A person's intent or culpable mental state is a question of fact for the trial court. See, e.g., *Wissler v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 09AP-569, 2010-Ohio-3432, ¶33, quoting *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 2006-Ohio-2957, ¶57, quoting *B&J Jacobs Co. v. Ohio Air, Inc.*, 1st Dist. No. C-020264, 2003-Ohio-4835, ¶10; *State v. Mason*, 6th Dist. No. L-06-1404, 2008-Ohio-5034, ¶69, citing *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶106.

{¶37} The trial court factually concluded "Detective Wuertz's reasons for listing E.K. as a 'victim' only on the search warrant," but on no other documents introduced at

the hearing, "are intentionally misleading and false." (Decision and Entry, 5.) As the court explained, "Detective Wuertz fully understood at the time he petitioned the court for a search warrant that he did not have probable cause for any criminal charge against Defendant as it relates to [E.K.] and lacked a good faith belief that the information he possessed would lead to any future charges." (Decision and Entry, 5-6.) With that premise, the trial court specifically concluded "Detective Wuertz knowingly and intentionally included the false characterization of [E.K.] in order to create probable cause to search Defendant's home." (Decision and Entry, 7.) The record contains competent, credible evidence supporting the trial court's factual determination.

{¶38} The trial court relied on Detective Wuertz' own testimony that the detective had no probable cause either to search defendant's home regarding his conduct with E.S. or for a charge against defendant regarding his conduct with E.K. Indeed, the detective acknowledged he had no basis to search defendant's home apart from the activities related to E.K.

{¶39} Moreover, the trial court considered the three different forms Detective Wuertz used in his investigation where, though given the opportunity, Detective Wuertz never noted E.K. was a victim. Initially, the court pointed to the complaint filed regarding E.S. that failed to reference E.K. "as a victim or otherwise." (Decision and Entry, 6.) The court further observed that Detective Wuertz did not mention E.K. in the Arrest Information Form. Finally, Detective Wuertz did "not mention [E.K.] in his Ohio Uniform Incident U-10 Report and specifically notes that only '1' victim is involved." (Decision and Entry, 7.) Although Detective Wuertz testified he personally considered E.K. to be a victim, the court pointed out he never filed "a complaint, u-10 report, or arrest report

specifically as it pertains to [E.K.]." (Decision and Entry, 7.) Rather, the trial court found "Detective Wuertz knows the definition of victim and deliberately chose not to include [E.K.] in any of his other police documents." (Decision and Entry, 8.)

{¶40} The trial court, as the finder of fact, must determine issues of credibility and weight of the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Here, competent, credible evidence supported the trial court's factual determination that "Detective Wuertz knowingly and intentionally included the false characterization of [E.K.]" in the search warrant affidavit "in order to create probable cause to search Defendant's home." (Decision and Entry, 7.)

{¶41} The state nonetheless focuses on the meaning of the word "victim," arguing the detective personally believed E.K. to be a victim. See *United States v. Garcia-Zambrano* (C.A.10, 2008), 530 F.3d 1249, 1256 (noting an appellate court need not defer to a district court's interpretation of an affidavit "where the district court's interpretation of the affidavit is based solely on the court's reading of the written words in the affidavit"). *Garcia-Zambrano*, however, goes on to conclude that "[w]here the district court uses extrinsic evidence to determine what the affidavit means, [an appellate court] will reject the [lower] court's interpretation only if clearly erroneous." Id.

{¶42} Here, the trial court did not rely solely on the written affidavit. Rather, the trial court considered Detective Wuertz' testimony that sought to explain why the detective used the term "victim" to refer to E.K. in the affidavit but did not use that term to describe E.K. in any other documentation. The trial court specifically concluded Detective Wuertz "lacks credibility in regards to his reasoning of using [E.K.] in the affidavit." (Decision and Entry, 9.)

