

ORIG

THE SUPREME COURT OF OHIO

STATE OF OHIO : Case Nos. 2011-1504
2011-1593

Appellee :

vs. : On Appeal from the
Summit County Court of Appeals,

JILLIAN D. HOBBS : Ninth Judicial District
Case No. 25379

Appellant :

MERIT BRIEF OF APPELLANT JILLIAN D. HOBBS

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Introduction

This case first presents the question of whether the search and seizure provisions of the United States and Ohio Constitutions bar a law enforcement officer from serving a dual-role as an officer and deputy clerk of a local municipal court for the purposes of determining probable cause for issuance of a warrant.

This Court should hold that an officer cannot serve in that dual capacity.

This case then presents the questions of what remedies are to be applied for a dual capacity violation. Ms. Hobbs submits that in these circumstances dismissal was appropriate as was suppression of evidence. This Court should also define what evidence must be suppressed when an arrest warrant was issued an officer acting in such dual capacity. It should decide that all evidence directly or indirectly taken from the time of implementation of the dual capacity policy should be suppressed.

This case arises from a warrantless felony arrest of Ms. Hobbs at her residence. Three Summit County Sheriff's detectives went to "interview" Ms. Hobbs regarding a burglary. They confronted her and her paramour Mr. Goudy. The complaining detective said Ms. Hobbs tearfully confessed after being allowed to speak privately with Mr. Goudy.

Ms. Hobbs was arrested for burglary. Drugs and paraphernalia were seized, but no drug charges were filed. Her warrantless arrest was followed immediately by the filing of a complaint and the simultaneous issuance of an arrest warrant for continued detention.

The complaining deputy, following then standard practice, used a 5-page multipart form. Thus the complaint and arrest warrant were each sworn to by the interrogating investigator/detective before his sergeant supervisor also the supervisor of detectives of the same department. The supervisor sergeant served in the dual-role as an officer and deputy clerk of a local municipal court to determine probable cause for issuance of an arrest warrant.

The complaining officer appeared before the Grand Jury and Ms. Hobbs was indicted for burglary. She moved to suppress and dismiss. Upon evidentiary hearing, the trial court found the warrant "invalid" because probable cause was not determined by a neutral and detached magistrate. But it found probable cause for the warrantless arrest that immediately preceded the warrant. It said dismissal was not appropriate, that the exclusionary rule provided the remedy, but determined that no evidence had been seized as "a direct result of the improperly issued warrant" and denied both motions.

Ms Hobbs plead no contest and was sentenced to 2 years in prison. She appealed.

The court of appeals held that the arrest warrant issued pursuant to another officer's "probable cause determination was invalid". It found "that exclusion of evidence was not the appropriate remedy" because "no evidence was derived from the arrest and accordingly there was no evidence to suppress". The appellate court held "the confession was not derived from the invalid arrest warrant... [which] could not flow back to invalidate a voluntary confession." It denied dismissal finding felony jurisdiction

invoked by a proper indictment, holding that an illegal arrest does not bar or affect the validity of subsequent proceedings.

The court of appeals denied timely application for reconsideration. It granted a motion to certify noting its decision and a Sixth District decision which held a police dispatcher was not a neutral and detached magistrate conflicted with two decisions from the Eighth District that had decided an officer could act as a neutral and detached magistrate.

This Court determined that the certified conflict existed. (Case No. 2011-1504). Ms. Hobbs also filed a separate discretionary appeal (Case No. 2011-1593). Upon consideration of the jurisdictional memorandum filed, this Court accepted that appeal as to its first proposition. It has consolidated the cases for briefing.

Ms. Hobbs seeks reversal of the appellate court's decision as to the failure to allow any remedy for constitutional violations

STATEMENT OF THE CASE/FACTS

The Warrantless Arrest

After patrol officers took a report, Sheriff's detectives talked to the reporting party who confirmed that her house "was broken into" although there were no signs of forced entry. T. 10-11. The report said that two other witnesses had "seen someone going into her house". The detectives interviewed those witnesses who "indicated they had saw Ms. Hobbs enter the victim's residence the day before" T.11

Acting on that information¹ three Sheriff's Detectives (Plymire, Klein, and Brown) "went then to make contact" with Ms. Hobbs at her residence (T. 12). They did not first ask for an arrest warrant for Ms. Hobbs or search warrant for her residence. No explanation was ever given as to why no warrants were obtained before confronting Ms. Hobbs.

Detective Plymire claimed that they "made contact with Ms. Hobbs and her male friend, Mr. Goudy, at the residence, their residence" T. 13 He said they knocked on the door, identified themselves, and Ms. Hobbs "invited us in" Id. After entry, the detectives then told her "what the investigation was regarding and that there was witnesses that had seen her go into a residence around the corner" T.13-14. Plymire said "Mr. Goudy and Jillian" asked if they could talk privately and were allowed outside "to the shielded— around the corner of the house from the front door and talked for a while" T.14. Detective Plymire said "when she came back she was upset, crying, and said that she took that stuff from that lady. She had a drug problem and she went in and took it" Id.

Detectives Brown and Klein then went back inside the residence with Ms. Hobbs seeking to "recover the property for the victim"². She said she did not have it but, when

¹ Ms. Hobbs was then on probation for an earlier conviction for burglary in Stark County. The detectives did not state that they knew of this conviction before they went to "make contact" with Ms. Hobbs.

² The property reported as taken was a 13" television and an X-Box 360 video game system. Common Pleas Trans., Doc #9,10, Transferred Barberton Municipal Court Record, Sheriff Incident Report, Property Supplement

“asked if there was anything in the house that shouldn’t be in the house”, she “walked” Detective Klein to where there was some “heroin or heroin products or paraphernalia of such hidden someplace in the bathroom” T.16. That property was apparently taken (but no confirmation appears of record). Ms. Hobbs was arrested; Mr. Goudy was not arrested³ because “she admitted going into the house and taking the property herself only and was adamant that he (Goudy) did not have anything to do with it.” (T.18)

The Complaint/Arrest Warrant

There is no dispute that Ms. Hobbs was arrested without a warrant then “transported to the (Sheriff’s) office and then from the office to Summit County Jail” T.18 The detectives “typed a complaint for the burglary” to forward to municipal court. “Our sergeant clerked it. He’s a clerk through the Barberton Municipal Court” T.19 The detectives used a multipart form whereby the complaint is sworn to by one police officer before another officer of that department who acted in the dual capacity as a police officer and deputy clerk for the local municipal court. When the complaint is signed and notarized at the same time “press thru” copies are created and a warrant form is simultaneously signed.

³ Mr. Goudy died July 7, 2010 from “complications of heroin use”. Ms. Hobbs was then imprisoned at Trumbull Correctional

Because a pre-printed "press-through" multipart form was used an arrest warrant did not separately issue; the Detective admitted 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". T.24-25

In response to specific questions of the trial court, Detective Plymire made it clear that he followed a standard procedure, one that was not used just for late hours when another clerk might not be available; he affirmed this when the court asked that it was correct that "in other words the sergeant isn't just acting as the deputy clerk in the evening hours but he'll do it during the day as well?" T. 28-29

On redirect examination Detective Plymire was *first* asked "[w]as any evidence gathered after Ms. Hobbs' arrest?" He answered "no" T. 30

Sergeant Stott was a Detective Bureau Supervisor who received one-hour training to act as a deputy clerk of the municipal court for [o]ur own officers, other officers for the sheriff's office' officers for other departments if need be depending on what they needed" T.33-34 The sergeant estimated he had so acted a "couple hundred" times. T.35. Stott claimed he determined if there was "enough probable cause for the arrest" T.36. He admitted that he knew that as part of his training and experience "that no warrant should issue except on probable cause determined by a neutral and detached magistrate". T.39. When asked if it was "pretty clearly established' that was the law, Stott said "Correct. We can agree on that wording absolutely" T. 43 But Stott maintained he was neutral and detached because he "was not involved in that investigation". T.39

The complaint Detective Plymire presented to his sergeant was a "bare bones" complaint; that is, it stated only that Ms. Hobbs

"on or about the 15th day of September, 2009 in the ...Township of Coventry did violate O.R.C. # 2911.12 constituting a charge of Burglary".

