

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,  
  
Plaintiff-Appellant,  
  
vs.  
  
LAWRENCE A. DIBBLE,  
  
Defendant-Appellee.

: Case No. **2011-1569**  
:  
: On Appeal from the Franklin County  
: Court of Appeals, Tenth Appellate  
: District  
:  
: Court of Appeals  
: Case No. 10AP-648  
:  
:

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**BRIEF OF AMICUS CURIAE FRATERNAL ORDER OF POLICE, CAPITAL CITY  
LODGE NO. 9, IN SUPPORT OF THE MEMORANDUM IN SUPPORT OF  
JURISDICTION OF APPELLANT, STATE OF OHIO.**

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LODGE NO. 9

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**EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION OF THIS  
CASE AS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

*Amicus Curiae* Fraternal Order of Police Ohio, Capital City Lodge No. 9, has a very real and substantial interest in this case. *Amicus* is the exclusive collective bargaining representative for over 4000 full-time sworn law enforcement officer employed by political subdivisions throughout Central Ohio. *Amicus* is the advocate for thousands of police officers, police supervisors, and law enforcement officials who either are, or may in the future be, greatly and adversely affected by the decision of the Tenth District Court of Appeals in this matter. In particular, the decisions of the trial and appellate courts do incalculable damage to the reputation and good name of the Upper Arlington Police Detective who conducted the criminal investigation of defendant-appellee, and who authored the affidavit in support of the search warrant in issue. *Amicus* accepts Appellant State of Ohio's explanation of why this case is a case of public or great general interest.

*Amicus* believes that the majority opinion in the court of appeals erroneously reviews the work of the police officer in this case as though he was a lawyer, and in so doing, reaches a result that runs counter to many precedents affirmed by not only this Court, but also the United States Court of Appeals for the Sixth Circuit, and the various courts of appeals throughout the state of Ohio. These precedents have been relied on by police and law enforcement officers in drafting affidavits, and in conducting criminal investigations throughout this state for many years.

In reviewing the decisions of the trial court and court of appeals in this case, it readily appears that neither court accorded the issuing magistrate's determination of probable cause the due deference it deserved. As this court held in part in *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, in paragraph two of the syllabus:

“In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the

magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. (*Illinois v. Gates* [1983], 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 followed.)”

By failing to give the determination of the issuing magistrate, Judge Peebles, due deference, the trial court essentially substituted its judgment for that of the magistrate. It also inflicted serious damage to the reputation of the police detective by ascribing false, misleading, and/or reckless motivations on his part in conducting the criminal investigation of defendant-appellee, and in drafting the affidavit in support of the search warrant. The trial court reached its conclusions simply because the investigating detective described one of the informants as a "victim". The court then ignored the detective's explanation that he perceived both informants as "victims" at the time he drew up his affidavit seeking a search warrant. At no time has the police officer at the center of this case, Detective Andrew Wuertz, had the opportunity to defend his reputation or rebut the trial court's finding and conclusion that he supplied false and misleading information in order to secure a search warrant against defendant's property. This Court can remedy that injustice by granting the state's motion in support of jurisdiction and thereafter reversing the trial court's decision, upheld by the court of appeals majority, because, as will be explained, it is contrary to the standards of law enunciated by this Court and the United States Supreme Court.

In addition, if the court of appeals' decision upholding the trial court's judgment is allowed to stand, the reputation of Detective Wuertz could be permanently damaged, and his credibility in future cases may be seriously undermined for no valid reason. Under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, the state is required to disclose any material affecting the credibility of a state's witness. See also, *Giglio v. United States* (1972), 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104; *Kyles v. Whitley* (1995), 514 U.S. 419, 115 S.Ct.1555, 131 L.Ed.2d 490, 63 USLW 4303. Given the trial court's erroneous interpretation of the verbiage contained in Detective

Wuertz's affidavit, the state may be obligated to disclose the court's decision in any future cases in which Detective Wuertz may be called to testify as a witness. It is respectfully submitted that such an unjust result should be considered when this Court decides whether to accept the state's motion in support of jurisdiction in this case.