{¶43} The trial court noted most people would agree that "even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization," but such circumstances do not satisfy the constitutional standards for a search for criminal activity. (Decision and Entry, 7.) Read in that context, the trial court's including the Black's Law Dictionary definition of "victim" in its decision was not in an attempt to apply an overly rigid standard for language used in a search warrant affidavit, but to contrast the meaning "victim" ordinarily has in a criminal investigation, such as the various forms Detective Wuertz completed, with the detective's application of personal beliefs. The trial court determined Detective Wuertz understood E.K. was not a "victim" in the criminal sense, so his using that term six times in the search warrant affidavit, as compared to a single reference to E.S., amounted to Detective Wuertz' knowingly and intentionally including false information in the affidavit in order to establish probable cause.

{¶44} Because competent, credible evidence supports the trial court's specific factual determination that Detective Wuertz knowingly and intentionally included false information in his search warrant affidavit in order to establish probable cause to search defendant's house, the trial court's decision to suppress the evidence obtained as a result of the search complies with applicable law. *Franks*. The state's second assignment of error is overruled.

VI. Third Assignment of Error – Good Faith Exception

{¶45} The state's third assignment of error argues the trial court erred in refusing to apply the good-faith exception to the exclusionary rule.

{¶46} Under the good-faith exception, the Fourth Amendment exclusionary rule should not operate to suppress evidence officers obtained when acting in objectively reasonable reliance on a search warrant that a detached and neutral magistrate or judge issued but ultimately is determined to be lacking in probable cause. *United States v. Leon* (1984), 468 U.S. 897, 922-23, 104 S.Ct. 3405, 3420-21. "*Leon* teaches that * * * the police officer may rely upon the legal judgment and decision of the judge as to the propriety for the issuance of the warrant." *Columbus v. Wright* (1988), 48 Ohio App.3d 107, 112. More recently, the United States Supreme Court phrased the issue in terms of an officer's "objectively reasonable reliance" on a warrant. *State v. Geiter*, 190 Ohio App.3d 541, 2010-Ohio-6017, ¶39, appeal not allowed, 128 Ohio St.3d 1445, 2011-Ohio-1618, citing *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695.

{¶47} As the trial court noted in its decision, *Herring* involved a computer error that generated an invalid warrant, and the Supreme Court determined the police acted in good faith in relying on the defective warrant. Here, by contrast, no electronic or other mechanical error occurred. Instead, the trial court determined Detective Wuertz deliberately included false information in his affidavit in order to obtain the search warrant. Given that one of the primary goals of the exclusionary rule is to deter deliberate police misconduct, this is not a situation where the good-faith exception applies. *Herring*, 555 U.S. at 144, 129 S.Ct. at 702.

{¶48} Accordingly, the state's third assignment of error is overruled.

VII. Fourth Assignment of Error – Issuance of Search Warrant absent "Victim #2"

{¶49} The state's fourth assignment of error asserts the trial court erred in concluding the search warrant for defendant's home could not have issued without the "Victim #2" characterization used to describe E.K.

{¶50} Under *Franks*, if a defendant satisfies its burden that a search warrant affidavit contains intentionally false information, the search warrant remains valid only if the remaining allegations in the affidavit are sufficient to constitute probable cause. *Franks*, 438 U.S. at 156, 98 S.Ct. at 2676. Having determined Detective Wuertz' use of the "Victim #2" in the affidavit was intentionally false and misleading, the trial court looked to the remaining allegations in the affidavit. All that remained were E.S.' statements that defendant inappropriately touched E.S. while she was a student at school. Nothing in the affidavit ties E.S.' allegations to any criminal conduct or evidence at defendant's home. Indeed, the detective admitted that the affidavit, as it relates to E.S. only, presented no basis to search defendant's house.

{¶51} The state nonetheless asserts a warrant can issue for "mere evidence" having a nexus to criminal behavior. *Warden v. Hayden* (1967), 387 U.S. 294, 307, 87 S.Ct. 1642, 1650. Even if E.K. were not a victim in her own right, the state argues that E.K. was still a witness with valuable information regarding potential evidence at defendant's home that might aid in defendant's conviction for the crime committed against E.S.

