ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 11-1593
Appellee	:	
vs.	:	On Appeal from the Summit County Court of Appeals,
JILLIAN D. HOBBS	:	Ninth Judicial District Case No. 25379
Appellant	:	

MEMORANDUM IN SUPPORT OF JURISDICTION

Mark H. Ludwig (#0017246) (Counsel of Record)
Law Office Of Mark H. Ludwig, LLC
344 Stouffer Road
Fairlawn OH 44333
330.472.1824 cell 888.893.4655 fax
attymarkludwig@yahoo.com

COUNSEL FOR APPELLANT, JILLIAN D. HOBBS

FILED
SEP 19 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Sherri Bevan Walsh
Prosecuting Attorney
Heaven DiMartino (#0073423) (Counsel of Record)
Assistant Prosecuting Attorney, Appellate Division
Summit County Safety Building
53 University Ave
Akron Ohio 44308
330- 643-7459 (office)

COUNSEL FOR APPELLEE, STATE OF OHIO

RECEIVED
SEP 19 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF CASE AND FACTS.....3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

A law enforcement officer serving in a dual role as an officer and deputy clerk of a local municipal court may not act as a neutral and detached magistrate. When a warrantless arrest has occurred without showing why a warrant could not first be obtained and is followed by a "bare bones" complaint for a resulting arrest warrant for continued detention issued by operation of such dual role officer as a recurring, systemic practice, the exclusionary rule applies to all evidence directly or indirectly obtained as a result of the policy from the date the policy was implemented, not simply from the date the particular warrant issued..... 5

Proposition of Law No. II:

Appellate courts may supplement and correct the record on appeal and may take judicial notice on timely motion to do so. When there is a question as to whether any evidence existed which should be suppressed, an appellant may move the court to supplement or correct the record or take judicial notice. When it is clear discovery disclosed the State had made recordings of appellant's calls from the jail and had given record notice of intention to use a prior conviction as other act evidence, it is error for the appellate court not supplement or correct the record or take judicial notice.....7

CONCLUSION.....10

PROOF OF SERVICE.....10

APPENDIX

State v Hobbs (June 29, 2011) Summit App. No. 25379, 2011-Ohio-3192.....A-1

State v Hobbs (June 29, 2011), Summit App No. 25379
Journal Entry denying motions to take notice/supplement record A-12

State v Hobbs (August 5, 2011), Summit App No. 25379
Journal Entry denying Application to Reconsider A-16

State v Hobbs (August 5, 2011), Summit App No. 25379
Journal Entry granting Motion to Certify Conflict.....A-18

State v Hobbs (September 2, 2011) Supreme Court No. 11-1504
Notice of Certified Conflict (cover page only).....A-20

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents critical issues in connection with the requirement that every arrest warrant must be found based on probable cause determined by a neutral and detached magistrate. Here law enforcement officers acted in a dual role as an officer and a deputy clerk of the local municipal court. An arrest warrant issued absent any such determination. The lower courts declined to apply the remedy of the exclusionary rule determining there was no evidence to suppress since the rule did not apply to "pre-violation conduct"

This Court should accept this case to define the proper boundaries for application of the exclusionary rule in cases of a systemic pattern and practice of deliberate violations of clearly established constitutional law.

This case also presents critical issues relevant to the appellate court's obligation to control its record on appeal including an appellate court's ability to take judicial notice. The appellate court determined that because certain evidence was not specifically offered in evidence at the suppression hearing said evidence was not in the record before the trial court.

By accepting this case this Court will do far more than simply correct the errors made in Mrs. Hobbs' appeal.

The court of appeals' decision establishes illogical and untenable rules that allow a trial court to ignore content of the record with impunity and without consequences. The

decision effectively ignores the protections of the Ohio Constitution and the Fourth and Fourteenth Amendments of the U.S. Constitution. It adopts a clearly erroneous view that systemic violations from a pattern and practice of police misconduct cannot be remedied in any fashion let alone by careful application of the exclusionary rule.

The decision fairly requires correction by this Court.

The implications of the decision impact the standards for arrest warrants and unfairly limit the applications of the exclusionary rule.

The public's interest in constitutional operation of the warrant process is profoundly affected by a holding that no evidence existed which could be suppressed. The holding sabotages the integrity of the exclusionary rule and undermines fundamental constitutional principles. The application of the exclusionary rule must be controlled by this Court's guidance of uniform principles.

Apart from those considerations, which make this case one of great public interest, the decision has broad general significance. It sets a precedent that excludes appellate control of its own record and refuses to recognize that an appellate court can take judicial notice.

This case involves substantial constitutional questions and presents questions of public or great general interest.

In sum this Court should exercise its jurisdiction to hear this case.

Statement of the Case/Facts

Acting on witness information that Ms Hobbs burgled a home, three Sheriff's detectives confronted her at her house. They had not first obtained an arrest warrant. One detective claimed she confessed she committed the crime because of her drug problem. She was arrested without a warrant and transported to jail. The detectives typed out a "bare bones' complaint, sworn to by one detective before a Sergeant of his department who acted in the dual capacity as a deputy clerk for the local municipal court. They followed a procedure used "hundreds" of times before and used a five page multi-part form which resulted in an arrest warrant issued when one officer took the oath of the other. The officers admitted that when the multipart form was "clerked" (filed) the last page (so entitled) became the warrant. The Sergeant however claimed he made an independent probable cause determination when he took the oath.