Where the form required the complainant to "(state the essential facts) it said:

Jillian D. Hobbs did trespass in an occupied structure that is the permanent or temporary habitation of Laura Scott when Laura Scott was present of likely to be present with purpose to commit in the habitation a criminal offense"

Thus, on its face the complaint did not explain any basis on which the complaining officer believed Ms. Hobbs committed the offense. Detective Plymire said that when he took the complaint to Stott he told him off any record that he "received a confession through the ongoing investigation of the burglary of Miss Scott's residence" T.20

Two weeks after her arrest and continued detention Ms. Hobbs was indicted for burglary. Detective Plymire who had signed the complaint testified at Grand Jury. (T. 21)

The record is clear that no *prompt* determination of probable cause was ever made by any neutral and detached magistrate. Ms. Hobbs was arrested September 16 at 1830 (6:30 p.m.); the complaint/ arrest warrant was filed September 17 at 6:52 a.m. T.25 Thus from the filing of the arrest warrant until the suppression motion (hearing held December 2, 2009) was determined February 25, 2010 over five months passed before a determination of probable cause was made, albeit in error, by a neutral and detached officer.

Rulings on Motions to Suppress and to Dismiss

Common Pleas Court

Ms. Hobbs moved to suppress and dismiss. CP Dkt #19 11-5-09 Motion and Memorandum to Suppress and Dismiss. A hearing was held. CP Dkt # 79 7/9/10 Transcript of Proceedings- Suppression Hearing of 12-2-09.

Ms. Hobbs' objections to the State's belated opposition and her motion to reopen the record were not addressed and thus denied. CP Dkt #34 12-2-09 Objection and Motion to Bar Opposition. CP Dkt #36 12-7-09 Motion to Reopen Record. See also, CP Dkt #37 12-14-09 Defendant's Supplemental Authorities.

The trial court found the arrest warrant was "not properly issued" and "invalid" CP Dkt # 49 2-25-10 Order Denying Motions to Suppress and to Dismiss (App. A-21 and App. A-23). The trial court said

"the remedy appropriate in this circumstance of a defective warrant issued subsequent to a warrantless arrest is not the draconian sanction of a bar to further prosecution by a summary quashing of the indictment and dismissal of charges but instead the lesser imposition of evidence suppression." App. A-23

It determined the exclusionary rule was the remedy but found "no further evidence was obtained subsequent to Hobbs' arrest" (App. A-19), that 'no evidence was obtained as a direct result of the improperly issued arrest warrant' (App. A-23) and that the evidence underlying the charges in the indictment and supporting the prosecution's case was gleaned from sources independent of the tainted warrant. It appears that this 'poisonous tree' was barren of 'fruit' for the prosecution to pluck." App A-23, A-24)

The trial court concluded that

“[[t]he Fourth Amendment exclusionary principle governs the application of the remedy in this case”.... but [t]here being no relevant evidence to suppress the remedy is inoperative.”.... “The invalid arrest warrant in all likelihood, amounts to harmless error on the part of the prosecution with the result that the accused in this case does not seem to have suffered any legally redressible prejudice”. (App. A-24)

For those reasons the trial court denied the motions to suppress and dismiss.

Ms. Hobbs entered a no contest plea and was sentenced to two years. CP Dkt.#59 4/5/10 Entry of Sentence. She timely appealed and has since served her sentences. CA Dkt #46 6-13-11 Motion to Supplement the Record and CA Dkt # 58 7-8-11 Journal Entry (denying same).

The appellate decision

The appellate court affirmed. CA Dkt # 49 6-29-11 Decision and Journal Entry, 2010-Ohio- 3192. (App A-6 to A-16)

Suppression

The appellate court found “the trial court determined and we agree that the arrest warrant issued pursuant to Sergeant Stott’s probable cause determination was invalid” 2010-Ohio-3192 at ¶16. (App. A-11) However it concluded that exclusion of evidence was not the appropriate remedy. *Id.* Finding it was “the fact that she confessed to the crime before she was arrested” the court concluded it would not apply the exclusionary rule to “pre-violation conduct” *Id* ¶18. (App A-12) It declined to apply suppression to grand jury testimony “because without knowing what testimony was presented to the

grand jury this Court can only speculate whether it constitutes fruit of the poisonous tree” Id. ¶19 (App. A-12) Thus the court concluded “the trial court correctly refused to suppress Hobbs’ confession” Id. “Under these circumstances the invalid arrest warrant could not flow back to invalidate a voluntary confession.” Id ¶20

Finally the appellate court held “the trial court correctly determined that no evidence was derived from the arrest and accordingly there was no evidence to suppress”. Id ¶20 (App.A-12).

The appellate court also denied motions to supplement or correct the record the record or take judicial notice. CA Dkt # 42 5-9-11 Journal Entry; CA Dkt # 47 6-29-11 Journal Entry. Ms. Hobbs had asked the court to take notice that discovery had disclosed that after the arrest warrant issued recordings of Ms. Hobbs jail telephone conversations were obtained for use in evidence and that the prosecution had given notice of its intention to use a prior conviction as other acts evidence. CP Dkt # 5 10-8-09 State’s Demand for Discovery⁴; CP Dkt # 19 11-4-09 Notice of Intention to Use Evidence.

Accordingly the court of appeals never considered if those items were evidence subject to suppression.

⁴ Under the Criminal Rules in effect at that time, the State was not entitled to seek discovery unless it had provided the same. On appeal the State did not dispute that the jail recordings “may have been exchanged during the discovery process” but “the CD of the telephone calls made from the jail were not introduced into evidence during the suppression hearing and were never made part of the record at the trial court level” CA Dkt # 41 4-29-11 State’s Response to Appellant’s Motions to Supplement

Dismissal

The appellate court said Ms. Hobbs contended as “a sub-argument of her motion to suppress” that the trial court should have also dismissed *the indictment with prejudice*. 2010-Ohio-3592 ¶24. (App. A-14) (Italics added) It overruled her contentions with regard to dismissal. *Id.* ¶27 (App. A-15)

However Ms. Hobbs’ motion to suppress and dismiss did not seek the indictment’s dismissal *with prejudice*. She argued jurisdiction never attached in municipal court given the bare bones complaint (no municipal court jurisdiction to bind-over) or that the testimony to the grand jury should have been suppressed. Under either circumstance jurisdiction would not attach. ¶25 (App.A-14) [“proper” indictment needed]

The appellate court affirmed the denial of the motions to suppress and dismiss; it overruled the assignment of error. ¶28 (App. A-15)

An application to reconsider was denied. However, Ms. Hobbs’ motion to certify a conflict was granted. This Court found that conflict’s certified question warranted resolution. Case No. 2011-1504. Ms. Hobbs’ separate discretionary appeal (Case No. 2011-1592) was accepted as to its first proposition of law and the two cases consolidated.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I

A law enforcement officer serving a dual-role as an officer and deputy clerk of a local municipal court may not act as a neutral and detached magistrate for purposes of Crim. R. 4(A)

Is a law enforcement officer serving in the dual role as an officer and deputy clerk of a local municipal court a neutral and detached magistrate for the purpose of issuing an arrest warrant?

The Sixth and Ninth Districts answered the question in the negative holding one officer could not serve in such a dual role. *State v Torres* (Aug.22, 1986) 6th Dist. No. WD-85-64 [police dispatcher could not serve dual-role]; *State v Hobbs* 2011-Ohio-3192 ¶ 16 [detective sergeant supervisor could not serve in dual-role].

But the Eighth District has held that an “uninvolved officer” could act as a neutral and detached magistrate. *State v Garrett*, 8th Dist. No.s.87112 & 87113, 2006-Ohio-6020; *State v Robinson* (Oct. 24, 1985) 8th Dist. Nos. 49501, 49518 & 49557

The certified question presents a conflict which this Court should now resolve.

