

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Case No. 11-1569

Plaintiff-Appellant,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

LAWRENCE A. DIBBLE,

Court of Appeals
Case No. 10AP-648

Defendant-Appellee

MERIT BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: sltaylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR PLAINTIFF-APPELLANT

DAVID H. THOMAS 0071492
511 South High Street
Columbus, Ohio 43215
Phone: 614-228-4141

COUNSEL FOR DEFENDANT-APPELLEE

Other Counsel Listed on Certificate of Service

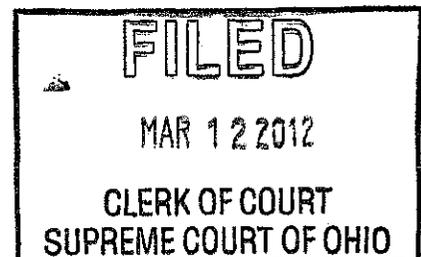


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STATEMENT OF FACTS

On March 29, 2010, the grand jury indicted defendant Dibble on twenty counts of voyeurism and one count of sexual imposition. (Trial Rec. 1) Sixteen of the counts were felonies because the victim was specified to be a minor. (Id.) These counts alleged that defendant had photographed the minor in a state of nudity by trespassing or surreptitiously invading the privacy of the minor for the purpose of sexually arousing or gratifying himself and that defendant was the minor's teacher, administrator, coach or other person having authority in the minor's school and/or was the minor's instructor. (Id.) Given the initials used for the victims in the voyeurism counts, at least fourteen different minor victims were involved. (Id.)

The date for all of the voyeurism counts was the time frame from August 1, 2002, to June 30, 2003. (Id.) The date for the sexual imposition count was April 28, 2009. (Id.)

The evidence for the voyeurism counts had been discovered through the execution of a search warrant on February 3, 2010. (Defense Ex. 1) The affidavit supporting the warrant described the following events:

On February 2, 2010 Victim #1 reported to the Upper Arlington Police Department that while a student at The Wellington School one of her teacher's, Lawrence A. Dibble touched her inappropriately. Victim #1 stated that she was rehearsing line for a play with Dibble in the school when he asked for a reward for getting his lines correct. He asked to touch Victim #1's stocking on her leg. Upon touching the stocking Dibble then proceeded to run his hand up under Victim #1's skirt brushing his fingers across her vaginal area. Victim #1 stated she was shocked and froze as Dibble then ran his hands over her buttocks, and lower abdomen area. Victim #2 was with Victim #1 while she made the report. Victim#2 stated she also had inappropriate contact with Dibble. Victim #2 stated it was after she had graduated high

school where Dibble had also been her teacher. Victim #2 stated that Dibble had taken photo's of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim #2 told investigators that Dibble used a digital camera to take the photo's, and made her wear a pillow case over her head while he took them.

On February 2, 2010 Victim #1 went to The Wellington School at the direction of the Upper Arlington Police wearing a recording device. She had a conversation with Dibble about the inappropriate touching where he stated "I just wasn't thinking".

Investigators from Upper Arlington believe Dibble's computers, camera's, media storage devices, etc. may contain correspondence, and photos to substantiate Victim #1 and Victim#2's claims.

The warrant was approved on February 3rd and authorized the seizure of, inter alia, computers, memory devices, and storage media. (Defense Ex. 1) The warrant was executed the same day. (Id.) Per the inventory of the search, the search resulted in the seizure of a number of media storage devices, including a laptop computer, camera, and several tapes and DVDs. (Id.)

On May 12, 2010, the defense filed a motion to suppress the evidence seized from defendant's home. (Trial Rec. 28) The defense contended that the inclusion of information regarding "Victim #2" had been intentionally false, claiming that the person identified as "Victim #2" had been a consensual sex partner with defendant. (Id.) The defense contended that the sole basis for seeking media storage devices in the warrant had been the false allegation that "Victim #2" was a "victim." (Id.)

The defense did not attach any affidavit from defendant or any other evidentiary documentation to support a claim of intentional or reckless falsity. The defense did attach a

copy of the warrant, which did not itself reveal any intentional or reckless falsity.

On June 3, 2010, the State filed a memorandum opposing the motion. (Trial Rec. 31) The State contended that the “Victim #2” reference had not been false because the detective believed that she had been victimized. (Id.) In particular, “Victim #2” had given specific details of defendant’s actions that “consisted of manipulation and grooming that began while she was an impressionable student under his supervision at the Wellington School. This manipulation continued through her graduation and eventually resulted in her submitting to the defendant’s deviant sexual demands in taking photographs of her vagina.” (Id.) Even if the “victim” reference was false, the State contended that it did not rise to the level of intentional or reckless falsity, and the warrant was obtained in good faith. (Id.)

The court convened a hearing on June 29, 2010. (T. 2 et seq.) At the start of the hearing, defense counsel conceded he needed to make a preliminary showing: “I think initially, Judge, I do need to make a preliminary showing for the specific issue I’ve raised here * * *.” (T. 3) Counsel then called Detective Andrew Wuertz of the Upper Arlington Police Department. (T. 3)

Wuertz testified that he was involved in an investigation involving Wellington School in February 2010. (T. 4-5) Wuertz filed a criminal complaint for gross sexual imposition on February 3, 2010, and the only victim listed in that complaint was E.S. (“Victim #1”). (T. 5-6, 26) He did not file any other complaint regarding any other victim. (T. 6) In filling out a “U-10” police report, Wuertz had only listed E.S. as a victim. (T. 9)

Wuertz presented a request for a search warrant to Judge Peebles on February 3rd. (T. 11) Wuertz conceded that the search warrant affidavit did not describe the use of

computers or picture taking regarding Victim # 1. (T. 13) Wuertz conceded that, as it applied to Victim #1, there was no probable cause to search the home of defendant, with Wuertz stating, “[a]s far as what’s written here, correct.” (T. 13)

Wuertz identified “Victim #2” as E.K. (also referred to as L.K. in the court’s later decision). (T. 14) Wuertz testified that E.K. had described touching and other activities that occurred after she graduated from Wellington School and turned 18. (T. 14)

When questioned by the defense about whether E.K.’s activities had been consensual, Wuertz contended that the consensual nature was “debatable” and that he thought she had been a victim, although he did not file any charges in relation to E.K. (T. 15) Wuertz conceded that E.K.’s four-page written statement included details about defendant visiting E.K. at her home in Maine, going to New York City with her to see a Broadway show, and sharing a carriage ride in Central Park. (T. 15-17)

The gist of the defense questioning was that E.K. had permitted defendant to take the pictures and had participated in e-mail exchanges with defendant. (T. 17) Wuertz responded, “Presenting it the way you’re presenting it is not a full comprehension of what exactly their relationship was.” (T. 17-18) When the defense asked whether E.K. was merely a “jilted lover,” Wuertz testified that “I think it’s inaccurate to call her a lover.” (T. 18) Wuertz believed that they were “consenting adults” only in a “strict definition” of that phrase. (T. 20) Wuertz conceded that the only information supporting a search of defendant’s home was the information regarding E.K. (T. 22)

At this point, defense counsel stated that “at this point I think I’ve probably gotten through, well through the window I need to get through.” (T. 22) Counsel said he may

have some further questions for Wuertz later in the hearing. (T. 22) The court then asked the prosecutor whether the prosecutor was conceding that the preliminary showing had been made:

THE COURT: Just so that we're clear here, I mean, Mr. Weisman made a comment that he's met his burden, so to speak.

Are you admitting that and moving on to the State's part of their case, or are you just simply cross-examining this witness to rebut this burden that he needs to make?

MR. HAWKINS: I'm simply cross-examining this witness.

THE COURT: Okay. Thank you.