Two weeks after her arrest and continued detention pursuant to that warrant Ms. Hobbs was indicted for burglary. The detective who signed the complaint/warrant testified at Grand Jury. No prompt determination of probable cause was ever made by any neutral and detached magistrate.

Ms. Hobbs moved to suppress. The trial court found the arrest warrant constitutionally invalid. It determined the exclusionary rule was the remedy but then found there was no evidence seized after the warrant issued. Ms. Hobbs entered a no contest plea and was sentenced to two years. She timely appealed (and has since served her sentence and been released).

Opposing her appeal the State argued, *inter alia*, that there was nothing to suppress. Ms. Hobbs argued the exclusionary rule should apply from the point of her initial confrontation by police. Alternatively if the rule was limited to post warrant seizures that should include grand jury testimony and the State's noticed intention to use a prior conviction as other acts testimony. She also asked to supplement or correct the record or to take judicial notice that discovery showed the State had recordings of Ms. Hobbs' telephone calls from jail.

The appellate court denied motions to supplement or correct the record or take judicial notice that discovery disclosed there were recordings of jail telephone conversations obtained. A-12 to A-15.

The appellate court affirmed. It found the warrant invalid but would not speculate that grand jury testimony was fruit of the poisonous tree. It did not specifically discuss the prior conviction other acts evidence but determined it would not apply the exclusionary rule to "pre-violation conduct" 2010-Ohio-3192 at ¶18, A-7

An application to reconsider was denied (A-16) but a motion to certify a conflict was granted. (A-18) Notice of Certified Conflict has been filed here and is pending in this Court. Case No.11-1504. (A-20)

Appellant separately seeks leave to pursue a discretionary appeal because the question certified does not specifically address the failure to apply the exclusionary rule to remedy an admitted pattern of constitutional violations or address the lower court's refusals to recognize that evidence was obtained after the warrant issued.

PROPOSITION OF LAW I

A law enforcement officer serving in a dual role as an officer and deputy clerk of a local municipal court may not act as a neutral and detached magistrate. When a warrantless arrest has occurred without showing why a warrant could not first be obtained and is followed by a "bare bones" complaint for a resulting arrest warrant for continued detention issued by operation of such dual role officer as a recurring, systemic practice, the exclusionary rule applies to all evidence directly or indirectly obtained as a result of the policy from the date the policy was implemented, not simply from the date the particular warrant issued.

To justify a warrantless arrest absent exigent circumstances the State must show reasons why a warrant could not be obtained. *State v Heston* (1972) 29 Ohio St.2d 152 (syllabus 2)

After warrantless arrest a valid complaint or affidavit must be promptly filed. R.C. §2935.08. A "bare bones" complaint offering no reason why the officer believes an arrestee committed an offense is not sufficient. *Whitely v Warden* (1971) 401 U.S. 560.

After warrantless arrest and upon filing a proper complaint or affidavit, a warrant issues and all further detention is pursuant to that warrant. R.C. §2935.08

The Fourth Amendment and the Ohio Constitution require that warrants issue only on probable cause determined by a neutral and detached magistrate; police officers simply cannot serve as a neutral and detached magistrate. *Shadwick v Tampa* (1972) 407 U.S. 345, 350; *United States v Parker* 373 F.3d 770 (6th Cir. 2004); *State v Torres* (Aug. 22, 1986) 6th Dist. No. WD-85-64 at *2 (police dispatcher having dual role not neutral and detached magistrate); Ohio Atty Gen Ops. No.95-020

The exclusionary rule is to be applied to deter similar future conduct when law enforcement has engaged in deliberate, recurring and systematic constitutional violations. *Henning v. United States* (2009) ---U.S. --- 129 S.Ct. 695. The exclusionary remedy applies to "fruit of the poisonous tree". *Wong Sun v. United States* (1963) 371 U.S. 471, 488. The trial and appellate court were wrong in determining the rule could not be applied here. The trial court found there was nothing to be suppressed. The appellate court found the exclusionary rule could not apply to "pre-violation conduct" *Hobbs,* 2010 Ohio-3192 at ¶18 (A-7). But the violations here were:

1) no explanation as to why not first get warrant before arrest *Heston supra*

2) use of a bare bones complaint *Whitley supra*

3) warrant issued absent any determination of probable cause by a neutral and detached magistrate *Shadwick supra*

4) denial of any reasonably prompt determination of probable cause. *County of Riverside v McLaughlin* (1991) 500 U.S. 44

The foregoing constitutional violations were the "trunk" of this poisoned tree; the individual warrant here was but one branch used to deny constitutional protection. The violations were part of a pattern and practice that began long before they were used against Ms. Hobbs. The lower courts were required to fashion the exclusionary remedy to deter police from engaging in such conducts. They failed to do so.