Standard of Review

Motions to dismiss are reviewed de novo. *State v Stallings*, 150 Ohio App.3d 5, 2002-Ohio-5942, ¶6

Appellate review of motion to suppress presents a mixed question of law and fact. *State v Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

A reviewing court should carefully review findings of "historical fact" for clear error while completing strictly "independent appellate review of ultimate determinations". *Ornelas v U.S.* 517 U.S. 690, 697-699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

Burdens of Proof

In an action involving a structural challenge to the validity of a warrant, the burden of proof rests with the defendant. *Franks v. Delaware*, 438 U.S. 154, 156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

On warrantless arrest the burden is on the State to prove that an exception to the warrant requirement applies. There is a strong preference if not a requirement that arrests be made by warrant; warrantless arrests and searches are per se unreasonable as outside the judicial process. *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed. 2d 290 (1978); *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967)

This Court requires that as part of justifying a warrantless arrest the State must show why a warrant could not be first obtained. *State v. Heston*, 29 Ohio St.2d 152, 280 N.E.2d 376 (1972) [syllabus two]

Argument

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Ohio Constitution's search and seizure provision has nearly identical language.

Ohio Constitution, Article I, Section 14

The Criminal Rules established by this Court and the various statutes enacted by the General Assembly implement the fundamental protections guaranteed by the federal and state constitutions. *Giordenello v. United States*, 357 U.S. 480, 485, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958):

The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that '* * * no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized,' of course applies to arrest as well as search warrants. See *Ex parte Burford*, 3 Cranch 448, 2 L.Ed. 495; *McGrain v. Daugherty*, 273 U.S. 135, 154-157, 47 S.Ct. 319, 323, 71 L.Ed. 580. The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint '* * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436. The purpose of the complaint, then, is to enable the appropriate magistrate *** to determine whether the 'probable cause' required to support a warrant exists.

Crim.R. 4 entitled "Warrant or Summons; Arrest" provides in pertinent parts:

(A) Issuance.

(1) Upon complaint. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, *a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by a judge, magistrate, clerk of court, or officer of the court*

designated by the judge, to any law enforcement officer authorized by law to execute or serve it.

(E) Arrest.

(1) Arrest upon warrant.

(a) Where a person is arrested upon a warrant that states it was issued before a scheduled initial appearance, or the warrant is silent as to when it was issued, the judicial officer before whom the person is brought shall apply Crim.R. 46.

(2) Arrest without warrant. Where a person is arrested without a warrant the arresting officer shall, except as provided in division (F), bring the arrested person without unnecessary delay before a court having jurisdiction of the offense, and shall file or cause to be filed a complaint describing the offense for which the person was arrested. Thereafter the court shall proceed in accordance with Crim. R. 5.

The General Assembly requires the prompt filing of an affidavit upon arrest without warrant. R.C. 2935.05. It also requires that a “judge, clerk, or magistrate” then issue a warrant:

Upon the filing of an affidavit or complaint as provided in sections 2935.05 or 2935.06 of the Revised Code such judge, clerk, or magistrate shall forthwith issue a warrant to the peace officer making the arrest, or if made by a private person, to the most convenient peace officer who shall receive custody of the person arrested. *All further detention and further proceedings shall be pursuant to such affidavit or complaint and warrant.* (Italics added) R.C. 2935.08.

The Iowa Supreme Court examined the “neutral and detached” requirement. *State v. Fremont*, 749 N.W.2d 234, 237 (Iowa 2008) notes that the second clause of the Fourth

Amendment, the Warrants Clause, is actually silent on the question of who may issue a valid warrant such that there can be no resort to a textual analysis of the Fourth Amendment to provide guidance on the question of who may issue a valid warrant.

The Iowa court also pointed out that that the drafting history of the Fourth Amendment is of little help; "there is simply nothing of relevance on the question of magistrate qualifications that can be teased from this drafting history". *Id.*

As that case noted, the first clear pronouncement by the United States Supreme Court that a warrant under the Fourth Amendment must be issued by a "neutral and detached" magistrate was in *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). In *Johnson*, Justice Robert Jackson coined a well recognized phrase in holding that the inferences drawn from evidence to determine whether probable cause existed to engage in a search must be made by:

"a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 14

The Iowa court noted that as originally formulated by Justice Jackson, the requirement of a "neutral and detached" magistrate was tied to the concept of separation of powers-the magistrate approving the warrant must not be an eager (or sullen) police apparatchik or agent. *Id.*

The requirement of a "neutral and detached" magistrate announced in *Johnson* has been often repeated by the United States Supreme Court in the separation of powers context. *Coolidge v. New Hampshire*, 403 U.S. 443,450 (1971) , [state attorney general

issued search warrant even though actively in charge of the investigation and later chief prosecutor at trial.] *Shadwick v. City of Tampa*, 407 U.S. 345, 350-351 (1972) [court clerk a judicial branch employee sufficiently disassociated from the role of law enforcement to issue arrest warrants; “[w]hatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement.” *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 321 (1979) [a town justice signed search warrant and accompanied police to make a case-by-case determination of obscenity; by becoming part of the prosecution team could not be considered neutral and detached *Id.* at 327]

Johnson, Coolidge, Lo-Ji Sales, and Shadwick all show that the warrant requirement reflects a preference for one sort of *judicial* officer over the far more competitively charged police officer when it comes to making the discretionary decisions that authorize search or arrest warrants.

As in the Iowa case, the issue of the neutrality or detachment of an issuing officer is not based only on the separation of powers concept. There are due process concerns involved because the Fourth Amendment applies by incorporation through the Fourteenth amendment due process. Thus due process alone is a factor.

Again as the Iowa court detailed, in *Connally v. Georgia*, 429 U.S. 245, 246 97 S.Ct. 546, 50 L.Ed.2d 444 (1977) the police obtained a search warrant from a justice of the peace. These justices were not salaried, but were compensated five dollars for every warrant issued but nothing in cases where the warrant was denied. *Id.* at 246. The Court

invalidated the warrant on the ground that the magistrate was not neutral and detached. *Id.* at 249-50. *Connolly* did not focus on separation-of-powers; it relied on the *due process* analysis provided in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972).

Ms. Hobbs submits that due process protects against determinations to issue warrants made by one with a direct pecuniary interest (as in *Connolly*) and, as *Tumey* and *Ward* have been applied, due process also protects against determinations to issue warrants made where, as here, the challenged relationship (two officers same department) provides a significant appearance of impropriety. When one officer swears before another officer and a warrant issues the complete disregard of a judicial determination simply appears unfair, even if not actually biased.

And if the requirement that no warrant issue except upon a finding of probable cause made by a neutral and detached magistrate had been followed in this case two other connected constitutional errors clearly apparent here could have been avoided.

Unlike another police officer, a neutral and detached magistrate is more likely to enforce the constitutional requirement that when a complaint issues purporting to charge an offense it must do so to some reasonable degree of particularity; "bare bones" allegations do not suffice. *Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1965).

This case presently exactly the kind of “bare bones” complaint that standing alone cannot constitutionally support a determination of probable cause for a warrant.

A neutral and detached magistrate issuing the warrant would also have insured that upon warrantless arrest an arrestee is afforded a reasonably *prompt* determination of probable cause for arrest. *County of Riverside v McLaughlin* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991)⁵

Holding that a law enforcement officer acting in a dual-role is not a neutral and detached magistrate is consistent with reasoned decisions of the federal Sixth Circuit. *United States v Weaver* 99 F.3d 1372, 1376 (6th Cir. 1996) [“the court must insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for police”] *United States v Parker* 372 F.3d 770 (6th Cir. 2004)[search warrant issued by jail administrative assistant not neutral]; *United States v Scott* 260 F. 3d 512 (6th Cir 2001) [search warrant issued by retired judge *void ab initio*] [Parker and Scott each emphasizing the Leon good faith exception does not apply] *But see United States v. Master*, 614 F.3d 236, 243 (6th Cir. 2010) [noting that *Herring supra* may allow good faith exception in circumstances unlike those here]; *U.S. v. Cornett*, 767 F.2d 922 (6th Cir. 1985)[local attorney appointed as trial commissioner in area where no district judge resides and who assisted complainant in drafting her complaint then issued warrant held neutral and detached]

⁵ *State v Berry* 80 Ohio St.3d 371, 385 at n. 9, 1997-Ohio-336 “ it is far from clear that the exclusionary rule will be applied to *freestanding* McLaughlin claims” (Italics added).