A clear, non-hypertechnical and realistic reading of Detective Wuertz's affidavit militates against the interpretation accorded by the trial court of his use of the term "victim" to describe informant L.K. or "Victim #2" within that document. In his affidavit in support of the search warrant, Detective Wuertz characterized the two females who supplied him with the information of criminality against the Defendant as "Victim #1" and "Victim #2." No one disputes that Detective Wuertz is a nonlawyer, untrained in technical, legalistic nuances, especially in the realm of characterizing parties or informants. Detective Wuertz maintained during the suppression hearing that he considered both of his informants to be "victims." Moreover, during that suppression hearing, the trial court observed 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." *State v. Dibble* (July 1, 2010), 10CR-03-1958, at p. 7, unreported. In spite of that observation, the trial court found that the police detective knowingly and intentionally made a false statement in order to obtain a search warrant against defendant's personal effects. Such a conclusion is not only defective as a matter of law, it unfairly calls into question the character and motivations of an officer whose record and service is exemplary.

Moreover, except for the appeal sought by the State in this case, Detective Wuertz has no opportunity to defend his reputation or rebut the trial court's finding that he "falsely" included L.K. as a "victim" in his affidavit before the issuing magistrate. *Amicus* submits that the majority opinion announced by the Tenth District Court of Appeals, if allowed to stand, will henceforth hold

nonlawyers to a higher standard of scrutiny, contrary to standard of law and precedents announced by this and other courts. Moreover, the majority opinion in the court of appeals will work to undermine the credibility and confidence of police officers who are charged with the responsibility of ferreting out crime in our communities on a daily basis.

The correct standard of law that should have been applied in this case was succinctly set forth by dissenting appellate judge, Judge Judith French, in her court of appeals dissenting opinion.

Therein, Judge French stated at ¶¶56-59:

"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).

"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.

"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).

“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.\*\*\*. ” *State v. Dibble*, 2011-Ohio-3817 (French, J., dissenting.)

*Amicus* respectfully requests that the Court consider the cogent and compelling reasoning articulated by Judge Judith French in her dissenting opinion in the court of appeals and accept jurisdiction in this case. *Amicus* further submits that even if this Court were to agree with the courts below that the warrant in this case was not valid, the good faith exception to the exclusionary rule should nevertheless uphold the search that took place, and thus compel granting the state's motion in support of jurisdiction.

### **STATEMENT OF THE CASE AND FACTS**

*Amicus* adopts and hereby incorporates the statement of the case and facts set forth by Appellant, State of Ohio.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

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

Detective Andrew Wuertz investigated the allegations raised against defendant-appellee and gave sworn oral information to the issuing magistrate, Judge Andrea Peebles, that supported the issuance of the search warrant. Detective Wuertz's testimony about the sworn oral information he provided to the magistrate was admitted without objection at the suppression hearing, but the trial court later stated that because of Crim. R. 41, it could not consider such information because it was not recorded. *Amicus* submits that such a conclusion should not be endorsed by this Court since it tends to undermine the investigative and testimonial credibility of law enforcement officials in obtaining the fruits of criminal enterprise as part of the truth-seeking process.

In addition to the reasoning set forth by the appellant-state in its memorandum in support of jurisdiction, *Amicus* asserts that even if this Court were to agree with the courts below that the warrant was not valid, the good faith exception to the exclusionary rule, announced by the United States Supreme Court in *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, and embraced and followed by this Court in *State v. Wilmoth* (1986), 22 Ohio St.3d 251, 490 N.E.2d 1236, syllabus, would compel a reversal of the decisions below in this case. As pointed out by the state in its memorandum in support of jurisdiction, ample Ohio precedent supports invocation of the good faith exception to the exclusionary rule in this case. “[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*, 5<sup>th</sup> Dist. No. 07 CA 5, 2008-Ohio-168, ¶ 45; *State v. O'Connor*, 12<sup>th</sup> Dist. No. CA2001-08-195, 2002-Ohio-4122, ¶¶ 21-22; *United States v. Pérez* (C.A. 4, 2004), 393 F.3d 457, 462. A review of all the surrounding circumstances in this case, including the proper standard of law discussed in proposition of law #2 herein, indicates that Detective Wuertz was

acting in good faith as a matter of law.

