

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE LAWRENCE A. DIBBLE**

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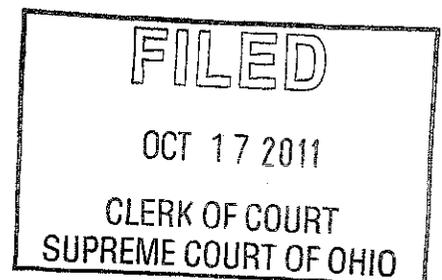


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**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR
GREAT GENERAL INTEREST AND DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case is not one of public or great general interest and does not involve a substantial constitutional question. Rather, the Franklin County Court of Common Pleas and the Court of Appeals for the Tenth Appellate District applied well-settled principles of case law and Fourth Amendment jurisprudence in finding that the Upper Arlington Police Department seized evidence from Appellee's residence in violation of his right to be free from unreasonable search and seizure.

The State has advanced three novel propositions of law in this matter: (1) that Crim.R. 41(C)'s recording requirement for the admissibility of evidence at suppression hearings is unconstitutional, (2) that the issue of falsity in a search warrant should be judged in a non-technical manner, and (3) that a trial court's statement that a hearing is preliminary mandates notice before proceeding to the merits of the case. None of these arguments should prevail, however, because the two courts that have examined this case have already subjected the evidence to the analysis set forth by this Court and the Supreme Court of the United States. Furthermore, the State is unable to advance any legal authority to support its novel positions. This case breaks no new legal ground and does not warrant further review. It is a straight-forward application of Fourth Amendment analysis to a search warrant that was lacking in probable cause, and review by this Court is unnecessary.

Factual Background

Because this case involves the sufficiency of a search warrant, a brief factual synopsis is appropriate. The following facts were presented in an affidavit. On February 2, 2010, a woman later described as "victim #1," reported to the Upper Arlington Police Department that the Appellee, who was her teacher, touched under her skirt. A second student, identified as "victim #2," described an

“inappropriate contact” with Appellee. This second woman also stated that Appellee had photographed her in compromising positions. Finally, when confronted with victim #1, Appellee purportedly said “I just wasn’t thinking.” On this basis, the Franklin County Municipal Court issued a search warrant for Appellee’s residence, which led to the seizure of evidence with a subsequent indictment for numerous counts of voyeurism and a single misdemeanor count of sexual imposition.

At a suppression hearing in the Franklin County Court of Common Pleas, the detective who wrote the affidavit admitted that he had omitted several key facts with respect to the two victims. First, he admitted that the incident with victim #1 had occurred ten months before the warrant was obtained. Second, he admitted that the sexual activity involving victim #2 was completely consensual, and had taken place after the woman had graduated and turned eighteen. He also admitted that “victim #2” was not a victim of crime and that she had not been described as a victim anywhere else in his file. The detective also testified that he had provided additional information about Appellee’s actions to the issuing judge. Finally, the detective admitted he did not believe there was probable cause to search Appellee’s residence in the absence of victim #2’s allegations, and that there was not probable cause to charge Appellee with a crime as it related to this second “victim.” None of the foregoing information was set forth in the supporting affidavit given to the Municipal Court Judge. However, the detective asserted that he had told the Judge, in sworn but unrecorded statements, about other suspicious activity by Appellee.

After hearing the detective’s testimony, the Common Pleas Court Judge determined that (1) the detective knowingly provided false information in the affidavit, (2) the good faith exception did not apply, and (3) the search violated Appellee’s Fourth Amendment rights. In ruling on probable cause, the trial judge also refused to consider the unrecorded statements supposedly made by the

detective, which were never incorporated into the affidavit. Subsequently the Tenth Appellate District overruled the State's four assignments of error and affirmed the trial court.

The State's Propositions of Law

None of the State's propositions of law set forth matters of public or great general interest or constitutional questions worthy of this Court's review. Accordingly, this Court should decline to exercise its discretionary jurisdiction in this matter.

The State argues in its first proposition of law that the enforcement of Crim. R. 41(C) is unconstitutional and that Detective Wuertz's unrecorded statements to the issuing judge should have been considered by the trial court in making its suppression decision. Apparently, the State is proposing that Crim. R. 41(C) is unconstitutional because it creates a substantive right for defendants by allowing for the exclusion of evidence and acting as an exclusionary rule. However, the exclusionary rule is a specific federal constitutional principle that governs the admissibility **at trial** of evidence seized in violation of a person's Fourth Amendment rights. See *Weeks v. United States* (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. Crim.R. 41(C) merely speaks to the admissibility of unrecorded testimony **at a suppression hearing**. The exclusionary rule and Rule 41(C) are distinct concepts.