Holding that a law enforcement officer acting in a dual-role is not a neutral and detached magistrate is consistent with reasoned decisions of other states. *People v Payne*, 424 Mich. 475,483, 381 N.W.2d 391 (1986) [deputy sheriff not actively involved in investigation acting as magistrate to issue search warrant not neutral and detached by status alone] citing *Vaughn v. State*, 160 Ga.App. 283, 284, 287 S.E.2d 277 (1981) [justice of the peace who was also a sworn and bonded, albeit inactive, deputy sheriff not neutral and detached magistrate]. But see, *State v Davis* 367 Ark. 330 , 240 S.W. 3d 115(2006)[assistant attorney general not involved in case investigation who was also part-time judge who issued warrant; held no error finding neutral and detached]

The Eighth District's contrary holdings in *Garrent* and *Robinson* that one officer can be a neutral and detached magistrate if not directly involved in the investigation of the subject crime should be rejected.

The Sixth and Ninth District have correctly held that a law enforcement officer serving in dual-role as a deputy clerk of courts cannot act as a neutral and detached magistrate.

While the appellate court correctly decided the dual-role issue, it erred when it denied the motions to suppress and dismiss and failed to afford any relief for constitutional error.⁶

⁶ The trial court also held the constitutional error was "in all likelihood harmless". App. A-24. The appellate court did not so find. No finding of harmless error beyond reasonable doubt was made by either court; to date the state has not argued harmless error.

Affirming that the dual-roles for officers do not meet constitutional standards for a neutral and detached magistrate then requires this Court to discuss and explain what relief should have been afforded here. Most importantly this case grants an opportunity for this Court to remind the courts of this State that the consequences of systemic patterns and practices of constitutional deprivations must be meaningful remedies, must work to bring an end to any such existing practices, and should be at least significant enough to prevent such practices from continuing in the future.

PROPOSITION OF LAW No. II

When a warrantless arrest occurred with no showing why a warrant could not first be obtained followed by a “bare bones” complaint for an arrest warrant for continued detention and the warrant issued when one officer acted in the dual role of officer and deputy clerk where that dual-role was part of a recurring, systemic practice denying prompt determinations of probable cause by a neutral and detached magistrate, the exclusionary rule must apply to all evidence obtained directly or indirectly due to such policy from the time the policy was implemented as well as apply to bar evidence directly or indirectly obtained after the particular warrant issued.

This Court granted Ms. Hobbs leave for discretionary appeal in Case No. 2011-1593 as to her first proposition of law. Proposition of Law II above is a clarified version of the proposition allowed.⁷

⁷ As originally stated the allowed proposition read:

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.

Memorandum in Support of Jurisdiction filed Sept. 19, 2011, Case No. 2011-1593, pp. i, 5

The issue here is what remedies if any should be applied for those constitutional violations in case like that *sub judice*. The trial court and appellate court each correctly held the arrest warrant invalid. But each court mistakenly held that dismissal would never be appropriate.

The trial court and appellate court each decided that the exclusionary rule was the sole remedy. But each court mistakenly held that the exclusionary rule could not apply but each court mistakenly found that nothing was seized as a direct result of the invalid arrest warrant; that is, that nothing was seized after the warrant issued. Each court mistakenly found there was nothing to be suppressed.

Dismissal without prejudice was an available remedy

Subject matter jurisdiction may be raised at any time. *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025 ¶10

This arrest warrant caused Ms. Hobbs to appear in municipal court. The warrant was defective for lack of a neutral and detached magistrate determination **and** because it had issued based upon a bare bones complaint/affidavit devoid of any information as to the source of the officer's information.

There is a constitutional component to the sufficiency of a complaint. *Whiteley v. Warden*, (1971), 401 U.S. 560, 564-565; 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). *State v. Johnson*, 48 Ohio App.3d 256, 549 N.E. 2d 550 (1988) [good faith exception not apply to arrest warrant issued on the strength of a "bare bones" affidavit.] A complaint for a warrant should answer *on its face* should answer the hypothetical question posed by Mr.

Justice Harlan in *Jaben v United States* 381 U.S. 214, 221-224 85 S.Ct. 1365, 14 L.Ed.2d 345 (1965): “officer what makes you think the defendant committed the crime charges?”

This complaint was simply insufficient to invoke the jurisdiction of the municipal court to send the case over to the grand jury. *But see, State v. Mbodji*, 2011-Ohio-2880, 129 Ohio St.3d 325, 951 N.E.2d 102 [complaint of private citizen not reviewed by official sufficient to invoke jurisdiction]; *Radvansky v City of Olmstead Falls* 395 F.3d 291, 307 fn.13 (6th cir. 2005) [“after the fact grand jury involvement cannot serve to validate a prior arrest”].

A remedy of dismissal *without prejudice* for lack of jurisdiction could have been applied. But assuming jurisdiction attached, the exclusionary remedy should have been applied.⁸

There was evidence to be suppressed

The “confession”

The second syllabus of *State v. Heston*, 29 Ohio St.2d 152, 280 N.E.2d 376 (1972) states that an arrest without a warrant is valid where the arresting officer has probable cause to believe that a felony was committed by a defendant **and** the circumstances are such as to make it impracticable to secure a warrant. *Heston* cites *State v. Woodards* (1966), 6 Ohio St.2d 14, 20, 215 N.E.2d 568 as quoting *Johnson v.*

⁸ Unlike a case recently decided this case presents an opportunity to apply *Herring v United States*, *infra*, as this case is one of recurring and systemic violations. *State v. Gould*, Slip Opinion No. 2012-Ohio-71 ¶2, ¶3

United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 [warrant need not be obtained when probable cause to believe felony was committed **and** the circumstances such as to make it impracticable to secure a warrant.]

Often the circumstances of a warrantless arrest make it clear why it was not possible to first get a warrant. [Fleeing bank robber waiving smoking pistol] But here nothing was presented by the State at hearing on motion to suppress as to why the detectives could not have first obtained a warrant before confronting Ms. Hobbs at her home and obtaining a "confession".

Since the State failed to show why this arrest needed to be made without a warrant, there was no probable cause shown to arrest and the alleged confession should have been suppressed.

But even assuming arguendo that there had been a showing of why the detectives could not have first obtained a warrant, suppression of the "confession" remained appropriate

The exclusionary rule applied at earlier point than that set by the lower courts

The appellate court used a strict linear approach to the exclusionary rule; it accepted the trial court's view that the starting point of a constitutional violation was the invalid warrant. Examination focused on what was seized with or after the invalid warrant. Since no physical evidence was seen to have been taken after the specific warrant issued, the lower courts saw no "fruit of the poisonous tree"; nothing to suppress.

In effect this chronological, linear view was applied:

Confession → Warrantless arrest → invalid warrant → nothing to suppress.

Thus viewed, the appellate court held it would "not now endorse an application of the exclusionary rule to *pre-violation* conduct (the alleged confession)" (Italics added)

Hobbs ¶ 18

The error in this view is that the constitutional violation is seen to begin only when this one particular complaint and warrant issued; thus the appellate court stated "the confession was not derived from the invalid arrest warrant" *Id.* (The trial court found nothing was taken as a "direct result" of the warrant, a standard not imposed in exclusionary rule analysis)

But the "confession" did not precede a warrant violation, it **followed** upon an admitted **pre-existing** systemic patterns and practices of ignoring the requirement that probable cause determinations be made by a neutral and detached magistrate, the "confession" was then not referenced in the "bare bones" complaint presented to the other officer and the State failed to show why a proper warrant could not be obtained prior to a warrantless arrest.

The lower courts erred in finding the remedy of exclusion of the "confession" could not apply. The failure to afford any remedy was error. Exceptions to the exclusionary rule do not go beyond the rule itself. *Arizona v Gant* 556 US --- ,129 S. Ct. 1710 (2009). Likewise applications of the rule should not be denied by strict lineal

chronology when clearly established violations of constitutional law are shown to be part of a systemic pattern and practice. The exclusionary rule's purpose must not so easily be defeated.

Herring v United States 555 US 135, 129 S. Ct. 695 (2009) held that the exclusionary rule should be applied to arrest warrants *when systemic error or recklessness appears*. The ultimate purpose of the exclusionary rule-- to deter police misconduct and preserve judicial integrity-- is best supported by recognizing that the constitutional violations did not begin when this one warrant issued.