Because those courts found constitutional violations but did not afford any remedy this Court must exercise jurisdiction and provide necessary guidelines.

PROPOSITION OF LAW II

Appellate courts may supplement and correct the record on appeal and may take judicial notice on timely motion to do so. When there is a question as to whether any evidence existed which should be suppressed, an appellant may move the court to supplement or correct the record or take judicial notice. When it is clear discovery disclosed the State had made recordings of appellant's calls from the jail and had given record notice of intention to use a prior conviction as other act evidence, it is error for the appellate court not supplement or correct the record or take judicial notice

An appellate court controls its record. In appropriate circumstances it may supplement and correct the record. App. Rule 9(E) It likewise may take judicial notice. *State v Mays* (1992) 83 Ohio App.3d 610, 613-614 [judicial notice applies in an appellate court citing Evid.R. 201(F) "Time of taking notice. Judicial notice may be taken *at any stage* of the proceeding."]

Here the trial court found there was nothing to suppress reasoning nothing was seized as a result of the arrest warrant. The appellate court denied any use of the exclusionary rule to "pre-violation" conduct.

Ms. Hobbs first argued the rule applied from her initial contact with police but even if it only applied after the warrant the arresting officer's testimony to the grand jury and use of a prior conviction as other act evidence should be suppressed. She moved the court to supplement or correct the record or take judicial notice that discovery showed the State had recordings of her calls from jail.

The appellate court found it could not speculate that grand jury testimony was fruit of the poisonous tree. 2010-Ohio-3192 at ¶19. It further found that because the jail calls and prior conviction were not admitted in evidence at the suppression hearing those items

were not "before the trial court" and that they were not "appropriate for this Court's consideration" Journal Entry, A-14. As to the jail calls and prior conviction the court cited *State v Hill* (2001) 90 Ohio St. 3d 571,573 for the proposition that an appellate court may not *add* to the record matters that were not before the trial court then decide the appeal on that basis. A-14 However grand jury testimony took place because Ms. Hobbs had been arrested and detained due to the warrant. R.C. §2935.08. And the existence of the calls and conviction *were* indirectly and directly in the record even if not offered in evidence at the suppression hearing. The trial and appellate record is more than a transcript of a suppression hearing.

State v. Schiebel (1990), 55 Ohio St.3d 71, 82 supported the motion to supplement this record:

> A court of appeals can authorize correction or supplementation of the trial court's record when the accuracy of proposed changes is undisputed, *In re Estate of Reeck (*1986), 21 Ohio St.3d 126, but the court of appeals cannot resolve (factual) disputes about the trial court's record in the course of an appeal. *Associated Estates Corp. v. Fellows (*1983), 11 Ohio App.3d 112, 114 (Parallel citations omitted)

Here, the State did not dispute that a CD of jailhouse calls existed; the State in effect agreed it was ("may have been") provided in discovery for use as evidence at trial. Nor did it deny it gave notice of intent to use the prior conviction.

As to the claim that the CD itself was not introduced in evidence at the suppression hearing, introduction into evidence is not the only way that material becomes part of "the record". An indictment is filed and is "in the record" but it is not introduced

in evidence. Every item of evidence which might be the subject of suppression is not necessarily offered in evidence at a suppression hearing. (A ton of seized cocaine is not brought to the courtroom or explosives found on a person are not "introduced in evidence" at a suppression hearing.)

Despite the "non introduction" of evidence at a suppression hearing, the existence of grand jury testimony, the intended use of a prior conviction and the existence of jail call recordings were part of the record.

The appellate court should have taken judicial notice of the same. In *City of Hubbard v. Luchansky* 102 Ohio App.3d 410 (1995) the Eleventh District (while not electing to take notice therein) first noted:

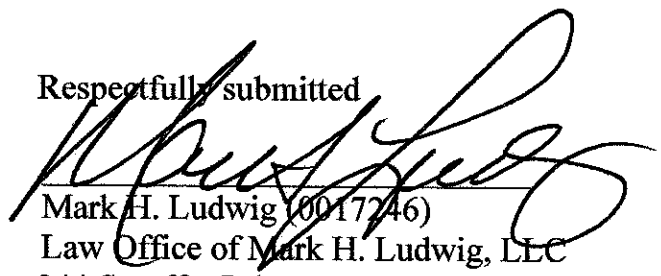
> As a general proposition, an appellate court has the authority to take judicial notice of any fact of which the trial court could have taken notice. *State v. Thomas* (Jan. 8, 1993), Lake App. No. 92-L-020, unreported, at 8, fn. 2, 1993 WL 9719. This would include the location of streets within the trial court's jurisdiction. Id.
>
> In applying the foregoing proposition, the courts of this state have consistently held that an appellate court can take judicial notice of a matter even if the trial court failed to do so, or if the issue has not been raised by the parties. See, e.g., *Greenfield v. Davis* (June 28, 1991), Highland App. No. 761, unreported, 1991 WL 122844.

By refusing to supplement or correct the record or take judicial notice the appellate court "shut its eyes" to the existence of at least three areas of evidence (grand jury testimony, jail calls, and prior record) all of which occurred after the arrest warrant issued, then determined the exclusionary rule did not apply to "pre-violation" conduct.