The trial court's decision not to consider Detective Wuertz's statements had nothing to do with the fundamental constitutional principles embodied in the exclusionary rule. The constitutionality of Crim. R. 41(C) is simply not at issue here. Rather, it is a clearly worded rule of Ohio criminal procedure governing the admissibility of evidence at suppression hearings. In this case, the rule simply rendered certain components of a detective's testimony inadmissible due to a failure to record as required. This failure by the detective to preserve evidence does not create a

Fourth Amendment issue. Thus, the State's first proposition of law does not present a substantial constitutional question or a matter of public or great general interest.

The State's second proposition of law is even less worthy of review. The proposition that terms like "victim" should be interpreted in a non-technical way has been the law for many years. See *United States v. Ventresca* (1965), 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684. Here, the trial court and the court of appeals did not apply any hypertechnical definitions to the detective. At the suppression hearing, the detective admitted that he used the term "victim #2" repeatedly in order to obtain the search warrant, but he failed to describe her as a victim in any other parts of the investigative record. He also admitted that he did not believe that she was a victim of crime, but that her information was necessary in order to gain access to Appellee's residence. Based on this information, the trial court found the use of the term "victim" in that context was false and misleading, and the court of appeals agreed. This was a straight-forward application of the legal standards set forth by this Court and the United States Supreme Court for judging probable cause and search warrants.

Finally, the State's third proposition of law proposes that, when a hearing is described as preliminary, the State is entitled to notice before the matter proceeds to the full merits of the issue. Although not specified in the State's proposition of law, this apparently applies to hearings under *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667, which requires a preliminary showing for challenges to a search warrant by extrinsic evidence. However, the State has not been able to provide a single example of a court engaging in this process in the course of a *Franks* hearing. Furthermore, the State waived this argument. At the suppression hearing in the case *sub judice*, the assistant prosecutor never objected to the course of the proceedings and ultimately

asked the trial court to rule on the merits of the pending motion to suppress. As the court of appeals found after reviewing the pleadings and the motion hearing transcript, the State had ample notice that the proceeding would cover both prongs of *Franks*.

As the court of appeals found, the State cannot show any prejudice from the actions of the trial court. Simply put, the Upper Arlington Police Department obtained a warrant lacking in probable cause to justify a search of Appellee's residence. The only information available to the police was that Appellee had allegedly engaged in inappropriate contact with a student at school ten months before, that he had a relationship and photographed a former student outside of school, and that he had apologized to the first student. None of this information creates a nexus with Appellee's home, therefore there was no probable cause to support issuance of a warrant. Accordingly, the trial court and the court of appeals applied well-settled principles of Fourth Amendments analysis to suppress the results of the search. Because this case does not present any significant constitutional questions or matters of great public or general interest, this Court should decline to exercise its discretionary jurisdiction.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

First Proposition of Law: Constitutionality of Rule 41(C)

In order for the trial court to admit the testimony that the detective gave before the issuing judge, his testimony must have been recorded, transcribed, and incorporated into the affidavit. Crim.

R. 41(C) plainly states:

Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses the affiant may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed, and made part of the affidavit.

Allowing only recorded testimony at a post-seizure hearing on a motion to suppress eliminates the subsequent bolstering of facts to support a finding of probable cause. *State v. Jaschik* (1993), 85 Ohio App.3d 589, 594; *discretionary appeal not allowed*, 67 Ohio St.3d 1450, 619 N.E.2d 419. Furthermore, the incorporation of the statements eliminates the fear that a reviewing court will have to guess as to the actual statements made to the judge issuing the warrant. *Id.* at 596.

Pursuant to the foregoing analysis, the trial court acted appropriately in refusing to consider the detective's testimony. His purported statements to the Municipal Court Judge were neither recorded nor incorporated into the affidavit. There was no way for the Common Pleas Court Judge to determine exactly what was said to the issuing Judge. Indeed, the detective himself was apparently unsure of what he had said. He said "I believe" twice in describing his testimony to the Judge. This is precisely the situation that Crim. R. 41(C) prohibits. The failure to record the affiant's oral testimony rendered it inadmissible in the hearing on Appellee's motion to suppress, and

the Common Pleas Court correctly decided not to consider such testimony in the probable cause analysis.

The State attempts to circumvent this requirement by conflating “admissibility” and “suppression,” and arguing that a violation of Crim. R. 41(C) should not lead to exclusion of evidence at trial. However, that was not the decision of the trial court. Rather, the trial court followed the well-settled limits of Crim. R. 41(C) in excluding the portion of Detective Wuertz’s testimony that was not recorded or memorialized in an affidavit.