(T. 22-23)

Under the prosecutor's cross-examination, Wuertz indicated that the investigation began on February 2, 2010, when E.K., E.S., and E.S.'s mother came to the police to report what had happened to E.S. (T. 23) E.S. said that defendant was theater director at Wellington, and every year he picks a student to be his "right-hand" aide to assist him. (T. 24) Wellington is a K-12 school, and she had been involved in theater since 7th grade. (T. 25-26) He had become a father figure to her. (T. 25)

In April of her senior year, she was working as that aide, rehearsing lines with defendant. (T. 24) She was wearing a skirt and stockings. (T. 24) Defendant commented that he liked how the stockings felt. (T. 24) "[A]s they were rehearsing lines, he said, 'As a reward every time I get my lines correct, I get to touch your stockings.' And she allowed him to do that." (T. 25) But the events that followed resulted in unwanted sexual contact:

At one point while they were rehearsing them, he got his lines right. And he said, "I believe I deserve a reward for

that.” And she said that she was standing in front of him. At which time Mr. Dibble closed his eyes, placed his hand on her leg, ran his hand up her inner thigh, forcing it up underneath her skirt, brushing his fingers against her vaginal area, and then took his hands around to her buttocks area feeling her buttocks, and then removed his hands.

(T. 25)

Wuertz testified about the unusual relationship that existed between E.S. and defendant:

Q. As the father figure, did she detail any other inappropriate or strange conduct that the defendant committed against her?

A. Part of – part of her role as being an aide to him, I found to be kind of strange, was that she had to give him back massages. The back massages turned out to be – they would be in his office. He would close the door. He would remove his shirt back so that she could touch her hands against his skin, and she would have to rub his back basically any time he asked her to do so.

Q. Did she indicate any other activity, either photographs or touching or otherwise?

A. She did. She relayed that she felt kind of strange. There were times that Mr. Dibble took pictures of them in kind of – she described them as unitard suits in order for costumes for plays and that in describing those she said he would have them specific instructions to wear nothing underneath these unitard suits, and he would then take pictures of them wearing these unitard suits in some way to aid in the creation of costumes for them.

Q. And these unitards, they were somewhat see-through, you indicated?

A. Correct. She described them as practically see-through, if not see-through.

(T. 26-27) Wuertz viewed E.S. as having been “brain-washed” or manipulated “to

basically get her to do whatever he asked her to do.” (T. 27-28)

After the April 2009 incident, E.S. had gone to her next class. (T. 28) But she was disturbed by what had happened, and so she wrote a letter to defendant. (T. 28) She took it to him, but, before he finished reading it, he tore it up and threw it away, saying “You can’t tell anyone about this, or it will ruin my life.” (T. 28)

By January 2010, though, the incident continued to weigh on E.S. (T. 28) She could not sleep and was having other problems. (T. 28) She therefore came forward. (T. 28)

Wuertz also interviewed E.K., whom he had described as “Victim # 2.” (T. 29)

Wuertz explained why he had viewed E.K. as a victim:

Q. * * * What did she tell you for you to think that she could in your mind at that time still be a victim?

A. She described a very similar situation to what [E.S.] had described, starting in the 7th grade had been involved in theater, had been close with Mr. Dibble. She’s a year older than [E.S.], had been his aide, had had to teach [E.S.] how to give massages to Mr. Dibble. She said that she had basically no father figure in her life, that she considered him as a father. In fact, I believe he would refer to himself to her as her stepdad or some kind of a situation like that.

It was just all very similar to the way that he had kind of cultivated [E.S.] along.

Q. Did she indicate any photographs or sexual relationship that took place when she was a student at Wellington?

A. No. She confirmed about the photos that were taken of them in the unitard suits, but she did not say there was any inappropriate contact while she was in school.

(T. 29-30)

When Wuertz went to see Judge Peeples seeking the search warrant, she swore him in and asked him to describe other things about the case. (T. 33-34)

Q. Okay. Do you recall what else you told her, whether it be in answer to a question or other testimony?

A. I believe I went back to a little more detail about how the relationship with these girls was started in 7th grade, how they were cultivated to the point to where they were.

I told her about the photographs of the unitards and the see-through unitards that they felt uncomfortable about, some just different things to give her a little bit more background than what was actually typed in the search warrant.

I believe in that I said due to the possible see-through of the unitards I was very concerned about where those photos were and what exactly those were being used for.

(T. 34) Wuertz was concerned that photographs of the see-through body suits might be disseminated by defendant. (T. 46-47)

Wuertz explained why he thought defendant's touching of E.K. was "inappropriate touching":

Q. * * * Why did you use the phrase "inappropriate touching"?

A. Because in speaking to [E.K.] about what had occurred there, it was very evident she was very conflicted about what had happened, that although she would reluctantly say it was consensual, she also would say she wasn't comfortable with it, and that the way that he touched her in order to take some of the pictures, she wasn't completely comfortable with.

Q. Is this why you refer to her as Victim Number 2?

A. Correct.

Q. Okay. And you told Mr. Weisman that you still – at the

time you – never mind now, but at the time you sought the search warrant and saw Judge Peeples, you viewed her as Victim Number 2? [E.K.] was a victim in this case?

A. That is correct.

Q. And why is that?

A. I believe, in both of these girls' stories and in sitting down and speaking with them and seeing their true emotions about their relationship with Mr. Dibble, that there was a serious amount of manipulation on Mr. Dibble's part upon them to make them believe certain things and that, although [E.K.], her maybe definition of consent, gave consent, I don't believe she gave consent knowing – the guise in which she was naked and these photos were taken were under the guise of Mr. Dibble teaching her about internal power, an internal energy that he said he wanted to share with her and connect with her on, and that the way the pictures were taken were because the ultimate energy is inside; and the only way to see it is to look at the vaginal area. And he took the pictures because the power was so strong that he couldn't look at it very long. He needed the pictures so he could look at the pictures longer and study them to see her internal energy and that eventually he would get to the point to where he would go inside to touch the energy, but that he wasn't ready to do that yet.

All of those things, [E.K.] is not an unintelligent girl. [E.K.], I believe, is intelligent. I believe [E.K.] was convinced that Mr. Dibble – and, in fact, she relayed to me she felt – she trusted him. She looked at him as a father figure, that he would not ever do anything to hurt her, and that she felt, therefore, that this was truly about him teaching her about body energy; and it wasn't sexual in nature and did admit that in the interview that she did feel now or at that time that indeed that it was sexual in nature on his part.

(T. 35-37) At the time he typed the warrant affidavit, Wuertz thought there was still a chance that defendant would be charged regarding E.K. (T. 37) "But, yes, as of today I still consider her a victim." (T. 37)

The court heard arguments from counsel at the conclusion of the hearing and took the matter under advisement. (T. 52) The hearing ended without the Court making a ruling on whether the requisite preliminary showing had been made to justify a full hearing.

On July 1, 2010, the court filed a decision and entry addressing the merits of the motion and granting the motion to suppress. (Trial Rec. 38) The court found that the “victim” reference to E.K. was false, that Detective Wuertz knowingly and intentionally made the false statement, and that Wuertz used the false characterization of E.K. as “victim” in order to create probable cause to search defendant’s home. (Id. at 7) The court refused to consider Wuertz’ testimony that he had provided additional sworn oral information to Judge Peeples, stating that such information could not be considered because it was not transcribed. (Id. at 3, 8, 9)

The court also rejected the State’s reliance on the good-faith exception to the exclusionary rule. (Id. at 8-9) The court stated that it had “observed Detective Wuertz’s testimony, appearance, and demeanor and find that he lacks credibility in regards to his reasoning of using ‘Victim # 2’ in the affidavit and regarding the additional conversation with Judge Peeples. There is no additional evidence besides his personal testimony to indicate this was an innocent mistake or that he had additional conversations with Judge Peeples outside the language included in the affidavit.” (Id. at 9)

The State filed a motion to reconsider or reopen the hearing on July 8, 2010. (Trial Rec. 41) The State contended that the court had prematurely reached the full merits. (Id.) The State tendered the affidavit of Judge Peeples as to how she would have testified if called as a witness at the hearing. (Id.) In particular, Judge Peeples stated she did not

believe the detective had lied to her or intentionally misrepresented "victim" status. (Id.)