CONCLUSION

This Court should accept jurisdiction on both Propositions of Law.

Respectfully submitted

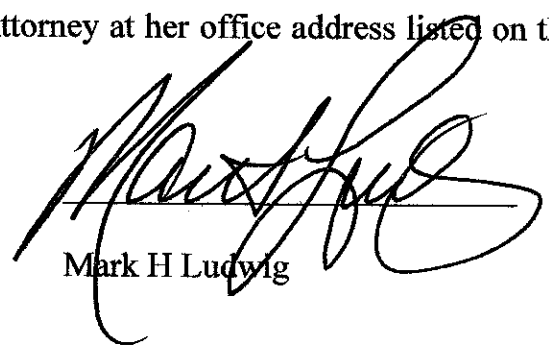


Mark H. Ludwig (0017246)
Law Office of Mark H. Ludwig, LLC
344 Stouffer Rd
Fairlawn OH 44333
330-472-1824 cell / 888-893-4655 fax
attymarkludwig@yahoo.com

Counsel for Appellant Jillian D. Hobbs

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular U.S. First Class mail to Heaven DiMartino Assistant Prosecuting Attorney at her office address listed on the title page first appearing on September 17, 2011



Mark H Ludwig

[Cite as *State v. Hobbs*, 2011-Ohio-3192.]

STATE OF OHIO COUNTY OF SUMMIT	))ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO Appellee v. JILLIAN DENISE HOBBS Appellant		C.A. No. 25379 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 09 2902

DECISION AND JOURNAL ENTRY

Dated: June 29, 2011

MOORE, Judge.

{¶1} Appellant, Jillian Denise Hobbs, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On September 16, 2009, after receiving a tip, three detectives from the Summit County Sheriff's Office visited Hobbs at her home to interview her regarding a recent burglary. Detective Scott Plymire testified that Hobbs invited them into her home. They informed her that they were investigating a burglary and that two witnesses had implicated her. Hobbs and her boyfriend, identified only as Mr. Gowdy, went outside and spoke privately. They walked around the side of the house in order to shield their conversation from the detectives. When they returned to the front of the house, Hobbs tearfully confessed that she had committed the crime because of her drug problem. Two of the detectives re-entered the house with Hobbs, Mirandized her, and inquired about the existence of drug paraphernalia in the home. Hobbs

COPY

directed the detectives to some heroin-related drug paraphernalia in the bathroom. The detectives placed Hobbs under arrest and transported her to the Summit County Jail. The detectives typed out a complaint, which they took to Sergeant Glenn Stott, also of the Summit County Sheriff's Office, to be "clerked."

{¶3} Sergeant Stott testified that he had taken a one-hour course in order to become a deputy clerk for the Barberton Municipal Court. He stated that "Detective Plymire later came to me with a typed affidavit that he had typed. I talked to him about the facts again. I asked if anything on the complaint and all the facts were true, and he swore to it, he did, and I clerked it." He testified that he made an independent probable cause determination based on Hobbs' confession.

{¶4} The complaint was filed with the Barberton Municipal Court the next morning. Detective Plymire testified that "[w]hen I type the complaint and it's clerked and it's sent to - - it becomes the warrant - - it becomes an arrest warrant once the Barberton clerk receives it." Hobbs was arrested on September 16, 2009, at approximately 6:30 p.m. On September 17, 2009, at approximately 6:52 a.m. the complaint was filed with the Barberton Clerk of Courts.

{¶5} On October 1, 2009, the Summit County Grand Jury indicted Hobbs on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree.

{¶6} On November 5, 2009, Hobbs filed a motion to suppress evidence and dismiss the charge on the basis that Sergeant Stott could not have acted as a neutral and detached magistrate. On December 2, 2009, the court conducted a suppression hearing. On February 25, 2010, the trial court denied the motion to suppress evidence and dismiss the charge.

{¶7} On March 29, 2010, Hobbs pleaded no contest to the burglary charge. The court found her guilty and sentenced her to two years of incarceration.

COPY

{¶8} Hobbs timely filed a notice of appeal, raising one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN DENYING [HOBBS'] MOTION TO SUPPRESS AND DISMISS BECAUSE IT DETERMINED FACTS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, BECAUSE IT APPLIED THE WRONG TEST OF LAW AND BECAUSE IT INCORRECTLY DECIDED THE ULTIMATE ISSUES ON MOTION TO SUPPRESS AND DISMISS."

{¶9} In her assignment of error, Hobbs contends that the trial court erred in denying her motion to suppress and dismiss because it determined facts against the manifest weight of the evidence, applied the wrong test of law, and incorrectly decided the ultimate issues. Although her route is indirect, Hobbs essentially argues that the motion to suppress and dismiss should have been granted. We do not agree.

{¶10} The State contends that at the trial court Hobbs failed to assert the specific grounds underpinning her motion to suppress and dismiss in violation of Crim.R. 47. Accordingly, the State contends she waived her appellate arguments. Although Hobbs filed a skeletal motion to suppress and dismiss with regard to several arguments, the State did not object or otherwise contend that it was uninformed as to the basis for her motion. Accordingly, we will address the merits of Hobbs' arguments.