The State relies on *State v. Wilmoth* (1986), 22 Ohio St.3d 251, 490 N.E.2d 1236. However, *Wilmoth* is legally and factually distinguishable from the instant case and does not support the State’s position. The State’s proposition of law addresses the trial court’s ruling on admissibility of evidence **at a suppression hearing**. That was not the issue in *Wilmoth*, which addressed whether or not a “technical” violation of Crim. R. 41 – of itself – requires suppression of evidence from use **at trial**.

In *Wilmoth*, police officers conducted surveillance of a “chop shop” and received information from five informants about criminal activity taking place inside. During this surveillance, one officer actually observed two stolen vehicles being brought inside the building. Rather than prepare an affidavit, the officers presented the information orally to a magistrate. Their testimony was recorded and they were sworn after they provided their testimony. *Id.* at 252-53. Subsequently, the defense moved to suppress evidence seized as a result of the warrant issued. Probable cause was not contested. *Id.* at 252. The only issue was whether the violations of Rule 41 (failure to submit an affidavit and the belated oath), without more, warranted suppression of the evidence.

The *Wilmoth* Court looked at the absence of bad faith and the urgency of the situation, which included the fact that cars were being destroyed:

A review of the testimony given by the two officers indicates that there was sufficient evidence provided to the magistrate for him to make a probable cause determination. All interests sought to be protected by the Fourth Amendment and Crim.R. 41 were safeguarded by the Lorain police officers and the magistrate. Therefore, there has been no fundamental violation and the oral affidavit complied with the “spirit” of Crim.R. 41.”

Id. at 264.

The State’s reliance on *Wilmoth* is misplaced. *Wilmoth* held that a “technical” violation of Crim. R. 41(C) did not automatically require suppression, at trial, of evidence under the Fourth Amendment. But that was not the holding of the trial court in the instant case. Rather, the trial court held, consistent with Crim. R. 41(C), that unrecorded statements were not admissible at the suppression hearing

Furthermore, the facts of *Wilmoth* make it readily distinguishable from the instant case. First, as the State concedes, unlike the officers in *Wilmoth*, Detective Wuertz’s testimony was not recorded. Second, there was no urgency in the case *sub judice*. The State did not present any evidence of exigent or urgent circumstances, and there was no reason for the detective to have omitted so much information from the affidavit (such as the fact that the alleged offense occurred ten months ago). In *Wilmoth*, by contrast, destruction of evidence was apparently ongoing when the warrant was issued. Third, the trial court in this matter found that the detective acted in bad faith through his misleading characterization of “victim #2.” Fourth, probable cause was the critical issue in this case. In *Wilmoth*, the officers were possessed of ample probable cause and the only issue was

whether or not the violation of Rule 41 also violated the defendant's Fourth Amendment rights. Thus, *Wilmoth* does not support the positions of the State and *amicus curiae*.

The trial court and court of appeals correctly concluded that Detective Wuertz's statements to the judge should not have been considered. The oral testimony was not recorded or preserved in any way, and the statements were inadmissible pursuant to Crim. R. 41(C). There is no need to consider the State's first proposition of law.

Second Proposition of Law: Falsity in Search Warrant Affidavits and "Technical" Language

In its second proposition of law, the State proposes: "The issue of falsity in a search warrant affidavit must be judge in light of the non-technical language used by nonlawyers." This proposition of law has been the rule for many years and there is no need for this Court to review the matter in this case. See *United States v. Ventresca* (1965), 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684. Furthermore, neither the trial court nor the court of appeals below applied any "hypertechnical" definition of the term "victim" to the detective's affidavit. Instead, both courts noted that the detective's use of the term was inconsistent and lacked credibility, and on that basis, suppression was warranted.

Viewing the evidence objectively, the detective simply did not have any evidence of criminal activity by Appellee as it related to "victim #2." The "victim" characterization was directly contrary to Ohio's definitions of the term at R.C. 2930.01(H) and 2743.51(L). While a detective need not be expected to recite these statutory provisions verbatim, a common sense interpretation of "victim" in the context of a search for crime should include, at a minimum, some connection to criminal behavior. Otherwise, the information is not relevant and need not have been included in the first place.

The detective in this case simply could not reasonably have believed that the person referred to as “victim #2” was actually a victim of a crime. He admitted that she had never been listed as a victim in any investigative report or criminal complaint. Furthermore, he acknowledged that the relationship between Appellee and this person had been consensual and occurred after she had completed school and both were adults. Most importantly, the detective stated he did not believe there was probable cause to search Appellee’s home without the information about “victim #2.”¹

Under these circumstances, the trial court and court of appeals had competent, credible evidence that the detective’s statements about “victim #2” were intentionally false or made with a reckless disregard for the truth. Those findings are entitled to substantial deference and there is no need for further review by this Court.