I believe that the word "victim" and the reference to "victim #2" is broader than a reference to someone who is the victim of a criminal act for whom a criminal complaint may be filed at that point against a named defendant. From my experience a victim may or may not evolve into a prosecuting witness. I understood the reference to "victim # 2" to be provided to me to reflect a M.O. utilized by a theater teacher at the Wellington school in Upper Arlington as to past and present students. I understood from the affidavit that "victim #2" had graduated and there was a touching believed to be inappropriate that was under continuing investigation by the Detective. I did not necessarily understand that "victim #2" was being represented to the court as a minor under age eighteen. * * *

(Id. at ¶ 5 of Peeples affidavit)

Judge Peeples also confirmed that there was a conversation between herself and

Detective Wuertz:

6. When police or law enforcement officers apply for a search warrant there is always introductory and substantive information discussed in connection with the search warrant application. The applicant and court both understand that to be admissible at a subsequent motion to suppress that information must be transcribed. In this case there was conversation with Det. Wuertz when the search warrant application was submitted regarding the teacher, students who did not have a father figure in the home, that the court was generally familiar with Wellington school. The court concluded that based on the information contained in the search warrant affidavit that it was not necessary to have the search warrant reissued. Nor was it necessary to take the extraordinary step of seeking a court reporter to take down the additional comments or discussion with Det. Wuertz. The fact that such information was not taken down and transcribed does not mean that such discussion did not occur.

(Id. at ¶ 6)

The State timely appealed by filing a notice of appeal on July 8, 2010. (Trial Rec.

40) The State made its certification under Crim.R. 12(K) only as to the voyeurism counts, and, therefore, the present appeal is limited to those counts.

The State raised four assignments of error. (Appeal Rec. 14) There were three central points to the State's appeal.

First, the defense had characterized the hearing as a preliminary proceeding, a position which was adopted by the trial court, and the State was prejudiced when the court without notice proceeded directly to the full merits.

Second, the detective's use of the word "victim" to describe one of the women involved was not intentionally or recklessly false, as shown by the trial court's concession that defendant's manipulation of that woman as a minor and young adult had reached a level of victimization.

Third, evidence of the detective's sworn oral statements to the issuing judge could be considered in determining whether the detective acted in good faith and whether the warrant was supported by probable cause even without the "victim" characterization.

In a 2-1 ruling, the Tenth District affirmed the order of suppression. (Appeal Rec. 33, 34) This Court granted review of the State's appeal in full. *12/21/2011 Case Announcements*, 2011-Ohio-6556.

ARGUMENT

Proposition of Law # 1: Sworn oral information provided to the issuing magistrate contemporaneous to the magistrate's review of a search warrant must be considered in determining the validity of the warrant under the Fourth Amendment and in determining the good faith of the officer, regardless of whether such information was recorded at the time. Criminal Rule 41(C) is unconstitutional in excluding unrecorded sworn oral information from later suppression hearings.

Wuertz testified that he gave sworn oral information to the issuing judge that defendant had photographed E.S. and E.K. in see-through unitards. Such photographs would have provided evidence relevant to defendant's "grooming" of these two students and to defendant's long-term sexual purposes, including when he touched E.S. The detective's testimony about the sworn oral information was admitted without objection at the hearing, but, relying on Crim.R. 41(C), the trial court later said it could not consider such unrecorded information.

The State's appeal directly challenged the constitutionality of Crim.R. 41(C), which excludes consideration of unrecorded sworn oral information. The State contended that the Fourth Amendment only requires that the information be given under oath or affirmation, and so the sworn oral information must be considered under the Fourth Amendment. The State also contended that Crim.R. 41(C) has an unconstitutional "substantive" effect in excluding evidence allowed by the Fourth Amendment.

The Tenth District relied on Crim.R. 41(C) but failed to address the State's constitutional challenges to that rule. This Court has rightly granted review of the State's first proposition of law to address these substantial issues.

The stakes are high. The federal Exclusionary Rule already imposes substantial

costs on the truth-finding function of the courts. “The principal cost of applying any exclusionary rule ‘is, of course, letting guilty and possibly dangerous criminals go free * * *.’” *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 2090, 173 L.Ed.2d 955 (2009) (quoting *Herring v. United States*, 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)). However, Crim.R. 41(C) multiplies those costs by preventing the full litigation of the Fourth Amendment issues. If Crim.R. 41(C) is allowed to stand, the guilty criminal gains a windfall twice over, with the courts refusing to consider sworn oral information, thereby tilting the case toward a finding of a Fourth Amendment violation that did not really occur, and then with the courts suppressing reliable evidence of guilt.

A.

The trial court erred in stating that Wuertz’ sworn oral statements could not be considered. To be sure, Crim.R. 41(C) provides that such sworn testimony is admissible in a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed, and made a part of the affidavit. Wuertz’ sworn statements were not submitted in transcribed form. But neither were they objected to. Moreover, the sworn oral statements were relevant to the determination of whether Wuertz acted intentionally or recklessly regarding the use of the “victim” characterization as to E.K and whether the good-faith exception to the exclusionary rule applied. “[I]n determining whether the good faith exception to the exclusionary rule applies, numerous courts have held a trial court may look beyond the four corners of the affidavit and consider unrecorded oral testimony to determine whether the officer executing the search warrant did so in good faith reliance on the judge or magistrate’s issuance of the search warrant.” *State v. Oprandi*, 5th Dist. No.

07 CA 5, 2008-Ohio-168, ¶ 45; *State v. O'Connor*, 12th Dist. No. CA2001-08-195, 2002-Ohio-4122, ¶¶ 21-22; *United States v. Perez*, 393 F.3d 457, 462 (4th Cir. 2004). The trial court erred in stating that the statements could not be used because “no record” of the statements “was presented as evidence.” Decision and Entry, at 8.

B.

The trial court also erred in believing that the sworn oral statements could not be used in assessing probable cause. Defendant only invoked the Fourth Amendment, and he could obtain suppression thereunder only if the Fourth Amendment was violated. But the Fourth Amendment by its plain terms only requires that *sworn* information be used for the issuance of a search: “[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, * * *.” There is no requirement in the Fourth Amendment itself that the warrant be issued based solely on written affidavits or based on contemporaneously-recorded sworn information.

“[T]he Fourth Amendment does not forbid supplementation of written warrant affidavits with sworn, unrecorded oral testimony * * *.” *United States v. Clyburn*, 24 F.3d 613, 614 (4th Cir. 1994). “The Fourth Amendment does not require that the basis for probable cause be established in a written affidavit; it merely requires that the information provided the issuing magistrate be supported by ‘Oath or affirmation.’” *Id.* at 617.

“Moreover, the Amendment does not require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit. It follows that magistrates may consider sworn, unrecorded oral testimony in making probable cause determinations during warrant proceedings, * * *.” *Id.* at 617

(quoting *United States v. Shields*, 978 F.2d 943, 946 (6th Cir. 1992); also citing three other federal circuits).

While the use of unrecorded sworn testimony violates Crim.R. 41(C), see *State v. Shepcaro*, 45 Ohio App.2d 293, 298, 344 N.E.2d 352 (10th Dist. 1975), a violation of a mere state rule does not provide a basis for suppression. It was the *Fourth Amendment* exclusionary rule the defense was invoking.

“The exclusionary rule has been applied by this court to violations of a constitutional nature only.” *State v. Wilmoth*, 22 Ohio St.3d 251, 262, 490 N.E.2d 1236 (1986), quoting *Kettering v. Hollen*, 64 Ohio St.2d 232, 234-235, 416 N.E.2d 598 (1980). “It is clear from these cases that the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights.” *Hollen*, 64 Ohio St.3d at 235.