A chronological, linear approach can serve the purpose of the exclusionary rule provided *the right starting point* is used. The starting point of this violation occurred long before the claimed confession and the individual arrest warrant. The record proved that there was a pre-existing systemic pattern and practice of warrants issued for one officer by another officer purporting to act as a neutral and detached deputy clerk; this practice had occurred a "couple hundred" times by Sgt Stott alone. Tr. p.35. Sgt Stott thought he was a "neutral and detached deputy clerk"; he claimed he made decisions here based on information "obtained from the witnesses and the confession" – but none of that information appeared on the face of the complaint –nor was any record made of what the complaining officer said to him; nevertheless he claimed that information was "what I based my probable cause on". Trans., pp.37, 40

The appellate court recognized that the dual-role of officers to determine probable cause was a practice various prosecutors were "repeatedly advised...that law enforcement

officers cannot serve as deputy clerks". Hobbs ¶ 16. (App.A-11) This practice *pre-existed* any "interview" of Ms. Hobbs at her home by officers who then already had information" obtained from witnesses" supposedly implicating Ms. Hobbs.

If a linear approach *beginning at the most appropriate starting point* is used:

Violation =

existing

pattern and practice

no neutral and

detached magistrate **plus** disregard of
obligations to obtain
warrant before arrest
(or explain why not)

followed by warrantless arrest
after confession

followed by invalid
warrant → indictment → discovery

The violations here begin *before* the confession, not just when one warrant issued after a confession. This is exactly the counterpoint to the arrest warrant practice discussed in *Herring supra*. [arrest warrant inadvertently not recalled from system]

Given the admitted "systemic error" of this practice, suppression is consistent with *United States v Crews* 445 U.S. 463, 474 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) [holding that "without more" dismissal or exclusion of in-court identifications was not required.] The "more" lacking in *Crews* was presented here by an admitted systemic pattern and practice.

The ultimate purpose of the exclusionary rule is to deter police conduct and preserve judicial integrity. At a minimum any reference to Ms Hobbs' arrest or her identification *by the charging police officer at trial* should have been suppressed.

The comments in *Crews* given in the context of that illegal arrest do not fairly apply to this case. In *Crews* the narrow issue was:

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest. 445 U.S. at 465

Ms. Hobbs never asked that the testimony of any alleged victim be barred.

Crews noted the scope of the exclusionary rule:

Wong Sun, supra, articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial: The exclusionary prohibition **extends as well to the indirect** as the direct products of such invasions. As subsequent cases have confirmed, 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.

445 U.S. at 470 (internal quoted citation omitted; bold emphasis added)

In the *typical* "fruit of the poisonous tree" case, however, the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation, and the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality. Thus, *most cases* begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity. *Id* at 471 (Italics added)

Crews does not bar the application of the exclusionary rule in this case when applied from the proper point.

Use of the proper, earlier starting point is also consistent with *Herring v United States* 555 U.S 135, 129 S.Ct. 695 (2009) (arrest on warrant which should have been recalled) Herring emphasized that the exclusionary rule should be applied when systemic error or recklessness appears. Such systemic error and recklessness admittedly occurred a "couple hundred" times before this invalid warrant. The systemic pattern and practice is not corrected and police conduct not deterred by a failure to apply the exclusionary rule from that earlier point.

But even if the warrant here was the only starting point for the rule:

There was evidence seized as a result of the invalid warrant

Grand jury testimony

The issued arrest warrant was the cause of Ms. Hobbs' detention. R.C. 2935.08. After the warrant issued, Ms. Hobbs was indicted. The State opened the door to the grand jury; it asked the detective who signed the complaint if he testified at grand jury; he said he presented "similar information" to the grand jury as he had to his sergeant. Tr. 21.

The appellate court found no error in failure to suppress the use of that testimony to support an indictment. It found that the specific content of what was said at grand jury was unknown and that without knowing what was said, "this Court can only speculate whether it constitutes fruit of the poisonous tree." ¶19. (App.A-12)

But the content of that testimony was contained in the record. Detective Plymire said he told the grand jury what he had told his sergeant Tr. 21. Sgt Stott said what he had been told by Plymire (no record taken) so he could determine probable cause. Tr. 37. The detective's testimony to the grand jury occurred chronologically after the warrant issued; again, Ms. Hobbs' detention after arrest continued pursuant to the invalid warrant. R.C. 2935.08

The appellate court erred in concluding that it would have to "speculate" as to what was said at grand jury. That conclusion is quite different than finding that testimony was not poisoned fruit.

If the testimony to grand jury was suppressed this indictment would not have issued. Ms. Hobbs does not claim that the Fourth and Fourteenth Amendments apply inside the grand jury. *Costello v. United States* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956) [indictment based solely on hearsay evidence does not violate Fifth Amendment] *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) [allowing grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of grand jury duty].

Ms. Hobbs does submit that under those narrow circumstances presented here both constitutions stand at the door of the grand jury; the exclusionary rule is necessary to bar certain evidence from entering the grand jury. Here apparently only what was said under the challenged warrant procedure was presented to the grand jury by the law enforcement officer directly involved in the challenged practice. Barring use of such testimony at

grand jury was appropriate. *See, State v. Conrad*, 50 Ohio St.3d 1, 552 N.E.2d 214 (1990) [indictment obtained by use of compelled testimony of witness previously immunized must be dismissed]

However even if the confession and the grand jury testimony were not suppressed, the basic premise of denying any use of the exclusionary rule i.e., that "no evidence was derived from the arrest" was still wrong; both courts ignored other evidence in the record.

Identification by charging officer

There was no doubt that Ms. Hobbs' person was detained pursuant to the warrant. *United States v Crews* did not bar finding *her* identification at trial by the one complaining officer directly involved in the pre-existing systemic pattern and practice. *Crews* addressed a claim that an unlawful arrest should bar trial identifications by reporting "citizen" witnesses. 445 U.S. 465

The prior conviction

After the arrest warrant issued, the State gave notice of its intention to offer evidence of a prior conviction. The detectives did not testify they knew of the prior offense before the warrantless arrest. Obviously "other acts" evidence is not offered at a trial unless there has been an arrest and detention. Neither lower court considered whether the other acts evidence had a sufficient nexus to the practice of using an invalid warrant to continue detention so as to be "forbidden fruit".

Ms. Hobbs submits sufficient nexus exists; but for arrest, prior convictions are not used in court. Likewise absent detention under this warrant other evidence would not have been obtained.

Tape recordings of jail conversations

It was undisputed that tape recordings of Ms. Hobbs' telephone call conversations while in county jail were "seized" due to her detention. The State correctly noted that the actual conversations themselves were never made a part of the record. But on appeal the State has not denied that such recordings existed and were disclosed in discovery. However these recordings were never disclosed by the State when it represented to the trial and appellate courts that "no evidence" was seized due to the warrant⁹. There was a direct connection between the warrant for continued detention and the jail recordings.

Whether the State could have obtained a conviction without the confession *or* under an indictment not obtained after detention upon such a warrant, *or* without the charging officer identifying Ms. Hobbs at trial *or* without other acts evidence *or* without using her jailhouse calls is unknown.

What is clear is that both courts failed to afford any meaningful remedy for an admitted systemic pattern and practice of invalid warrants. The very purpose of the

⁹ One might assume the charging detective did not know of the jail recordings and only inadvertently mislead the trial court when he testified that there was no "evidence gathered after Miss Hobbs' arrest" Tr. 30 But that does not explain the trial prosecutor's failure to immediately disclose those recordings to the trial court.

exclusionary rule has been ignored by refusing to suppress the "confession", let alone by ignoring the evidence obtained and used after the warrant issued.

Penalties imposed for violations must bear relation to purposes which law serves. *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13, 58 USLW 4457 (1990) [officers with probable cause entered home without first obtaining a warrant and secured admission of guilt; that statement suppressed, subsequent statement at station not suppressed]. Of course:

"The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands *prior to any illegality*."

United States v. Crews, 445 U.S. at 475

But "reach backward" assumes a starting point : where does this Court draw the line on the illegality? Only when the Ms. Hobbs' warrant issued? Ms. Hobbs submits that an established systemic pattern and practice of disregard of clearly established constitutional law as to requirements for prompt determinations of probable cause by a neutral and detached magistrate upon more than bare bones complaints compels this Court to "draw the line" of illegality as existing before officers confronted Ms. Hobbs.