{¶52} Although E.S. asserted defendant photographed her, she did not allege any conduct took place at defendant's home. She alleged defendant touched her inappropriately on school grounds and photographed her at an undisclosed location. We

note, however, E.K. mentioned the photographs and added that no inappropriate touching occurred with her at school, thus suggesting the photographs were taken at school. Further, E.K.'s statements about defendant's photographing her pertained solely to E.K.'s consensual conduct with defendant. E.K. did not allege defendant photographed anyone other than her, and she did not assert she had knowledge that defendant possessed explicit photographs of anyone other than her. Lastly, the affidavit supporting the warrant did not mention the photographs. Under *Hayden*, the state lacked probable cause to search defendant's home. Accordingly, the state's fourth assignment of error is overruled.

VIII. Disposition

{¶53} Having overruled the state's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Motion to strike denied;
judgment affirmed.

TYACK, J. concurs.
FRENCH, J. dissents.

FRENCH, J., dissenting.

{¶54} In the second assignment of error, appellant contends that the trial court erred by concluding that Detective Wuertz intentionally included false information within the warrant affidavit in order to create probable cause for the warrant. I agree.

{¶55} Appellee argued in his motion to suppress that Detective Wuertz lied when referring to E.K. as a victim in the search warrant affidavit. To successfully attack the veracity of a search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either knowingly and intentionally or

with reckless disregard for the truth. *Franks v. Delaware* (1978), 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676. Even if the search warrant affidavit contains false statements of that type, the warrant is still valid unless, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." Id. at 156, 98 S.Ct. at 2676. Here, the trial court found that (1) the affidavit's characterization of E.K. as a "victim" was false and misleading, and (2) Detective Wuertz provided this false information knowingly, intentionally, and in order to create probable cause to search appellee's home.

{¶56} In reviewing appellee's motion to suppress, we must accept the trial court's factual and credibility determinations if they are supported by competent, credible evidence. See *State v. Tolliver*, 10th Dist. No. 02AP-811, 2004-Ohio-1603, ¶38. We need not, however, defer to the court's interpretation of the language of the warrant affidavit itself. See *United States v. Garcia-Zambrano* (C.A.10, 2008), 530 F.3d 1249, 1256 (holding that, where a district court's interpretation of a written warrant affidavit is based solely on the court's reading of the written words in the affidavit, the appellate court will not defer to the trial court's interpretation).

{¶57} Here, the trial court interpreted the term "victim" to mean, and only to mean, "a person who is the object of a crime." I conclude, however, that it was improper for the trial court to apply such a limited definition. Specifically, it is improper for a court to invalidate warrants by interpreting the accompanying affidavits in a "hypertechnical" manner because the affidavits are drafted by nonlawyers in the midst and haste of a criminal investigation. *United States v. Ventresca* (1965), 380 U.S. 102, 108-09, 85 S.Ct. 741, 746.

{¶58} Used more broadly, "victim" can mean (1) "a person who suffers from a destructive or injurious action," or (2) "a person who is deceived or cheated, as by his own emotions or ignorance, by the dishonesty of others, or by some impersonal agency." Webster's Encyclopedic Unabridged Dictionary (Random House 1997).

{¶59} The trial court noted that few people "would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization." I agree. And, applying this characterization to what may have occurred between E.K. and appellee, an affiant could have reasonably concluded that E.K. was a "victim" under a definition broader than the one the court imposed. Therefore, the characterization of E.K. as a victim was not false, and the trial court erred by suppressing the evidence on that basis.

{¶60} I have not considered whether suppression may be appropriate on other grounds. Rather, I would sustain appellant's second assignment of error only to the extent that it argued the trial court erred by concluding that the characterization of E.K. as a victim was false. Because the majority has determined otherwise, I respectfully dissent.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 10AP-648
v.	:	(C P C No 10CR-03-1958)
Lawrence A. Dibble,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 4, 2011, having denied defendant's motion to strike, and having overruled the state's four assignments of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed to plaintiff.

BRYANT, P.J. and TYACK, J.

By _____
Judge Peggy Bryant

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