Accordingly, a violation of Crim.R. 41 does not perforce justify exclusion of evidence. *Wilmoth*, 22 Ohio St.3d at 262, citing *Hollen*, 64 Ohio St.2d at 234-35, citing *State v. Downs*, 51 Ohio St.2d 47, 63-64, 364 N.E.2d 1140 (1977). “Only a ‘fundamental’ violation of Rule 41 requires automatic suppression, and a violation is ‘fundamental’ only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards.” *Wilmoth*, 22 Ohio St.3d at 263 (quoting another case).

In *Wilmoth*, the Court concluded that the violation of the written-affidavit requirement in Crim.R. 41(C) “was not a violation of constitutional magnitude” and did not warrant suppression. Equally so here, the recording requirement of Crim.R. 41(C) is not a requirement of the Fourth Amendment itself, and therefore a violation of Crim.R. 41(C) in

this respect would not warrant suppression.

C.

Defendant likely will contend that Crim.R. 41(C) itself creates an exclusionary rule by excluding evidence from the suppression hearing of unrecorded sworn oral testimony given to the magistrate issuing the warrant. Even if that were the intent of the rule, however, the rule itself would be unconstitutional. Statutory law provides that the issuing magistrate “may demand other and further evidence before issuing the warrant,” see R.C. 2933.23, and such statute therefore allows the consideration of oral facts given under oath. “When facts under oath are given the magistrate, sufficient to create in the latter’s mind a finding of probable cause for the search, the accused receives all the protection which he is guaranteed. To say those facts must be shoe-horned into a written form is to require more of both the police agency and the magistrate than the law dictates. * * * [O]ral facts to a magistrate * * * should be open to consideration when the validity of a criminal process is challenged.” *State v. Misch*, 23 Ohio Misc. 47, 48, 260 N.E.2d 841 (1970); see also, *State v. Hendricks*, 70 Ohio Op.2d 421, 423 328 N.E.2d 822 (1st Dist. 1974) (seeing no reason why sworn oral information given to issuing magistrate cannot be considered).

In addition, a mere rule cannot create or modify a “substantive” right. The Ohio Supreme Court’s rule-making authority is limited to “procedural” matters. “The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right.” Article IV, Section 5(B), Ohio Constitution.

“Substantive” is that “body of law which creates, defines and regulates the rights of

the parties. The word substantive refers to common law, statutory and constitutionally recognized rights.” *State v. Slatter*, 66 Ohio St.2d 452, 455, 423 N.E.2d 100 (1981).

Under such definition, the creation of an exclusionary rule would be a matter of substantive law. “The exclusionary rule is a substantive rule of law designed to protect our constitutional rights from official encroachment.” *State v. Hennessee*, 13 Ohio App.3d 436, 437, 469 N.E.2d 947 (4th Dist. 1984). Criminal Rule 41(C) simply cannot create such a substantive right to the exclusion of evidence.

It makes no difference that the rule is couched in terms of the admission of evidence at a subsequent suppression hearing. A procedural rule can have a “substantive effect” if it is “so restrictive as to constitute a *de facto* abrogation or modification of the right itself.” *State v. Greer*, 39 Ohio St.3d 236, 246, 530 N.E.2d 382 (1988). Criminal Rule 41(C) would have such a substantive effect as its ultimate effect is to cut off the ability of the State to support the issuance of the warrant with sworn information allowed by the Fourth Amendment and allowed by statute. As an “exclusionary rule,” Crim.R. 41(C) would fail as an impermissible modification and expansion of the substantive right of what is sufficient for the issuance of a search warrant.

D.

Defendant likely will devote much of his argument to the contention that Crim.R. 41(C) is a wise rule in excluding evidence of unrecorded sworn oral statements. But the wisdom or rationale behind the rule is not before this Court. The State is not contending that the rule is irrational or violative of due process. Rather, the State is contending that *the Fourth Amendment itself* does not require recording and that *the Fourth Amendment itself*

only requires sworn information, not sworn recorded information. The Fourth Amendment was the only possible basis for suppression here. The criminal rule cannot amend the constitutional provision, nor can it have the substantive effect of amending or modifying the Fourth Amendment right by creating a right to have only recorded information considered.

The constitutionality of Crim.R. 41(C) is squarely before this Court. In addition, the applicability of the Fourth Amendment exclusionary rule is also before this Court. The Fourth Amendment exclusionary rule is only applicable if the Fourth Amendment itself is violated; violation of a state criminal rule does not constitute a violation of the Fourth Amendment.

In the present case, the Fourth Amendment allowed the consideration of all sworn information presented to the issuing magistrate, even unrecorded information. The validity of the warrant must be upheld under the Fourth Amendment,¹ regardless of whatever violation of Crim.R. 41(C) might be demonstrated.

E.

Even if the trial court was correct in concluding that the sworn oral statements could not be considered, the court still erred in concluding that, without the characterization of E.K. as a victim, there would have been no basis to issue a search warrant for defendant's home. Even when the allegations do not pertain to a "victim" of crime, E.K.'s allegations

¹ Defendant's motion to suppress did not rely on Article I, Section 14, of the Ohio Constitution. Such reliance would have been inappropriate anyway. Section 14 allows probable cause to be based on sworn oral information too. In addition, there is no exclusionary rule for a violation of Section 14. *State v. Lindway*, 131 Ohio St. 166, 2 N.E.2d 490 (1936).

related to photo-taking were still relevant to support the issuance of the warrant for defendant's home. A warrant can issue for "mere evidence" having a nexus to criminal behavior because it "will aid in a particular apprehension or conviction." *Warden v. Hayden*, 387 U.S. 294, 306, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). "Mere evidence" can relate to evidence that merely will aid in proving the State's case-in-chief, such as evidence of motive, and even evidence that would merely aid in rebutting or impeaching defense claims. *Messerschmidt v. Millender*, ___ U.S. ___, Slip Op., at 14-15 & n. 7 (2012). Even if not a "victim" in her own right, E.K. was still a witness with valuable information that supported a conclusion that defendant's home would have evidence of the modus operandi that would aid in the conviction of defendant for the crime committed against E.S.

In light of the foregoing, there were two bases to believe that defendant's home had evidence that would aid in conviction. Even if not a "victim," E.K.'s allegations provided probable cause that defendant's home would have photographic evidence related to E.K., thereby showing the ultimate sexual purpose behind his manipulations and grooming of the students, and, thus, his ultimate sexual purpose vis-à-vis victim E.S.

In addition, per Wuertz' sworn oral statements to Judge Peebles, there was probable cause that defendant would still have in his possession the photographs of victim E.S. and the other girls in their see-through unitards, thereby also confirming the manipulation and grooming described in the accounts given by E.S. and E.K. There is a reasonable inference that offenders tend to hoard sexual images and secrete them in secure places, like their home. *State v. Byrne*, 972 A.2d 633, 640-41 (R.I. 2009).

Proposition of Law # 2: The issue of falsity in a search warrant affidavit must be judged in light of the non-technical language used by nonlawyers.

The lower courts applied an unduly legalistic understanding of “victim” in order to conclude that Wuertz’ use of that term regarding E.K. was intentionally or recklessly false and to conclude that the good-faith exception of the exclusionary rule did not apply.

A.

In *State v. Waddy*, 63 Ohio St.3d 424, 441, 588 N.E.2d 819 (1992), this Court set forth the parameters for reviewing claims that a police affiant made a false statement in a search warrant affidavit.

To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either “intentionally, or with reckless disregard for the truth.” *Franks v. Delaware* (1978), 438 U.S. 154, 155-156, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667, 672. “Reckless disregard” means that the affiant had serious doubts of an allegation’s truth. *United States v. Williams* (C.A. 7, 1984), 737 F.2d 594, 602. Omissions count as false statements if “designed to mislead, or * * * made in reckless disregard of whether they would mislead, the magistrate.” (Emphasis deleted.) *United States v. Colkley* (C.A. 4, 1990), 899 F.2d 297, 301.

Even if the affidavit contains false statements made intentionally or recklessly, a warrant based on the affidavit is still valid unless, “with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause * * *.” *Franks, supra*, 438 U.S. at 156, 98 S.Ct. at 2676, 57 L.Ed.2d at 672.