Moreover, as the dissenting opinion in *Wilmoth* acknowledged, oral testimony is permitted to supplement a written affidavit before the issuing magistrate. *Wilmoth*, 22 Ohio St.3d at 269, citing *State v. Misch* (1970), 23 Ohio Misc. 47, 48, (Sweeney, J. dissenting.). See R.C. 2933.23. Here, the trial court should have at least considered the sworn oral statements of the police detective and issuing magistrate in determining the validity of the search warrant. Instead, the manner in which the trial court conducted the suppression hearing precluded the state from having an opportunity to call Judge Peeples to testify concerning her finding of probable cause in issuing the search warrant of defendant's home. If the trial court had conducted the suppression hearing as suggested by the State, it would have likely upheld the warrant in issue, and would not have ascribed improper, false and intentional motives on the part of Detective Wuertz.

### **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.

The trial court erred, as a matter of law, in its interpretation of the words used by Detective Wuertz in his affidavit seeking a search warrant of defendant's home. As stated by Judge French in her dissenting opinion in the court of appeals:

"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." *State v. Dibble*, 2011-Ohio-3817, at ¶57 (French, J., dissenting.)

In *United States v. Ventresca* (1965), 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684, the United States Supreme Court reviewed the standards to be applied by courts in determining the validity of search warrants and the affidavits that support them. Therein, it ably reasoned that

“[i]f the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. 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.” *Id.*

This Court has uniformly endorsed and adopted the *Ventresca* standard as set forth above. In *State v. Joseph* (1971), 25 Ohio St.2d 95, 97, 267 N.E.2d 125, 126, this Court first cited the reasoning of *Ventresca* and how affidavits are usually drafted in haste by nonlawyers, but found the affidavit defective on other grounds. Several years later, in *State v. Karr* (1975), 44 Ohio St.2d 163, 166, 339 N.E.2d 641, 645, this Court again reiterated the language cited in *Ventresca*, and cited other cases in upholding the affidavits drafted the police therein. Then, in *State v. Nabozny* (1978), 54 Ohio St.2d 195, at 206, 375 N.E.2d 784, at 793, this Court specifically quoted the language of *Ventresca* in unanimously stating: “Thus, heedful of the sound admonition in *United States v. Ventresca, supra*, we find that the affidavits for the search warrants sufficiently demonstrated that probable cause for the searches existed.”

The various courts of appeals throughout the state of Ohio have also adopted, cited and followed what this Court described as the “sound admonition of *Ventresca*.” In *State v. Daniels* (1981), 2 Ohio App.3d 328, 441 N.E.2d 1133, the Sixth District Court of Appeals in Huron County, noted the language of *Ventresca* in making the logical observation that should also hold true in this

case: “It would be unreasonable to require officers of the law, whose job is to protect and serve, to also be masters of the intricacies of the English language.” *Id.* at 330, 441 N.E.2d at 1136. *Cf. State v. OK Sun Bean* (1983), 13 Ohio App.3d 69, 73, 468 N.E.2d 146, 152 (the court of appeals discounted the good faith of the police officer as a ground for upholding the validity of the affidavit, but such a standard of law was adopted shortly thereafter by the United States Supreme Court in *United States v. Leon, supra*, and by this Court in *State v. Wilmoth, supra*).