A relevant question in determining whether evidence is fruit of the poisonous tree and therefore subject to the exclusionary rule is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at *by exploitation of that illegality* or instead by means sufficiently distinguishable to be

purged of the primary taint." *United States v. King*, 990 F.2d 1552, 1563 (10th Cir.1993) (quoting *Wong Sun*, 371 U.S. at 488).

In this case, the answer to that question is the confession *was* obtained by exploitation of the systemic pattern of practice of making a warrantless arrest without explanation for the lack of a warrant, knowing that a warrant could issue by an officer acting in a dual-role to deny prompt determinations of probable cause by a neutral and detached magistrate. See *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("The exclusionary prohibition extends as well to the *indirect* as the direct products of [Fourth Amendment] invasions."); *Wong Sun* and *Crews* do not stand for the proposition that all preexisting governmental conduct immediately prior to issuance of an illegal arrest warrant is exempt from suppression.

In this case even if the warrantless arrest had been proven justified (and it was not) the confession, the grand jury testimony, the officer's trial identification, the prior conviction and the jail tape recordings were all developed for use at trial after the arrest warrant issued; all and any of those items were t least an indirect result of the systemic pattern and practice of violations.

CONCLUSION

This Court should hold that a police officer cannot serve in the dual role as an officer and a deputy clerk of a local municipal court to determine if probable cause exists to issue an arrest warrant. It should hold such conduct is a violation of due process and

the Fourth Amendment requirement that such probable cause determinations be promptly made by a neutral and detached magistrate. The dual role practice when coupled with the use of “bare bones” complaints or affidavits to support of such warrant also effectively denies any prompt judicial determination of probable cause for arrest.

This Court should hold that where a systemic pattern and practice of that dual role scheme existed, dismissal without prejudice may be an elected defense remedy and the exclusionary rule must be applied to evidence directly and indirectly obtained as part of the systemic practice. This Court should make it clear that the exclusionary rule must be applied at a point that effectively ends such practices.

This Court should reach these conclusions under the Fourth and Fourteenth Amendments of the United States Constitution and the Ohio Constitution Article I Section 14.

Some might claim that a “bare bones” complaint or affidavit and the failure of a neutral and detached magistrate to promptly determine if probable cause exists to issue an arrest warrant are somehow not egregious constitutional violations.

The Iowa Supreme Court in *State v Freemont supra* quoted well when it said:

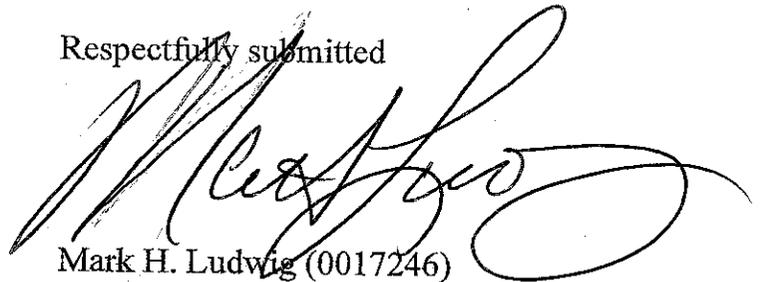
We recognize that some may not regard this case as presenting an egregious violation of the Fourth Amendment. As observed by Justice Bradley over one hundred years ago in the seminal Fourth Amendment case of *Boyd v. United States*, 116 U.S. 616 (1886) , *abrogated on other grounds by Bellis v. United States*, 417 U.S. 85 (1974) :

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and

slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as it is insisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. *Boyd*, 116 U.S. at 635

The rulings of the trial and appellate court denying the motions to suppress and dismiss should be reversed. The conviction in this case should be vacated; because Ms. Hobbs has completed the sentence imposed, she should be discharged and her conviction ordered expunged.

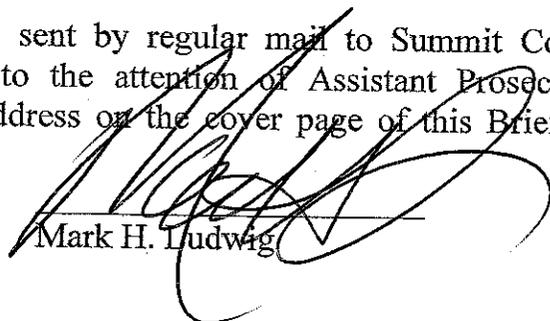
Respectfully submitted



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PROOF OF SERVICE

I certify that a copy of the foregoing was sent by regular mail to Summit County Prosecuting Attorney Sheri Bevan Walsh to the attention of Assistant Prosecuting Attorney Heaven DiMartino at her office address on the cover page of this Brief on January 19, 2012.



Mark H. Ludwig

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. 11-1504

Appellee :

vs. : On Appeal from the

JILLIAN D. HOBBS : Summit County Court of Appeals,

Appellant : Ninth Judicial District

Case No. 25379

NOTICE OF CERTIFIED CONFLICT

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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

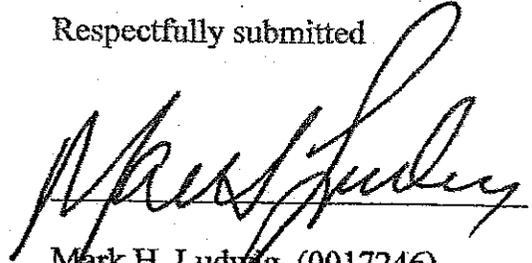
Appellant Hobbs prevailed on the issue certified. The certifying court's opinion was in her favor and in accordance with a cited Sixth District holding that for an arrest warrant to be valid, it must be issued by a neutral and detached magistrate. 2011-Ohio-3192 ¶15. However the certifying court's opinion 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 when the officer has so acted?

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

Respectfully submitted

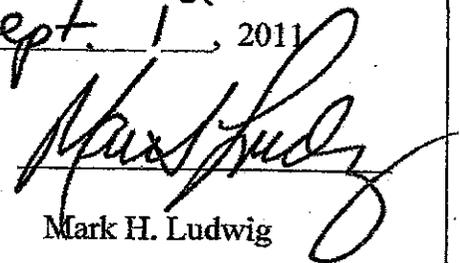


Mark H. Ludwig (0017246)
Law Office of Mark H. Ludwig, LLC
COUNSEL FOR APPELLANT,
JILLIAN D. HOBBS

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

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. 11-1593

Appellee :

vs. : On Appeal from the

JILLIAN D. HOBBS : Summit County Court of Appeals,

Appellant : Ninth Judicial District

: Case No. 25379

NOTICE OF APPEAL OF APPELLANT JILLIAN D. HOBBS

Mark H. Ludwig (#0017246) (Counsel of Record)
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FILED
 SEP 19 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

COUNSEL FOR APPELLANT, JILLIAN D. HOBBS

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Heaven DiMartino (#0073423) (Counsel of Record)
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RECEIVED
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 SUPREME COURT OF OHIO

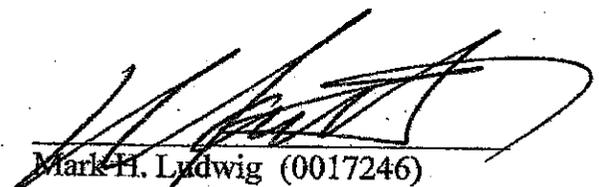
COUNSEL FOR APPELLEE, STATE OF OHIO

NOTICE OF APPEAL OF APPELLANT JILLIAN D. HOBBS

Appellant JILLIAN D. HOBBS gives notice of appeal to the Supreme Court of Ohio from the judgments of the Summit County Court of Appeals, Ninth Judicial District, entered in Court of Appeals Case No.25379 on June 29, 2011. Appellant JILLIAN D. HOBBS Meredith timely made application for reconsideration on July 11, 2011. The Court of Appeals denied reconsideration on August 5, 2011. The Court of Appeals granted a motion to certify a conflict on August 5, 2011. Notice of Certified Conflict was filed with this Court on September 2, 2011 (Case No. 11-1504)

This case raises substantial constitutional questions and is one of public or great general interest.