When an officer relies in reasonably objective good faith on the judge’s approval of a search warrant, the evidence seized pursuant to such warrant will not be suppressed.

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). But this

good-faith exception to the exclusionary rule itself has an exception when a *Franks* violation is shown. *Leon*, 468 U.S. at 923. The applicability of the good-faith exception, and the existence of a *Franks* violation, therefore become opposite sides of the same coin here. If a *Franks* violation is legitimately found, then the good-faith exception to the exclusionary rule does not apply. If a *Franks* violation is not found, then the good-faith exception can be found to apply.

B.

In this case, Detective Wuertz' adoption of a shorthand reference for the two women, "Victim #1" and "Victim #2," was understandable. In addition to the desire to avoid expressly referencing their identities in a publicly-filed document, the references were justified because both were in fact victimized by defendant through a pattern of manipulation and grooming.

The trial court's focus on Wuertz' characterization of E.K. as "Victim #2" was misplaced because, ultimately, the court agreed that there was a level of victimization as to E.K. As the court stated, "This Court would find few people, if any, who would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization." Decision and Entry, at 7. The court thus conceded that there is an almost-universal belief that even minimal manipulative control would be immoral, and, as testified by Wuertz, the manipulation here was much more involved. Wuertz thus joined what could be considered an almost-universal view that defendant created "some measure of victimization." His use of the "victim" characterization was not even false under this

almost-universal view, let alone intentionally or recklessly false.

These relationships reflected a pattern of grooming and manipulation begun while these women were minors and students and therefore could be viewed as a particularly vile variant of the “svengali” model. A “svengali” is “a person who completely dominates another, usually with selfish or sinister motives,” see Dictionary.com (last viewed online 2-29-12), and here the control was even more pronounced, begun when they were young, exacerbated by employment of “father figure” designs, and furthered by things like the trumped-up “internal energy” ploy. “The name Svengali has entered into comon (sic) parlance as well, to embody the idea of the mysterious but irresistible manipulator, who subdues his victims to his will and works them puppet-like behind the scenes to accomplish his purposes.” Steven Connor, BBC Radio 3 Review of Svengali’s Web, (March 9, 2000) (available at www.bbk.ac.uk/english/skc/svengali/; last viewed online 2-29-12) The “victim” characterization in this context was appropriate and was not intentionally or recklessly false. *Both* E.S. and E.K. were victims of defendant’s manipulations, including his conning them into posing for photographs in their see-through unitards while they were still students.

A reader of Wuertz’ affidavit would not have understood that “Victim # 2” was subject to criminal behavior. Wuertz’ affidavit indicated that the inappropriate touching of E.K. occurred after she graduated from high school, at a point in time when defendant “had” been her teacher. A reader therefore would have known that the teacher-student relationship had concluded and that E.K. was no longer in school. And, in contrast to the allegations regarding E.S., the affidavit did not describe the touching in the kind of detail

that would show criminal behavior.

Also pertinent are the sworn oral statements given by Wuertz to Judge Peeples. Those statements are relevant to the validity of the warrant, but, even if not usable to establish probable cause, they were relevant to show that Wuertz did not act intentionally or recklessly in using the “victim” characterization. The judge hearing those statements plainly would have understood the “victim” reference to be a reference to a broader understanding of “victim,” broader than just criminal victims.

C.

As the United States Supreme Court has recognized, search warrant affidavits are drafted by nonlawyers and should be interpreted as such. *United States v. Ventresca*, 380 U.S. 102, 108-09, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). Judge French in dissent correctly recognized that the majority and the trial court were applying an unduly legalistic understanding of “victim”:

{¶57} Here, the trial court interpreted the term “victim” to mean, and only to mean, “a person who is the object of a crime.” I conclude, however, that it was improper for the trial court to apply such a limited definition. Specifically, it is improper for a court to invalidate warrants by interpreting the accompanying affidavits in a “hypertechnical” manner because the affidavits are drafted by nonlawyers in the midst and haste of a criminal investigation. *United States v. Ventresca* (1965), 380 U.S. 102, 108-09, 85 S.Ct. 741, 746.

{¶58} Used more broadly, “victim” can mean (1) “a person who suffers from a destructive or injurious action,” or (2) “a person who is deceived or cheated, as by his own emotions or ignorance, by the dishonesty of others, or by some impersonal agency.” Webster’s Encyclopedic Unabridged Dictionary (Random House 1997).

{¶59} The trial court noted that few people “would argue

with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization.” I agree. And, applying this characterization to what may have occurred between E.K. and appellee, an affiant could have reasonably concluded that E.K. was a “victim” under a definition broader than the one the court imposed. Therefore, the characterization of E.K. as a victim was not false, and the trial court erred by suppressing the evidence on that basis.

D.

Given the foregoing, the trial court erred and abused its discretion in invalidating the warrant based on Wuertz’ use of the “victim” characterization to describe E.K. Given the trial court’s own concession that there is an almost-universal belief that such manipulation is immoral and may involve “some measure of victimization,” the court was in effect conceding that the use of the word “victim” was accurate. In light of what Wuertz knew about defendant and his manipulations of E.S. and E.K., the “victim” characterization was not false, was not intentionally or recklessly false, and was made in good faith given these common lay understandings of what “victim” means.

E.

In the Tenth District, defendant cited two statutory definitions of “victim” in the Ohio Revised Code, apparently claiming that such definitions somehow settle the issue of whether Wuertz was being knowingly or recklessly false. But both definitions were specifically limited to how particular statutes define “victim.” R.C. 2930.01 (“As used in this chapter”); R.C. 2743.51 (“As used in sections 2743.51 to 2743.72 of the Revised Code”). These definitions do not purport to provide the exclusive understanding of “victim” that might ever be referenced in an Ohio court or in an Ohio search warrant.

Defendant erred in the Tenth District in contending that the State's various arguments are "totally irrelevant to an appellate review of this case." Even the trial court agreed that there was a level of victimization as to E.K. The trial court's own characterization of such victimization is certainly relevant to appellate review, as is all of the evidence of defendant's manipulations of E.S. and E.K.

In addition, the modus operandi involved in the victimization of E.K. was relevant because Wuertz provided such information to the issuing judge in sworn oral testimony. As stated above, such sworn oral testimony is properly considered in determining the validity of the warrant. Even if not considered for that purpose, it could be considered in determining whether Wuertz acted knowingly or recklessly in using the "victim" characterization and/or in determining whether he acted in good faith for purposes of applying the good-faith exception to the exclusionary rule.

Proposition of Law # 3: When a court adopts the position that a hearing is preliminary in nature, the court shall give notice to the parties before proceeding to the full merits.

Without notice to the State, the trial court converted what it had agreed was a preliminary hearing into a full hearing on suppression. The State was prejudiced.

A.

A defendant claiming intentional or reckless falsity in a search warrant must make a substantial preliminary showing to justify a full hearing.

A defendant who seeks to overcome the presumption of validity accorded a warrant affidavit by making a substantial preliminary showing of a knowing, intentional, or reckless falsity, has, under *Franks, supra*, the task of supporting his

allegations by more than conclusional accusations, or the mere desire to cross-examine. Instead, a challenge to the factual veracity of a warrant affidavit must be supported by an offer of proof which specifically outlines the portions of the affidavit alleged to be false, and the supporting reasons for the defendant's claim. This offer of proof should include the submission of affidavits or otherwise reliable statements, or their absence should be satisfactorily explained. Even if the above is established, the court in *Franks* stated that an evidentiary hearing to review the validity of the search warrant is not mandated by the Fourth Amendment if, after the affidavit material alleged to be false is excluded from the affidavit, there remains sufficient content in the affidavit to support a finding of probable cause.

State v. Roberts, 62 Ohio St.2d 170, 177-78 405 N.E.2d 247 (1980) (footnote omitted).