More recent Ohio courts of appeals decisions have also readily embraced the appositeness of *Ventresca* in these contexts while addressing the validity of affidavits supporting a search warrant. See *State v. Birk*, 2008-Ohio-5571, No. 2007-CA-63 (OHCA5); *State v. Bates*, 2009-Ohio275, 08 CA 15 (OHCA5), at ¶42; *State v. Norman*, 2011-Ohio-568, 2010-CA-21 (OHCA5), at ¶46.

The Sixth Circuit Court of Appeals has also cited the *Ventresca* standard when reviewing the validity of affidavits written by nonlawyer police officers underlying search warrants. See *Mays v. City of Dayton* (6<sup>th</sup> Cir. 1998), 134 F.3d 809, 815.

In addition, the Sixth Circuit in another legal context noted the pitfalls courts will encounter when attempting to infer knowledge of legal concepts to nonlawyers:

“While lawyers are trained to parse carefully arguments and to pay close attention to the meaning of individual words, not everyone is so careful in crafting specific language and ordering ideas. As Justice Sutherland noted, ‘[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.’ *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Similarly, we would be hard-pressed to assume that such a layman has the lawyer’s love of precision in language.” *Jolliff v. NLRB* (6<sup>th</sup> Cir. 2008), 513 F.3d 600, at 616.

Here, the courts below did not apply a common sense and realistic interpretation to the police detective’s affidavit. Moreover, the court of appeals’ decision upholding the trial court’s determination does great harm and injustice to the men and women engaged in law enforcement in

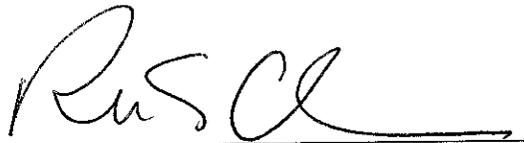
our communities by calling into question their credibility and truthfulness in their pursuit of obtaining justice for victims of crime. Detective Wuertz is a nonlawyer. As Judge French noted, it was improper for the trial court to invalidate the warrant obtained by Detective Wuertz simply because the detective characterized one of the persons who supplied him with information of the underlying crimes as a “victim.” *Amicus* submits that the trial judge applied a hypertechnical definition of the term “victim” and applied legalistic knowledge to a nonlawyer, and then incorrectly concluded, as a matter of law, that the detective therefore provided false information to the issuing magistrate.

All of the precedents set forth above illustrate that courts are charged with the responsibility of completely assessing all the surrounding circumstances involved in the drafting of an affidavit by a police officer or detective who is a nonlawyer. The Tenth District Court of Appeals majority clearly erred in ignoring the applicability of *Ventresca, supra*, and thereby upholding the trial court’s hypertechnical interpretation of Detective Wuertz’s use of the term “victim” in evaluating the truthfulness of the detective’s affidavit. As Judge French reasonably concluded in applying the appropriate standard, the detective’s characterization of both female informants as “victims” was not false, and that even the trial court correctly observed 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.” Because both the trial judge and the Tenth District Court of Appeals majority seriously erred in failing to consider *Ventresca* and the use of language by nonlawyers in suppressing the evidence, this Court is respectfully requested to grant the state’s motion in support of jurisdiction and hear the case on its merits.

## CONCLUSION

For all of the foregoing reasons, this case involves matters of public and great general interest. The decisions rendered by the lower courts, which attempt to hold a non-lawyer police detective as to a standard that should only be applicable to legal counsel, *sub silentio* overturns and/or ignores many controlling precedents that courts and law enforcement officers have relied upon for years. *Amicus*, on its own behalf and on behalf of the thousands of police and law enforcement officers it represents, respectfully requests that this Court grant jurisdiction over this case to rectify the errors committed by the courts below.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell E. Carnahan", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent by ordinary U.S. mail to Steven L. Taylor, Assistant Prosecuting Attorney, counsel for Appellant-State of Ohio, at his address, 373 South High Street, 13th Floor, Columbus, Ohio 43215, and to David H. Thomas, 511 South High Street, Columbus, Ohio 43215, counsel for Defendant-Appellee, this 16<sup>th</sup> day of September, 2011.



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