{¶11} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court

COPY

must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." (Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

{¶12} In its order denying Hobbs' motion to suppress and dismiss, the trial court found the facts recounted above to be accurate. The court then observed that although the complaint appeared to be supported by probable cause, Sergeant Stott could not, in light of his position as a law enforcement officer, properly serve as a neutral and detached magistrate, citing *Shadwick v. Tampa* (1972), 407 U.S. 345, 350. The court determined that the arrest warrant, issued after Hobbs' arrest, was improperly issued. The trial court further determined however, that no evidence resulted from the improper procedure and thus, that there was no evidence to suppress. All of the evidence was independently discovered prior to the arrest and issuance of the warrant. Finally, the trial court ruled that dismissal of the burglary charge was inappropriate under this Court's holding in *State v. Reymann* (1989), 55 Ohio App.3d 222, 225, citing *United States v. Crews* (1980), 445 U.S. 463, 474 ("[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction").

{¶13} Upon review of the transcript, the trial court's findings of fact are supported by some competent, credible evidence. See *Burnside* at ¶8. The facts are not in dispute. Instead, Hobbs' contentions are more in the nature of challenges to the court's legal conclusions. Hobbs also contends that she was unfairly prevented from contesting the detective's statements as to what took place at her house. The record, however, reflects that Hobbs' counsel was given the opportunity to present evidence at the hearing. The following exchange took place between counsel and the court:

> "[COUNSEL]: Here's the problem. I would call my client about the underlying circumstances of the arrest, but we're not challenging that.

COPY

> "THE COURT: No, I don't think it's really relevant.
>
> "[COUNSEL]: So I just want to clear -- I'm sorry, Your Honor. I want to make it clear for the record, we're not agreeing with that version that was given to you, but it's been stated, and we're not -- since we're not trying to suppress that. I want to thank you, Your Honor."

The exchange hardly reflects the trial court preventing Hobbs from contesting the underlying circumstances of the arrest. At the hearing, Hobbs' counsel seems to agree that her testimony is irrelevant to the suppression issue and makes no effort to call her to testify.

A. Suppression

{¶14} With respect to suppression, Hobbs argues that "[a] strict chronological or linear view that evidence to be suppressed can only come after a *void arrest* warrant is erroneous." (Emphasis sic.) She then suggests that the exclusionary rule, as a remedy for Fourth Amendment violations, is a "circle of protection" as opposed to a horizontal line. Consequently, Hobbs contends that the detective's testimony before the grand jury should have been suppressed. Hobbs does not support these contentions with citations to authority. App.R. 16(A)(7).

{¶15} While the Eighth District Court of Appeals has held that a law enforcement officer from the same department serving a dual-role as an officer and deputy clerk of the local municipal court can properly serve as a neutral and detached magistrate, we are not persuaded by that authority. See, e.g., *State v. Garrett*, 8th Dist. Nos. 87112 & 87123, 2006-Ohio-6020; *State v. Robinson* (Oct. 24, 1985), 8th Dist. Nos. 49501, 49518 & 49577. Instead, we are inclined to agree with the Sixth District Court of Appeals in holding that in order for an arrest warrant to be valid, it must be issued by a neutral and detached magistrate. *State v. Torres* (Aug. 22, 1986), 6th Dist. No. WD-85-64, at *2, citing *Shadwick*, supra (holding that "[a] police dispatcher having the dual function of a clerk is not a neutral and detached magistrate").

COPY

{¶16} In this case, Sergeant Stott attempted to serve as a deputy sheriff and a deputy clerk of the Barberton Municipal Court. The trial court determined that, as a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime," *Shadwick*, 407 U.S. at 350, citing *Johnson v. United States* (1948), 333 U.S. 10, 14, he was unable to serve as a neutral and detached magistrate for the purpose of making probable cause determinations. Additionally, we note that the Attorney General of Ohio has repeatedly advised prosecutors of various counties that law enforcement officers cannot serve as deputy clerks. See, e.g., 1995 Ohio Att.Gen.Ops. No. 95-020 (reasoning that such an arrangement was inappropriate because an employee of the county sheriff serving as a deputy municipal court clerk could be called upon "to determine whether the county sheriff or a deputy sheriff had probable cause to make a warrantless arrest"). Accordingly, the trial court determined, and we agree, that the arrest warrant issued pursuant to Sergeant Stott's probable cause determination was invalid. The trial court did, however, emphasize that Sergeant Stott did not appear to act partially. Likewise, the court did not find that probable cause was lacking to support the arrest. The trial court concluded that exclusion of evidence was not the appropriate remedy. We agree.

{¶17} The exclusionary rule has been applied by courts as an evidentiary remedy to certain Fourth Amendment violations. *Crews*, 445 U.S. at 470 ("the exclusionary sanction applies to any 'fruits' of a constitutional violation-whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention"). The exclusionary remedy, however, is not triggered by every infraction, and when it is, it is limited to the "fruit of the poisonous tree." *Wong Sun v. United States* (1963), 371 U.S. 471, 488.