As stated in *Franks*:

There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Franks, 438 U.S. at 171.

B.

In the present case, defendant's motion referred to the need to make a "preliminary showing" but did not make it. The defense had provided no evidentiary materials or evidentiary statements to support a showing of intentional or reckless falsity.

Even so, the court convened a hearing, at the outset of which defense counsel conceded that he had not yet made the necessary substantial preliminary showing. Counsel stated at the outset that he needed to make a preliminary showing: "I think initially, Judge, I

do need to make a preliminary showing for the specific issue I've raised here * * *." (T. 3)

After his direct examination of Wuertz, defense counsel contended that he had "gotten through, well through the window I need to get through." (T. 22) The following exchange then occurred between the court and the prosecutor:

THE COURT: Just so that we're clear here, I mean, Mr. Weisman made a comment that he's met his burden, so to speak.

Are you admitting that and moving on to the State's part of their case, or are you just simply cross-examining this witness to rebut this burden that he needs to make?

MR. HAWKINS: I'm simply cross-examining this witness.

THE COURT: Okay. Thank you.

(T. 22-23) The hearing ended without the court making the necessary ruling on whether the substantial preliminary showing had been made.

The court itself had set forth the dichotomy. The State's questioning was "just simply cross-examining this witness to rebut this burden that he needs to make." (T. 23) The State was not yet "moving on to the State's part of their case." (T. 22-23) When the prosecutor said he was merely cross-examining, i.e. not moving on to the State's part of the case, the court said "okay." (T. 22-23)

C.

When litigation is designed to proceed in discrete stages, special care must be devoted to such stages so that the litigants have sufficient notice that the court is moving from one stage to the next. For example, converting a motion to dismiss into a motion for summary judgment without notice to the parties is erroneous. *Petrey v. Simon*, 4 Ohio

St.3d 154, 447 N.E.2d 1285 (1983). Converting a preliminary hearing on revocation into a full hearing on revocation prejudices the defendant who did not have notice of the conversion. *State v. Weaver*, 141 Ohio App.3d 512, 516, 751 N.E.2d 1096 (7th Dist. 2001).

Relevant here is the case law requiring that issues of preindictment delay be dealt with in two phases. In the first phase, the defendant bears the burden of proving actual prejudice from the delay. *State v. Whiting*, 84 Ohio St.3d 215, 217, 702 N.E.2d 1199 (1998). If that burden is met, then the prosecution has the burden of producing evidence of a justifiable reason for the delay. *Id.* at 217.

In *Whiting*, the trial court at the prosecution's behest had originally ruled that the defense bore the burden of production on the "justifiable reason" issue. But the trial court later concluded that the State bore the burden and dismissed the charge. When the appellate court later agreed that the prosecution bore the burden of production, the appellate court still remanded for a further hearing, since the State had relied on the trial court's original ruling placing the burden of production on the defense. The Ohio Supreme Court did not dispute the premise that reliance on the trial court's ruling would have warranted a reopened hearing, but the Court concluded that, in this particular case, the State had not been misled because the State even before the trial court's ruling had been arguing that the defense bore the burden of production.

In the present case, the *defense* had billed the proceeding as an effort on the part of the defense to make its substantial preliminary showing. The court *adopted* that stance later when it questioned the prosecutor about whether the case could proceed beyond that preliminary stage. In the end, the court *never* made the threshold finding that the necessary

preliminary showing had been made. The court converted the preliminary issue into a decision on the merits without notice of such conversion to the State. In contrast to *Whiting*, the State did not engender any confusion of the need for a preliminary, threshold showing and determination; the defense itself conceded the need for the threshold showing and determination, and the trial court then adopted that analysis.

D.

The State's subsequent motion to reopen or reconsider confirms that it was prejudiced by the premature conversion. At a minimum, the State could have called Judge Peoples to testify about the sworn oral statements given by Wuertz at the time she approved the warrant. The court below asserted that it disbelieved Wuertz on whether the oral statements were made to Judge Peoples, and so the testimony of Judge Peoples on that point could have provided substantial corroboration in that respect. As noted elsewhere in this brief, the Fourth Amendment allows consideration of the sworn oral statements regarding the validity of the warrant and, at a minimum, such oral statements are relevant to whether Wuertz was endeavoring to intentionally or recklessly mislead Judge Peoples in using the "victim" characterization.

E.

According to the Tenth District, the State was contending that a *Franks* hearing must be bifurcated, but the State has never made that contention. Instead, the State argues that, *in this particular case*, both the defense and the trial court had stated the hearing was preliminary in nature. And it was clear that the defense (and thus the court) were referring to the preliminary showing required by *Franks* in order to get a hearing. To be sure, the

defense never should have obtained the hearing to begin with, having not yet made any substantial preliminary showing, but when the defense itself billed the hearing as preliminary, and when the court acquiesced, the State could rely on those statements. When the court later proceeded to the full merits without notice to the State, the State was prejudiced. Had it known the full merits were in play, the State could have called the issuing judge to confirm what the detective had told her under oath.

Equally flawed was the Tenth District's nonsensical contention that the defense counsel and court were characterizing as "preliminary" the question of whether the defense had proven by a preponderance that Wuertz had made an intentionally or recklessly false statement. The language used by the defense counsel, such as "preliminary" and "gotten * * * through the window," showed that he was referring to a threshold, preliminary burden of the defense, i.e., the preliminary issue of whether he should get a full hearing. On the other hand, there is nothing "preliminary" about the issue of whether the officer made an intentionally or recklessly false statement; that is the very issue to be litigated on the merits in the full evidentiary hearing authorized by *Franks*.

The timing of the comments of counsel and the court confirm this. Counsel made his statements at the outset of the direct examination of Wuertz and at the conclusion of that direct examination, before the State had even been given the opportunity to cross-examine the witness. Counsel's comments at that point are readily understood as treating his direct examination of Wuertz as an offer of proof akin to the preliminary offer of proof needed to justify a full hearing under *Franks*. It would have been illogical for counsel to have been contending, after only the direct examination, that he had already proven his

claim of intentional or reckless falsity by a preponderance.

The court had the same understanding that the hearing was still only in a preliminary phase. It would have made no sense, even before cross-examination, to ask the prosecutor whether the defense had proven by a preponderance the claim of intentional or reckless falsity. The prosecutor had not even questioned the witness yet. When the court asked the prosecutor whether defense counsel had “met his burden,” the court could only have been referring to a preliminary burden, not whether the defense had already proven its claim by a preponderance through direct examination alone.

In addition, under the Tenth District’s nonsensical interpretation, the court would have been asking the prosecutor whether he agreed that the defense had already proven its claim and yet still was asking whether the State was “moving on to the State’s part of their case” on that issue. The court would not have been asking for a concession on the central claim and yet still assuming that there was a need to have a “State’s part of their case.”

In short, the Tenth District’s interpretations of the comments of counsel and the court are counterintuitive and ought to be rejected. Counsel and the court were referring to the preliminary showing needed to justify a full, plenary hearing. Such comments indicated that the hearing was only preliminary in nature, and the State was misled and prejudiced when the court failed to give notice that it was treating the hearing as a full, plenary hearing.

F.

Defendant might contend that the State waived/forfeited this issue by making arguments about the “merits” at the conclusion of the hearing. But such arguments on the

“merits” were to be expected even in the preliminary posture of the suppression issue as it then stood. The “merits” of what constitutes a “victim” were certainly relevant to the “substantial preliminary showing” that the defense was required to make regarding whether the detective had made a knowing or reckless falsehood in that regard. In addition, the prosecutor’s argument that probable cause existed even without the “victim” characterization was relevant in that preliminary posture as well, since a finding that probable cause still existed could have obviated any need to address the issue of knowing or reckless falsity altogether. In short, the prosecutor’s arguments were entirely consistent with the case remaining in the preliminary posture that the defense and the trial court earlier acknowledged.