Third Proposition of Law: Preliminary Nature of Proceedings

In its third proposition of law, the State argues “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.” Specifically, the State suggests that *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667, which requires a preliminary showing for challenges to a search warrant by extrinsic evidence, also requires two separate hearings. That proposition of law is unsupported by

¹ The jurisdictional memoranda of both *amicus curiae* argue that it is “hypertechnical” to expect that Detective Wuertz should know that the term “victim” in a search warrant affidavit which seeks evidence of criminal activity should include some expectation that the person is a victim of crime. This defies common sense, because the only reason to use the term “victim” in this context is to look for evidence of a crime. Furthermore, neither amici address the fact that the detective did not describe the woman as a victim anywhere else in his file or that, because she was not a victim of crime, there was no reason to search Appellee’s home for evidence of criminal activity.

any judicial authority and is contradicted by this Court's own decisions. In addition, the issue has been waived by the State.

It is well-settled: "An appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277, citing *State v. Childs* (1968), 14 Ohio St.2d 56, 236 N.E.2d 545.

When the evidentiary hearing commenced, the assistant prosecutor did not object to the testimony of the police detective who prepared the affidavit and obtained the search warrant. After both parties had an opportunity to examine the detective, the trial court asked for closing arguments. The prosecutor proceeded to address the merits of the suppression issue and argue that there was sufficient probable cause to support the warrant and that, in the absence of probable cause, the good-faith exception should apply. The prosecutor never voiced an objection and did not address the *Franks* issue at all. Furthermore, the State declined an opportunity to present additional witnesses. To the contrary, the prosecutor in this case asked the trial judge to proceed to a ruling on the merits of Appellee's motion to suppress. Thus, the trial court and defense were never on notice that the State objected to the nature of the proceedings and the State waived this issue for appellate review.

There is also no legal support for the State's argument that the trial court erred in considering the merits of Appellee's motion to suppress after its consideration of the *Franks* issue. Even if the State had not waived this argument, the cases cited by the State are inapposite. The prosecution cites no applicable authority and instead relies on a pre-indictment delay case to advance its novel argument.

However, *State v. Whiting* (1998), 84 Ohio St.3d 215, 702 N.E.2d 1199, actually undercuts the State's argument in this case. *Whiting* addressed the procedure for a defendant's motion to dismiss based on pre-indictment delay. In ruling, this Court held that a defendant was entitled to dismissal of a murder indictment based on a fourteen year pre-indictment delay, given the trial court's finding that the defendant demonstrated actual substantial prejudice, and the State's failure to present evidence of justifiable reason for delay. This Court also found that prosecutors were not entitled to a new trial court hearing on the matter because they had not been prejudiced by a trial court's erroneous ruling on the burden of production. *Id.* at 218.

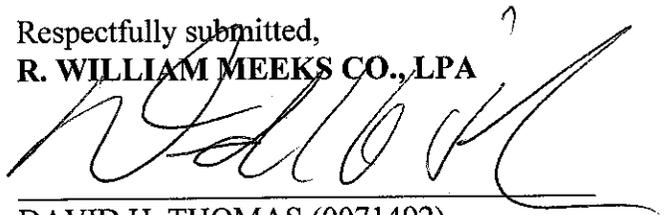
Whiting does not support the State's argument in this case. As in *Whiting*, the prosecution here cannot claim that it was misled by the trial court. The prosecutor declined to call additional witnesses and addressed the merits of the motion to suppress. He did not make any argument about *Franks* or the defendant's burden, nor did he ask for additional opportunity to challenge the defense's motion to suppress. Furthermore, as discussed above and given the lack of probable cause to search Appellee's residence in any event, the State has failed to demonstrate prejudice. Under these circumstances, the State cannot claim it was misled by the defense and the trial court.

Accordingly, there is no need to review the State's third proposition of law.

CONCLUSION

Accordingly, because the trial and appeals courts applied well-settled analyses in issuing appropriate rulings, this is not a case of public or great general interest, nor does it involve a substantial constitutional question, this Court should decline jurisdiction.

Respectfully submitted,
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I hereby certify that a true copy of the foregoing was duly served upon (1) Counsel for the State of Ohio, Steven L. Taylor, Franklin County Prosecutor's Office, 373 South High Street, Columbus, Ohio 43215, (2) Counsel for *Amicus Curiae* Ohio Prosecuting Attorneys Association, Joseph T. Deters and Scott M. Heenan, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, and (3) Counsel for *Amicus Curiae* Fraternal Order of Police, Capital City Lodge Nine, Russell E. Carnahan and Robert M. Cody, Hunter, Carnahan, Shoub, Byard & Harshman, 3360 Tremont Road, Suite 230, Columbus, Ohio 43221, on October 17, 2011, by regular United States mail.



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