COPY

{¶18} Hobbs contends that the exclusionary rule provides a circle of protection around criminal defendants and that the fact that she confessed to the crime *before* she was arrested does not preclude suppression and exclusion of evidence. We do not agree with this unsupported contention. "In the typical 'fruit of the poisonous tree' case * * * the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation[.]" (Emphasis sic.) *Crews*, 445 U.S. at 471. The goal is to exclude evidence that flows from, and is the result of, the violation of a person's constitutional rights. We do not now endorse an application of the exclusionary rule to pre-violation conduct.

{¶19} At the suppression hearing, the State asked Detective Plymire about his testimony before the grand jury. Hobbs' counsel objected and the court sustained the objection. Even if we were to assume that grand jury testimony is potentially subject to suppression, without knowing what testimony was presented to the grand jury this Court can only speculate as to whether it constitutes fruit of the poisonous tree. The real gist of Hobbs' arguments before us seems to be that all evidence, particularly Hobbs' confession, should have been suppressed. Having rejected Hobbs' "circle of protection" theory, we conclude that the trial court correctly refused to suppress Hobbs' confession.

{¶20} The trial court determined that the procedure used by the deputy sheriffs in this case invalidated the warrant due to the lack of a probable cause determination by a neutral and detached magistrate. However, the trial court also correctly determined that no evidence was derived from the arrest and, accordingly, there was no evidence to suppress. Hobbs confessed to the commission of the burglary prior to the arrest. In fact, according to the detective's testimony, the arrest was predicated primarily upon her confession. That is, the confession led to the arrest. Therefore, the confession was not derived from the invalid arrest warrant. Under these

COPY

circumstances, the invalid arrest warrant could not flow back to invalidate a voluntary confession.

{¶21} Hobbs has argued, but has not separately assigned as error, App.R. 12(A)(2), that her confession was the product of a *Miranda* violation. This argument is unavailing because there is no evidence that she was subjected to custodial interrogation. "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." *Miranda v. Arizona* (1966), 384 U.S. 436, 469. "The cases since *Miranda* have focused on whether the criminal defendant was in custody and whether the defendant was subject to interrogation." *State v. Waibel* (1993), 89 Ohio App.3d 522, 525.

{¶22} In this case, the detectives visited Hobbs at her home and she invited them into the house. They informed her that they were investigating a burglary. Eventually, she went outside to smoke and to speak privately with Gowdy around the side of the house. At that time, the detectives also left the home and stood far from the couple to allow them privacy. Without prompting by the detectives, Hobbs returned from the side of the house and tearfully confessed to the burglary. No evidence from the suppression hearing suggested that Hobbs was not free to leave or otherwise terminate the conversation. Her confession was not, therefore, the result of custodial interrogation and *Miranda* does not apply.

{¶23} For the foregoing reasons, Hobbs' contentions with regard to suppression are overruled.

COPY

B. Dismissal

{¶24} As a sub-argument of her motion to suppress, Hobbs contends that the trial court should have also dismissed the indictment with prejudice. Hobbs contends that Detective Plymire's grand jury testimony should have been, essentially, excluded from taking place and that, as a result, "[n]o testimony before grand jury [sic] means no indictment means no case. Dismissal follows." Hobbs cites to *State v. Lanser* (1924), 111 Ohio St. 23, for the proposition that "without the filing of a proper affidavit no jurisdiction is acquired." Hobbs reasons that dismissal must result due to the lack of jurisdiction. We do not agree.

{¶25} *Lanser* is inapplicable because it addresses only the jurisdiction of mayor's courts over "one accused of an offense before a justice of the peace, mayor, or police judge." Id. at 26. This case involves the felony jurisdiction of the court of common pleas. "The Court of Common Pleas is, by Section 2931.03, Revised Code, given original jurisdiction in felony cases. The felony jurisdiction is invoked by the return of a proper indictment by the grand jury of the county." *Click v. Eckle* (1962), 174 Ohio St. 88, 89. "'[I]t is now well established that even if an arrest is illegal it does not affect the validity of subsequent proceedings based on a valid indictment[.]'" *State ex rel. Jackson v. Brigano* (2000), 88 Ohio St.3d 180, 181, quoting *Krauter v. Maxwell* (1965), 3 Ohio St.2d 142, 144.

{¶26} "As to dismissal, the United States Supreme Court has stated that a criminal defendant 'cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. * * *'" *Reymann*, 55 Ohio App.3d at 225, quoting *Crews*, 445 U.S. at 474. Therefore, the invalid arrest warrant does not require the dismissal of the indictment.

COPY

{¶27} Accordingly, Hobbs' contentions with regard to dismissal are overruled.

III.

{¶28} Hobbs' assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, P. J.
DICKINSON, J.
CONCUR

COPY

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

COPY

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HORRIGAN

2011 JUN 29 AM 7:50

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

JILLIAN DENISE HOBBS

Appellant

C.A. No. 25379

JOURNAL ENTRY

Hobbs has filed the following motions:

1. "to supplement the record or take judicial notice";

2. "alternate motion to hold determination and for limited remand";

3. an objection to the magistrate's order/motion to reconsider/motion to clarify the magistrate's order filed on May 9, 2011, which disposed of an additional motion to supplement the record or take judicial notice;

4. an "addendum to motion to supplement record or take judicial notice"; and,

5. a reply to the State's opposition to her motion to supplement.