Indeed, at the conclusion of the hearing, the court said it would be issuing a “brief decision.” (T. 52) This reference to a “brief” decision suggested the kind of abbreviated threshold determination that would be pertinent to the case in its still-extant preliminary posture. The promise of a “brief” decision did not give notice that the case had moved past the substantial-preliminary-showing stage. Nothing the trial court said at the hearing indicated that the case had moved past that stage.

The State’s first notice that the case had proceeded past that stage was the court’s issuance of the not-so-brief eleven-page decision, which skipped the “substantial preliminary showing” determination and proceeded with the granting of full suppression. This was error, and it was prejudicial to the State for the reasons outlined above.

G.

Nor did the prosecutor waive the substantial-preliminary-showing threshold

requirement by allowing the detective's testimony to proceed. The defense itself billed the testimony as preliminary, and so the prosecutor's failure to object cannot be converted into a "waiver" of the need to make the preliminary showing. When the court later confirmed the preliminary nature of the testimony, the prosecutor still had no reason to object. The lack of objection to such preliminary testimony cannot be taken as a waiver of the issue of whether a preliminary determination was needed.

H.

Defendant might also contend that the State waived/forfeited the issue by failing to object. But when the prosecutor was asked about whether he was agreeing that the defense had made its substantial preliminary showing, the prosecutor did not agree and instead indicated that he was merely cross-examining the detective in the preliminary-showing stage. (T. 22-23) This exchange gave the court ample indication of the State's position that the case was still in the substantial-preliminary-showing stage.

Defendant's waiver argument would also fail because the State could not be expected to make an anticipatory objection to the court's later actions. The law required that the court first decide the substantial-preliminary-showing threshold before proceeding to a full hearing on the motion. The State did not need to make an anticipatory objection on the assumption that the court would violate the law; the State could expect that the court would comply with the law, as the court was presumed to know the law. *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶ 57 ("judges are presumed to know the law").

When the court later erred by skipping the threshold requirement and by treating the

earlier hearing as its full hearing on the merits, the State was in no position to object, as the error was first exemplified through the issuance of a written decision demonstrating the error. To say there was a “waiver” here would be to penalize the State for not being clairvoyant in anticipating that the court would commit the error it did commit.

The very nature of this error, involving the conversion of a preliminary matter to a final ruling without notice, is not susceptible to objection. Since the error occurs outside the presence of the party, the party is not physically present in order to register an objection then and there. Since the error involves lack of notice, the party cannot be blamed for not objecting earlier.

If substantial proceedings had occurred after the error and the party still did not object, then a waiver argument might make sense. But here the State filed an objection and an appeal before any further proceedings, thereby obviating any claim of waiver.

I.

Defendant might also contend that the State was not misled because it did not seek to introduce any evidence. But the State would have had no reason to introduce evidence in a proceeding already billed *by the defense* as a hearing *for the defense* to make its own preliminary showing. Naturally, the State saw no need to call witnesses in that preliminary setting; it had no burden of proof, and the only thing at stake was whether a full-merits hearing would be held. There would be time enough to present evidence, like that of Judge Peeples, if and when the case proceeded to the next step. But when the court skipped the full-merits hearing altogether, the State was deprived of that opportunity. The failure to call witnesses at the defense preliminary hearing is irrelevant to the question of whether the

State was prejudiced by the trial court's skipping of the full-merits hearing that should have occurred next.

CONCLUSION

The State respectfully requests that this Court reverse the Tenth District's judgment and remand the case to the trial court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

RON O'BRIEN
Franklin County Prosecuting Attorney

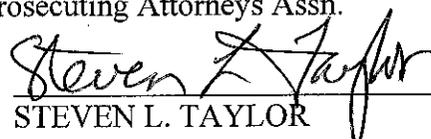


STEVEN L. TAYLOR/0043876
(Counsel of Record)
Chief Counsel, Appellate Division
Counsel for State

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 12th day of Mar., 2012, to David H. Thomas, 511 South High Street, Columbus, Ohio 43215, counsel for defendant.

A copy was also mailed on the same date to the following counsel for amici: Russell E. Carnahan, Hunter, Carnahan, Shoub, Byard & Harshman, 3360 Tremont Road, Suite 230, Columbus, Ohio 43221, counsel for Fraternal Order of Police, Capital City Lodge No. 9, and Scott M. Heenan, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, counsel for Ohio Prosecuting Attorneys Assn.



STEVEN L. TAYLOR

ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

LAWRENCE A. DIBBLE,

Defendant-Appellee

Case No.

11-1569

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 10AP-648

**NOTICE OF APPEAL OF
PLAINTIFF-APPELLANT STATE OF OHIO**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: sltaylor@franklincountyohio.gov

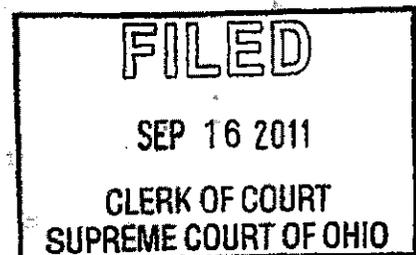
and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appeals Division

COUNSEL FOR PLAINTIFF-APPELLANT

DAVID H. THOMAS 0071492
511 South High Street
Columbus, Ohio 43215
Phone: 614-228-4141

COUNSEL FOR DEFENDANT-APPELLEE



NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

Plaintiff-appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *State v. Dibble*, 10th Dist. No. 10AP-648, on August 4, 2011.

The State of Ohio invokes the jurisdiction of the Supreme Court on the grounds that the case presents substantial constitutional questions, presents questions of public or great general interest, and involves a felony and warrants the granting of leave to appeal.

Respectfully submitted,



STEVEN L. TAYLOR 0043876

(Counsel of Record)

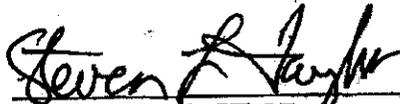
Chief Counsel, Appeals Division

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 16th day of Sept., 2011, to David H. Thomas, 511 South High Street, Columbus, Ohio 43215, counsel for defendant.

Pursuant to S.Ct.Prac.R. 14.2(A), a copy was also sent by regular U.S. mail on this 16th day of Sept., 2011, to the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



STEVEN L. TAYLOR

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
AUG -4 PM 12:50
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellant,

v.

Lawrence A. Dibble,

Defendant-Appellee.

No. 10AP-648
(C P C No 10CR-03-1958)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 4, 2011, having denied defendant's motion to strike, and having overruled the state's four assignments of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed to plaintiff.

BRYANT, P.J. and TYACK, J.

By 

Judge Peggy Bryant

28
FILED
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2011 AUG -4 PM 12:42
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellant,

v.

Lawrence A. Dibble,

Defendant-Appellee.

Horton

No. 10AP-848
(C.P.C No 10CR-03-1958)
(REGULAR CALENDAR)

DECISION

Rendered on August 4, 2011

Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellant.

R. William Meeks Co., LPA, and David H. Thomas, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiff-appellant, state of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to suppress of defendant-appellee, Lawrence A. Dibble. Because the trial court's findings of fact support the applicable legal standard for suppressing evidence, and thus also the trial court's decision to suppress the evidence the state obtained through the warrant at issue, we affirm.

I. Facts and Procedural History

{¶2} On February 3, 2010, Upper Arlington Police Detective Andrew Wuertz asked a Franklin County municipal court judge to approve a search warrant for defendant's home. Detective Wuertz sought the warrant after speaking with two young women, E.S. and E.K., who reported their past experiences with defendant, a theater instructor at a private school for students enrolled in kindergarten through twelfth grade. In the affidavit supporting the warrant, Detective Wuertz referred to E.S. as Victim #1 and E.K. as Victim #2.

