ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO,	:	NO. 11-1569
Plaintiff-Appellant,	:	On Appeal from Franklin County Court of Appeals, Tenth Appellate District
vs.	:	
LAWRENCE A. DIBBLE,	:	Court of Appeals Case Number 10AP-648
Defendant-Appellee.	:	

AMICUS CURIAE'S MEMORANDUM IN SUPPORT OF JURISDICTION

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Interest of Amicus Curiae

The Ohio Prosecuting Attorneys Association is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: "To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members." The OPAA has a great interest in how the affidavits that police officers draft to obtain search warrants are reviewed.

Explanation of why this case is a case of public or great general interest and does involve a substantial constitutional question

The affidavits that are used to obtain search warrants are rarely, if ever, drafted by someone with a formal legal education. They are written by officers who are often in a rush to obtain a search warrant so that evidence can be quickly obtained and so criminals can be stopped before they cause even more harm. Because the people who draft those affidavits are often in a rush, under great pressure, and not lawyers, courts should not apply rigid or hypertechnical definitions to the terms that are used in affidavits.

That, however, is what happened below. The detective that was investigating whether a teacher was committing sexual crimes against his students had interviewed two people who were familiar with the teacher. Legally, only one was a victim in the sense used by courts. The other, though not the victim of any crime, had been victimized.

To protect their identities, the detective referred to them as Victim #1 and Victim #2. He set forth what his investigation had uncovered about the teachers interactions with both of them. He was sure to include facts that showed Victim #1 was the victim of a crime whereas Victim #2 was not.

The lower courts found that the detective referring to Victim #2 with the word "victim" was done to intentionally mislead the judge and was equivalent to him lying to obtain the warrant.

This case is about more than whether the lower courts were just wrong. It is about this Court offering guidance to not only lower courts, but to those who draft affidavits everyday. These affidavits are written every day. This Court's guidance on how they are to be written will, therefore, be of great importance to all of Ohio.

Statement of the Case and Facts

Amicus adopts the statement of the case and facts presented by the State of Ohio.

Argument in Support of the State of Ohio's Second Proposition of Law

Proposition of Law No. 2: The issue of falsity in a search warrant affidavit must be judged in light of the non-technical language used by nonlawyers.

Nearly a half century ago, in *United States v. Ventresca*, the United States Supreme Court recognized that affidavits used to obtain search warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation" and that the "[t]echnical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."[1] It went on to caution that "[a] grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."[2] In other words, "[p]robable cause exists when the affidavit demonstrates in some trustworthy fashion the likelihood that an offense has been or is being committed."[3]

The affidavit in question here reads as follows:

"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

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[1] *United States v. Ventresca* (1965), 380 U.S. 102, 108-109, 86 S.Ct. 741, 13 L.Ed.2d 684.
[2] *Id.*
[3] *United States v. Santana* (1st Cir. 2003), 342 F.3d 60, 65, cert. denied, (2004) 540 U.S. 1206, 124 S.Ct. 1478, 158 L.Ed.2d 129.

made the report. Victim #2 stated that she also had inappropriate contact with Dibble. Victim #2 stated it was after she 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."[4]

The Tenth District found that the officer's use of the terms "Victim #1" and "Victim #2" to label the young women he had been speaking with was improper and that it amounted to the officer lying to obtain the warrant. The Tenth District's decision sets dangerous precedent for two reasons.

First, the validity of an affidavit should not turn on the pseudonym that an officer chooses to use when trying to protect a person's identity. In the affidavit, the officer chose to use the terms "Victim #1" and "Victim #2" instead of the names or initials of the young women that were involved in this case. Whether an officer chooses to use E.S. and E.K. or Victim #1 and Victim #2 or Girl 1 and Girl 2 or any other term should not affect the validity of an affidavit. Yet that is what happened here.

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[4] Search Warrant Affidavit (all grammatical and spelling errors sic).

To only aggravate matters, the Tenth District improperly over emphasized the labels that the detective attached to each young woman by incorrectly counting how many times the detective referred to each (the lower court claimed Victim #1 was only referred to once whereas Victim #2 was referred to six times; a review of the affidavit shows each was referred to six times).

Officers should not be forced to second guess what pseudonyms they give to people nor how often they use them when drafting affidavits. What should matter is if the facts set forth in the affidavit establish probable cause. If allowed to stand, the Tenth District's decision will force police to focus not only on reciting facts, but also in doing so in a way that is, for want of a better term, sufficiently neutral enough to survive later judicial scrutiny.

A reviewing court should not apply hypertechnical definitions of words.

Second, the lower courts improperly forced a criminal definition of the word "victim" onto the pseudonyms that the Detective used. As the Supreme Court held, words used in affidavits should be given their common everyday usage. Here, the lower courts recognized that Victim #2 suffered at least some victimization. Despite that finding, the lower courts found that the use of the term must have been used to trick the magistrate into believing that Victim #2 had to have been a victim of a crime.

That finding forces a definition of "victim" that was not intended and, in turn, leads to the conclusion that the Detective was actively trying to mislead the magistrate into signing off on a search warrant. Such a conclusion is unwarranted. If, after all, the Detective wanted to trick the magistrate into issuing a warrant, why would he have then set forth what his investigation about Victim #2 revealed, which included the revelation

that what happened between her and Dibble occurred after she graduated and was an adult?

Conclusion

The lower courts have applied a rigid and hypertechnical definition to a word and then used that definition to second guess whether an experience judge that was once a criminal prosecutor was tricked into thinking crimes existed. This Court should accept jurisdiction over this case to guide the lower courts on how *Ventresca* applies to Ohio and to the police who must draft the affidavits for search warrants on a daily basis.

Respectfully,

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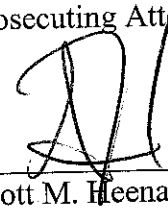
Prosecuting Attorney



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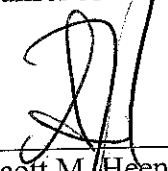
Proof of Service

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to David H. Thomas, 511 South High St., Columbus, Ohio 43215, and Steven L. Taylor, Franklin County Prosecutor's Office, 373 South High St., 13th Floor, Columbus, Ohio 43215, counsel of record, this 14th day of September, 2011.



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