This journal entry is filed on the same day as our decision and journal entry addressing the merits of this appeal.

App.R. 9(E) provides the process that should take place "[i]f anything material to either party is omitted from the record by error or accident * * *." In such a situation, this Court, on "proper suggestion or its own initiative, may direct that the omission or misstatement be corrected * * *." App.R. 9(E). App.R. 15(A) allows an application for an order or other relief to be made by motion to the court of appeals and "shall state with particularity the grounds on which it is based[.]"

COPY

Hobbs' first motion to supplement the record requests that this Court supplement the record with a journal entry of the lower court granting judicial release in the underlying case, as well as a journal entry from the Stark County Court of Common Pleas denying judicial release in an unrelated case. Each entry was filed after the record in this appeal was transmitted. Contrary to the requirement of App.R. 15(A) the motion does not "state with particularity the grounds on which it is based". Hobbs' single sentence states that the Stark County case was referenced in the State's Notice of Intention to Use 404(B) Evidence and at sentencing. The motion does not address the relevance to any of the assignments of error of the requested documents, and this Court will not engage in supposition. The motion is overruled.

As to the objection to the magistrate's order/motion to reconsider/motion to clarify, the appellate rules and Civ.R. 53 provide for a motion to set aside a magistrate's order. The rules do not provide for a motion to reconsider or motion to clarify a magistrate's order. In this case, we will treat the objection as a properly filed motion to set aside the magistrate's order. In her motion to supplement the record Hobbs initially failed to state with particularity the grounds on which the motion was based. Hobbs merely indicated that the CD-R disc of a telephone call she made from jail was material, as the trial court ruled there was nothing to be suppressed as seized. In the addendum to the motion she included "an Excel spreadsheet on the CD-R disc of telephone calls [she] made after her arrest while incarcerated in County jail." In the original motion she also stated without any support that the recordings were to be used at trial. The reply to the State's opposition to the motion to supplement, which the magistrate did not consider, cites *City of Medina* v. *Osiecki*, 9th Dist. No. 09CA0064-M, 2011-Ohio-1534, a case that involved a motion to correct the record. In that case, the appellant contended that the record prepared by the Clerk of Courts and

COPY

submitted to the appellate court conflicted with the official docket sheet. The trial court ultimately reviewed the inconsistency and corrected an inaccurate entry. This Court concluded that the dispute had been properly resolved by the trial court.

Hobbs, however, has requested this court, not to correct the record below, but to supplement the record with an evidentiary item that was apparently the subject of discovery but that neither party sought to admit into evidence. Inasmuch as the requested item was not before the trial court, it is not appropriate for this Court's consideration. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Hill* (2001), 90 Ohio St.3d 571, 573, quoting *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. Accordingly, the motion to set aside the magistrate's order is overruled.

We would be remiss if we did not further note that the motion to supplement the record or take judicial notice, the addendum to that motion, and the alternate motion to hold determination and for limited remand each consist of no more than 10 typed lines including all argument and citations. The State's response consisted of an additional 10 typed lines. Hobbs' reply to the State's response, however, takes up nine pages. The purpose of reply briefs is not to set forth new arguments but only to rebut those raised by an opposing party. *Smith v. Ray Esser & Sons, Inc.*, 9th Dist. No. 10CA009798, 2011-Ohio-1529, at ¶15. "Allowing new arguments in a reply brief denies respondents the meaningful opportunity to respond." Id. (examining replies in the context of summary judgment and noting that allowing additional arguments in reply "summary judgment by ambush.").

Finally, in the "alternate motion to hold determination and for limited remand," Hobbs seeks to have this Court withhold a decision and remand this matter to the trial court

COPY

for an initial determination of the motion to supplement the record. For the foregoing reasons, this motion is not well taken and is overruled.

The motions are overruled.

Judge

Concur:
Whitmore, P.J.
Dickinson, J.

COPY

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HORRIGAN

2011 AUG -5 AM 10: 54

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

JILLIAN D. HOBBS

Appellant

C.A. No. 25379

JOURNAL ENTRY

Appellant has moved this Court to reconsider its decision, which was journalized on June 29, 2011 and affirmed the decision of the Summit County Court of Common Pleas. Appellee has not responded to the application.

In determining whether to grant an application for reconsideration, a court of appeals must review the application to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117. In her motion for reconsideration, Appellant reiterates the arguments rejected by this Court in our original decision, that this Court: erred when it "applied the exclusionary rule using a strict linear approach" and that "issues of what [evidence] was seized should be more fully considered[.]"

As our decision fully addressed each of Appellant's arguments, the Court finds that the application for reconsideration in this case neither calls attention to an obvious error nor raises an issue that we did not consider properly. Rather, Appellant asserts that this Court was simply wrong in its decision.

COPY

Accordingly, the motion for reconsideration is denied.