Respectfully submitted

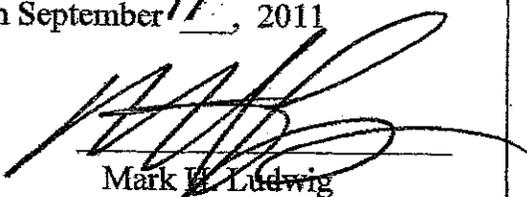


Mark H. Ludwig (0017246)
Law Office of Mark H. Ludwig, LLC
COUNSEL FOR APPELLANT,
JILLIAN D. HOBBS

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 September 17, 2011



Mark H. Ludwig

A - 5

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25379

Appellee

v.

JILLIAN DENISE HOBBS

Appellant

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

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.

{¶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

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.

"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").

{¶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.

{¶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

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.

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.

{¶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

APPEARANCES:

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

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

DANIEL M. HERRIGAN
2010 FEB 25 PM 1:10

SUMMIT COUNTY
CLERK OF COURTS
STATE OF OHIO,

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

Plaintiff)	CASE NO. CV 2009-09-2902
)	
-vs-)	JUDGE MCCARTY
)	
JILLIAN D. HOBBS,)	<u>ORDER</u>
)	
Defendant)	

This case comes before the Court upon Defendant, Jillian D. Hobbs',
 Motion to Suppress and to Dismiss. As grounds for this motion, Defendant states that the
 U.S. and Ohio Constitutions mandate that warrants issue upon probable cause by oath before a
 neutral and detached magistrate. Defendant contends that, in this case, the arrest warrant issued to
 seize Defendant's person was not sworn before a neutral and detached magistrate. It is on these
 grounds that Hobbs moves this Court to suppress all evidence of her arrest and seizure of her person
 and any statements or identifications, and to dismiss the charges against her.

FACTUAL BACKGROUND

Detective Scott Plymire received a report, taken by a patrol officer, from the victim of a
 burglary, Luana Scott. Det. Plymire reviewed the report and went to Scott's home to speak with her.
 Det. Plymire confirmed the report with Scott, and then proceeded to contact the two identified
 witnesses. Upon conducting interviews with the witnesses, Det. Plymire received information
 identifying Jillian Hobbs as the individual who entered Scott's home on the day of the burglary.

Det. Plymire, along with Dets. Klein and Brown went to the home of Hobbs that same day. Hobbs and her male friend, Mr. Gowdy, were present when the officers arrived. Hobbs invited the detectives in and they discussed with her the nature of their investigation. They also informed Hobbs that certain witnesses had observed her enter a house around the corner.

After Hobbs and Gowdy took a moment to talk privately outside, Det. Plymire observed that, after Hobbs finished speaking with Gowdy, she was crying and visibly upset. Det. Plymire testified that Hobbs confessed to him that she had taken that stuff from that lady [Scott] and admitted that she had taken the items to support her drug habit. The detectives inquired of Hobbs and Gowdy as to the possibility of recovering any of the victim's property. They stated that none of the items were in the house, but did admit that there were heroin products and/or paraphernalia hidden in the bathroom. The detectives recovered the heroin, but were unable to ascertain the whereabouts of any of Scott's property.

One of the detectives read Hobbs her Miranda rights, and placed her, but not Gowdy, under arrest pursuant to her admission of entering Scott's house and taking the property. After being placed under arrest, Det. Plymire indicated that Hobbs was taken to the office and then transported to the Summit County Jail. Det. Plymire completed the incident reports. He typed up an affidavit and a complaint and advised a Sergeant Scott, who was not involved in the investigation, as to the facts of the case.

Sergeant Scott was acting in his duty as a deputy clerk of the Barberton Municipal Court. Upon his determination that probable cause existed, the arrest warrant issued for Defendant Hobbs upon the receipt of the complaint by the Barberton Municipal Clerk of Courts. Det. Plymire testified that it is standard procedure in obtaining a warrant for an on-site or warrantless arrest to swear the

complaint before a sergeant acting as deputy clerk even during the hours that the Barberton Clerk is open. No further evidence was obtained subsequent to Hobbs' arrest.

LAW & ANALYSIS

Defendant Hobbs' motion presents two questions before the Court. First, the Court must determine whether Sergeant Scott could have acted as a neutral and detached magistrate for the purpose of issuing the warrant for Hobbs' arrest. Second, if the first question is answered in the negative and the arrest warrant was not properly issued, what effect does this have on the subsequent indictment of Defendant and on this case currently pending before the Court?

The Fourth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, Section 14 of the Ohio Constitution contains a nearly identical provision.

Hobbs was arrested without warrant, pursuant to R.C. §2935.03. R.C. §2935.05 states in part:

When a person named in section 2935.03 of the Revised Code has arrested a person without a warrant, he shall, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and shall file or cause to be filed an affidavit describing the offense for which the person was arrested.

Subsequent complaints and affidavits must be issued pursuant to R.C. §2935.05 and Rule 4(E)(2) of the Ohio Rules of Criminal Procedure, which provides in pertinent part:

(2) Arrest without warrant. Where a person is arrested without a warrant the arresting officer shall . . . bring the arrested person without unnecessary delay before a court having jurisdiction of the offense, and shall file or cause to be filed a complaint describing the offense for which the person was arrested.

“The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime.” *Shadwick v. Tampa* (1972), 407 U.S. 345, 350. “An issuing magistrate must satisfy two tests: the tests of neutrality and detachment, and the test of his capability to determine whether probable cause exists for the requested arrest.” *Id.* Inferences of probable cause must be drawn by “a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” *Id.* citing *Johnson v. United States* (1948), 333 U.S. 10, 14; *Giordenello v. United States* (1958), 357 U.S. 480, 486.

The Supreme Court has not addressed the exact question presented by the case at bar. In *Coolidge, supra*, the Court held that a state attorney general, who was personally involved in police activities relating to the case and was later to serve as chief prosecutor at trial, was not “neutral and detached” and held the warrant issued under his authority invalid. In *Shadwick, supra* at 350, the Court stated that “[w]hatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement” in holding that “clerks of the municipal court may constitutionally issue the warrant”.

Several of the courts of Ohio have address similar or related issues. In a case before the Eighth District Court of Appeals, a defendant argued that an individual's dual role as a policeman and as a deputy clerk made him incapable of acting as a neutral and detached magistrate. *State v. Robinson*, 1985 Ohio App. LEXIS 9055 (Ohio Ct. App., Cuyahoga County Oct. 24, 1985). The Court rejected that position, holding that “a[n uninvolved] police officer could act as a neutral and detached magistrate for purposes of Crim.R. 4(A).” *Id.* Again in *State v. Garrett*, 2006 Ohio 6020,

P29 (Ohio Ct. App., Cuyahoga County Nov. 16, 2006), the Court held that an uninvolved officer may act as a neutral and detached magistrate and sign the complaint.

A search has not uncovered any case on point decided by the Ninth District Court of Appeals. In a factually dissimilar case, the Sixth District Court of Appeals did note, "in order for an arrest warrant to be valid, it must be issued by a neutral and detached magistrate". *State v. Torres*, 1986 Ohio App. LEXIS 7948 (Ohio Ct. App., Wood County Aug. 22, 1986) citing *Shadwick, supra; Coolidge, supra*. The Court held that "[a] police dispatcher having the dual function of a clerk is not a neutral and detached magistrate. *Id.*

In her motion, Hobbs has not argued that probable cause did not exist, nor does she contend that this particular sergeant/deputy clerk was not impartial. Hobbs' argument centers on the notion that any individual in a position or capacity such as Scott's, inexorably entangled in the business of law enforcement, cannot act as neutral and detached magistrate. This Court agrees with Hobb's position. Nothing on the particular facts of this case suggest that Sergeant Scott acted improperly or gave the impression of a lack of impartiality in his judgment, nor do the facts suggest any lack of probable cause. However, a police officer, even if he was not directly or actively involved in the case, should not serve as a deputy clerk for the purpose of issuing warrants. The officer lacks the requisite "severance and disengagement from activities of law enforcement." Because an officer acting as an issuing magistrate does not meet the first test of *Shadwick, supra*, the test of neutrality and detachment, the Court finds that the warrant was not properly issued.

Having found that the arrest warrant was not properly issued, the Court must now determine what effect this has on the subsequent indictment of Hobbs and on the outcome of this case. The exclusionary principle stands for the proposition that the proper remedy to be applied to a Fourth Amendment violation is the suppression of all evidence obtained as a result of the illegal seizure or

arrest. The Supreme Court held in *United States v. Crews* (1980), 445 U.S. 463,474; *Gerstein v. Pugh* (1975), 420 U.S. 103, 119, that “an illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction.” In view of the above statement, it may be fairly inferred then that the U.S. Supreme Court has deemed the ultimate sanction of a bar to further prosecution to generally be too onerous and disproportionately harsh in measuring the relief to be afforded in this context.

The Ohio Court of Appeals for Franklin County in citing *U.S. v. Crews*, stated in concurrence that as a general principle, “the proper remedy for a Fourth Amendment violation is suppression of the evidence wrongly obtained, not dismissal of the charges.” *City of Columbus v. Galang*, 2003 Ohio 4506 (Ohio Ct. App., Franklin County Aug.26, 2003), *Fairborn v. Douglas* (1988), 49 Ohio App. 3d 20, 21, 550 N.E. 2d 201. Moreover, in *Galang*, that Ohio Court of Appeals goes on to state that even granting the fact that an illegal arrest was made, that conduct, in and of itself, does not “affect the validity of a subsequently filed affidavit, complaint, or indictment commencing criminal proceedings predicated on the arrest.” *Id.* at ¶8, *State v. Schultz* (Mar. 11, 1992), Athens App. No. 1480, 1992 Ohio App. LEXIS 1172. In addition, an illegal detention of the accused by police, cannot debar the government from attempting to try the case against the accused “through the introduction of evidence wholly untainted by the police misconduct.” *Id.*

The U.S. Supreme Court stated that for purposes of determining what evidence to suppress, the accused is not deemed a “suppressible fruit” and an unlawful detention is not reason itself to foreclose the opportunity of the Government to try him on the basis of evidence not tainted by police misconduct. *Crews, supra*, at 474, See also *U.S. v. Blue* (1966), 384 U.S. 251, 255 (for the proposition that exclusionary remedy does not “extend to barring prosecution altogether.”) The implication is clear then, that the remedy appropriate in this circumstance of a defective warrant

issued subsequent to a warrantless arrest, is not the draconian sanction of a bar to further prosecution by a summary quashing of the indictment and dismissal of charges, but instead the lesser imposition of evidence suppression.

It is uncontroverted that an arrest warrant found to be defectively issued is a violation of rights guaranteed in the Constitution and as such warrants some type of judicial remedy. The victim of a detention and indictment predicated on an invalid warrant is not without judicial recourse and the prosecution does not escape scrutiny. As a practical matter, the exclusionary rule, when applied in a particular case, may produce the effect of eliminating the necessary evidence underpinning the prosecution's case in chief thereby resulting in a decision not to prosecute. However, generally, the exclusionary rule does not ipso facto mechanically act to take the decision out of the hands of the prosecution by foreclosing all further opportunity to try a case with evidence originating from sources independent of the defective warrant. See *Crews* at 474.

In applying the standard propounded for remedying prosecutorial violations of this kind to the facts in the instant case, two conclusions can be drawn. First, it is clear from the above-mentioned analysis that the exclusionary principle outlined in the Supreme Court's Fourth Amendment jurisprudence is the relevant remedial framework governing the disposition of this case. Using the exclusionary rule standard for framing a judicial remedy it necessarily follows that any judicial sanction imposed in this case will be in the nature of an evidence suppression and not under this guiding principle, a complete bar to prosecution and concomitant dismissal of charges.

Secondly, overlaying this standard to the facts of this case, it would appear that no evidence was obtained as a direct result of the improperly issued arrest warrant. The evidence underlying the charges in the indictment and supporting the prosecution's case in chief was gleaned from sources independent of the tainted warrant. It appears that this "poisonous tree" was barren of "fruit" for the

prosecution to pluck. In a case implicating the same issue, the facts were such that no evidence of the crime was obtained as a result of the defendant's arrest, and on appeal, the Court in that case, citing to *Crews, supra*, at. 470-474, stated that had it been able to address this issue (i.e. the suppression and dismissal of the charge based on the illegal arrest was first raised on appeal) it would find the exclusionary rule not to apply. *State v. Reymann*, 55 Ohio App. 3d 222, 225 (Ohio Ct. App., Summit County 1989). That case involved an alleged hit skip violation and the Court found that the accident witnesses' testimony was not related to the conduct of the police officer in question and therefore was ruled admissible against the accused. *Id.* See *Crews, supra* at 470-474. In that case, the Court went on to state that "there was no evidence of the hit skip which was tainted by the illegal arrest." *Id.*

The Fourth Amendment exclusionary principle governs the application of the remedy in this case. The analysis establishes the fact that evidence suppression may be required but not the severe judicial remedy of a total bar to prosecution. There being no relevant evidence to suppress, the remedy determinative in this case is inoperative. See *Crews, supra* at 470-474. The exclusionary remedy is adequate to redress any cognizable harm suffered to the interests of the accused in this matter. Accordingly, without such evidence to suppress, it compels the conclusion that the invalid arrest warrant, in all likelihood, amounts to harmless error on the part of the prosecution with the result that the accused in this case does not seem to have suffered any legally redressible prejudice. Accordingly, both of Hobbs' motions must be DENIED.

IT IS SO ORDERED,


JUDGE ALISON MCCARTY

Cc:
Attorney Mark Ludwig
Assistant Prosecutor Nick Palumbo

CONSTITUTION OF UNITED STATES

Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO CONSTITUTION

Article I. Bill of Rights

§ 14. Search warrants and general warrants

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

Ohio Statutes

§ 2935.05. Filing affidavit where arrest without warrant

When a person named in section 2935.03 of the Revised Code has arrested a person without a warrant, he shall, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and shall file or cause to be filed an affidavit describing the offense for which the person was arrested. Such affidavit shall be filed either with the court or magistrate, or with the prosecuting attorney or other attorney charged by law with prosecution of crimes before such court or magistrate and if filed with such attorney he shall forthwith file with such court or magistrate a complaint, based on such affidavit.

History. Effective Date: 01-01-1960

§ 2935.08. Issuance of warrant

Upon the filing of an affidavit or complaint as provided in sections 2935.05 or 2935.06 of the Revised Code such judge, clerk, or magistrate shall forthwith issue a warrant to the peace officer making the arrest, or if made by a private person, to the most convenient peace officer who shall receive custody of the person arrested. All further detention and further proceedings shall be pursuant to such affidavit or complaint and warrant.

History. Effective Date: 01-10-1961

OHIO RULES OF CRIMINAL PROCEDURE

As amended through July 1, 2011

Rule 4. Warrant or Summons; Arrest (in part)

(A) Issuance.

(1) Upon complaint. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by a judge, magistrate, clerk of court, or officer of the court designated by the judge, to any law enforcement officer authorized by law to execute or serve it.

The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the issuing authority may require the complainant to appear personally and may examine under oath the complainant and any witnesses. The testimony shall be admissible at a hearing on a motion to suppress, if it was taken down by a court reporter or recording equipment.

The issuing authority shall issue a summons instead of a warrant upon the request of the prosecuting attorney, or when issuance of a summons appears reasonably calculated to ensure the defendant's appearance.

(C) Warrant and summons: form.

(1) Warrant. The warrant shall contain the name of the defendant or, if that is unknown, any name or description by which the defendant can be identified with reasonable certainty, a description of the offense charged in the complaint, whether the warrant is being issued before the defendant has appeared or was scheduled to appear, and the numerical designation of the applicable statute or ordinance. A copy of the complaint shall be attached to the warrant.

(E) Arrest.

(1) Arrest upon warrant.

(a) Where a person is arrested upon a warrant that states it was issued before a scheduled initial appearance, or the warrant is silent as to when it was issued, the judicial officer before whom the person is brought shall apply Crim.R. 46.

(2) Arrest without warrant . Where a person is arrested without a warrant the arresting officer shall, except as provided in division (F), bring the arrested person without unnecessary delay before a court having jurisdiction of the offense, and shall file or cause to be filed a complaint describing the offense for which the person was arrested. Thereafter the court shall proceed in accordance with Crim. R.5.