Carla Moore
Judge

Concur:
Whitmore, P. J.
Dickinson, J.

COPY

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HORRIGAN

2011 AUG -5 AM 10: 55

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

JILLIAN D. HOBBS

Appellant

C.A. NO. 25379

JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on June 29, 2011, and the judgments of the Eighth District Court of Appeals in *State v. Garrett*, 8th Dist. Nos. 87112 & 87123, 2006-Ohio-6020 and *State v. Robinson* (Oct. 24, 1985), 8th Dist. Nos. 49501, 49518 & 49577. Appellee has not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment * * * is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

Appellant has proposed that a conflict exists between the districts on the issue of "[w]hether a law enforcement officer from the same department serving a dual-role as an officer and deputy clerk of a local municipal court can properly serve as a neutral and detached magistrate to determine probable cause to issue a warrant[.]" Upon review, we find that a conflict of law exists and therefore we grant appellant's motion. See *State v. Keith*, 9th Dist. No. 08CA009362, 2009-Ohio-76.

COPY

Accordingly, we certify the following issue to the Supreme Court of Ohio pursuant to App.R. 25:

"May a law enforcement officer, serving a dual-role as an officer and deputy clerk of a local municipal court, act as a neutral and detached magistrate for purposes of Crim.R. 4(A)?"

Carla Moore
Judge

Concur:
Whitmore, P. J.
Dickinson, J.

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 11-1504
Appellee	:	
vs.	:	On Appeal from the Summit County Court of Appeals,
JILLIAN D. HOBBS	:	Ninth Judicial District Case No. 25379
Appellant	:	

NOTICE OF CERTIFIED CONFLICT

Mark H. Ludwig (#0017246) (Counsel of Record)
Law Office Of Mark H. Ludwig, LLC
344 Stouffer Road
Fairlawn OH 44333
330.472.1824 cell 888.893.4655 fax
mhludwig@neo.rr.com

COUNSEL FOR APPELLANT, JILLIAN D. HOBBS

Sherri Bevan Walsh
Prosecuting Attorney
Heaven DiMartino (#0073423) (Counsel of Record)
Assistant Prosecuting Attorney, Appellate Division
Summit County Safety Building
53 University Ave.
Akron Ohio 44308
330-643-7459 (office)

COUNSEL FOR APPELLEE, STATE OF OHIO

RECEIVED
SEP 02 2011
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 02 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Certified Conflict

Appellant Jillian D. Hobbs, by counsel, brings the appeal by filing a notice of certified conflict issued by the 9th District Court of Appeals. According to the Journal Entry certifying the conflict it conflicts with the 8th District Court of Appeals' opinions in *State v Garrett* and *State v Robinson*, cited in said Entry. The question certified is:

> **"May a law enforcement officer, serving in a dual-role as an officer and deputy clerk of a local municipal court, act as a neutral and detached magistrate for purposes of Crim. R. 4(A)?"**

Copies of the order certifying the conflict, the certifying court's opinion, and the conflicting court of appeals opinions are attached pursuant to Supreme Court Practice Rule 4.1 [The *Robinson* opinion is from Ohio Bar Casemaker, page numbers added]

Motion to Clarify Question to Be Certified

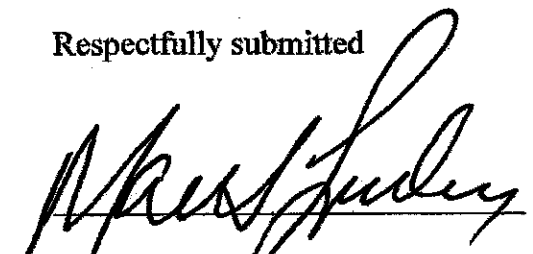
Appellant Hobbs prevailed on the issue certified. The certifying court's opinion was in her favor and in accordance with a cited Sixth District holding that for an arrest warrant to be valid, it must be issued by a neutral and detached magistrate. 2011-Ohio-3192 ¶15. However the certifying court's opinion found no remedy and held that the exclusionary rule did not apply. Id., ¶16-¶20

Appellant moves the Court to add to the question certified the following in order that this Court's decision would also address the remedy:

> Should an officer not be permitted to act in such dual-role, does the exclusionary rule apply where the officer has so acted?

. Appellant moves this Court to address both the wrong and the remedy.

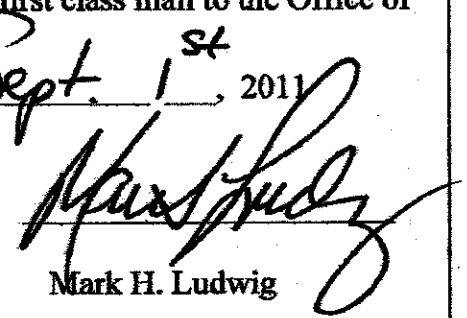
Respectfully submitted



Mark H. Ludwig (0017246)
Law Office of Mark H. Ludwig, LLC
COUNSEL FOR APPELLANT,
JILLIAN D. HOBBS

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular first class mail to the Office of Heaven DiMartino Assistant Prosecuting Attorney on Sept. 1st, 2011



Mark H. Ludwig