{¶3} According to the warrant affidavit, defendant "inappropriately" touched the vaginal area and buttocks of his student, Victim #1, while they were at school. (Defense Ex. 1, Attachment 1.) Victim #1 later confronted defendant about the incident, and defendant said, "I just wasn't thinking." (Defense Ex. 1, Attachment 1.) Victim #2 "stated she also had inappropriate contact with" defendant. (Defense Ex. 1, Attachment 1.) The incident regarding Victim #2 occurred after Victim #2 graduated from the school where defendant was her teacher, and it involved defendant's taking photographs "of her nude vaginal area during one of their meetings where inappropriate touching was involved." (Defense Ex. 1, Attachment 1.) Detective Wuertz claimed he needed to search defendant's home because defendant's "computers, camera[s], media storage devices, etc. may contain correspondence, and photos to substantiate Victim #1 and Victim #2's claims." (Defense Ex. 1, Attachment 1.)

{¶4} The municipal court judge approved the warrant, and when it was executed, police seized a laptop computer, camera, and several tapes and DVDs from defendant's home. Based on the evidence obtained from that search, defendant was

indicted on 20 counts of voyeurism; he also was charged with one count of sexual imposition for sexually touching E.S. None of the charges pertained to E.K.

{¶5} Defendant filed a motion to suppress evidence obtained from the search of his home, arguing Detective Wuertz improperly referred to E.K. as a victim in the search warrant affidavit when E.K. was an adult and their sexual activity was consensual. The trial court held a hearing on the motion on June 29, 2010. At the commencement of the hearing, defense counsel noted, "I think initially, Judge, I do need to make a preliminary showing for the specific issue I've raised here." (Tr. 3.) The defense then called Detective Wuertz to testify.

{¶6} Detective Wuertz began by conceding the information he possessed regarding E.S. gave him no probable cause to search defendant's home. The subsequent questioning thus focused on E.K., or Victim #2. Defense counsel inquired of Detective Wuertz about using the term "Victim #2" to refer to E.K., which the detective admitted was used six times in the affidavit "in order to get a search warrant." (Tr. 17.) In response to the questions, Detective Wuertz agreed that, although E.K. told him defendant took pictures of her and sexually touched her, E.K. said those incidents occurred after she turned 18 and was no longer a student at the school where defendant taught. Detective Wuertz, however, stated that whether E.K. consented to the activity was "debatable." (Tr. 15.) Detective Wuertz testified defendant and E.K. were "consenting adults" only in a "strict definition" of that phrase. In response to counsel's asking whether E.K. was merely a "jilted lover" whose concern about her relationship with defendant arose only after she learned of defendant's incident with E.S., Detective Wuertz replied, "I think it's inaccurate to call her a lover." (Tr. 18.) The detective

No. 10AP-648

4

nonetheless acknowledged that E.K. said defendant visited her at her home in Maine, went to New York City with her to see a Broadway show, and shared a carriage ride in Central Park. Detective Wuertz did not file any charges pertaining to E.K.

{¶7} Despite such activity, the detective stated he thought E.K. was a victim. Defense counsel explored that statement, inquiring of other paperwork the detective completed in the case. The detective's testimony revealed he did not include E.K. as a victim in any other form he completed on the case, including the complaint and the U-10.100, both of which were completed either the same day or the day before the affidavit supporting the search warrant request was presented to the court. The detective conceded he had no basis to charge defendant with a crime as to E.K.

{¶8} When defense counsel finished his direct examination of Detective Wuertz, he said he thought he had "gotten through * * * the window I need to get through." (Tr. 22.) The trial court asked the prosecutor if he was "admitting" the defense met its burden and "moving on to the State's part of their case," or if he was "simply cross-examining this witness to rebut [the defense's] burden." (Tr. 22-23.) The prosecutor said, "I'm simply cross-examining the witness." (Tr. 23.)

{¶9} Detective Wuertz first testified on cross-examination about defendant's sexual activity with E.S. According to the detective, E.S. had been defendant's student since seventh grade, and E.S. considered defendant a father figure. In April of her senior year, E.S. was working as defendant's aide and rehearsing lines with him. Defendant told E.S., "As a reward every time I get my lines correct, I get to touch your stockings." And she allowed him to do that." (Tr. 25.) Another time, after defendant correctly recited his lines, he said, "I believe I deserve a reward for that." (Tr. 25.) E.S.

was standing in front of him, and he brushed his fingers against her vaginal area and felt her buttocks. E.S. told Detective Wuertz that the sexual contact was unwanted, and she wrote defendant a letter about it. Defendant tore the letter and threw it away, saying, "You can't tell anyone about this, or it will ruin my life." (Tr. 28.)

{¶10} Defendant also required E.S. to give him back massages, lifting his shirt for her to "touch her hands against his skin." (Tr. 26-27.) Although not included in the affidavit supporting the warrant, Detective Wuertz' testimony included information that defendant also took pictures of her and other students in unitard suits, instructing the students not to wear anything underneath the suits, which were "practically see-through, if not see-through." (Tr. 27.) Detective Wuertz concluded defendant "brain washed" or manipulated E.S. so she would do whatever he asked of her. (Tr. 27.)

{¶11} Detective Wuertz thought E.K. was also a victim of defendant because "[s]he described a very similar situation to what [E.S.] had described." (Tr. 29.) Detective Wuertz stated E.K.'s relationship with defendant started when she became involved in theater in the seventh grade. She, too, considered defendant a father figure, and defendant would even refer to himself as her stepfather. She also was a former aide to defendant who taught E.S. how to give him massages. Detective Wuertz said he thought E.K. was a victim because defendant deceived her into allowing him to photograph her vaginal area under the guise of wanting to study her "internal energy." (Tr. 36.)

{¶12} Detective Wuertz testified that, when he was writing the warrant affidavit, he thought defendant might be charged with a crime for his conduct with E.K., and he stated that, "as of today I still consider her a victim." (Tr. 37.) According to Detective

Wuertz, he described, in the warrant affidavit, defendant's touching E.K. as "inappropriate" because "it was very evident she was very conflicted about what had happened, that although she would reluctantly say it was consensual, she also would say she wasn't comfortable with it, and that the way that he touched her in order to take some of the pictures, she wasn't completely comfortable with." (Tr. 35.)

{¶13} Detective Wuertz went to the municipal court judge to obtain a search warrant, where she swore him as a witness and asked him about his investigation. Detective Wuertz testified at the suppression hearing that he told the judge about defendant's relationship with E.K. and E.S. Detective Wuertz mentioned not only that defendant took pictures of them while they were in unitards but that they were uncomfortable with such activity.

{¶14} On redirect examination, defense counsel presented the detective with yet another document he completed, the Ohio Uniform Incident Report, completed on February 2, 2010, and reviewed by his sergeant on February 3, 2010, the day the detective sought the search warrant. Not only did the form not include E.K. as a victim, but Detective Wuertz specifically noted on the form only one victim. Although Detective Wuertz stated he later could have added a victim to the report, he did not add E.K. as a victim to the form because he lacked probable cause that defendant committed a crime against E.K. Defense counsel asked the detective why, given that admission, he referred to E.K. as a victim in the search warrant affidavit, and Detective Wuertz replied, "At the time that I typed the search warrant, we were still continuing the investigation. I believed that [E.K.] could potentially still be a victim." (Tr. 44.)

{¶15} The trial court inquired whether the parties had any further evidence to present. When both declined, the state requested the opportunity to present a closing argument that, as given, addressed the merits of defendant's motion to suppress evidence; defendant responded. After ascertaining neither party had anything further, the court stated it would take the matter under advisement, explaining it would not rule from the bench but would issue a "brief" decision later. (Tr. 52.)

{¶16} On July 1, 2010, the trial court issued a written decision and entry granting defendant's motion to suppress. Although acknowledging defendant's behavior was reprehensible, the court concluded Detective Wuertz "lacks credibility in regards to his reasoning" for referring to E.K. as a victim in the search warrant affidavit. The court decided Detective Wuertz knowingly and intentionally made a false statement when he characterized E.K. as a victim in the search warrant affidavit, and he used the false characterization to create probable cause to search defendant's home. The court declined to consider Detective Wuertz' testimony about the oral statements made to the municipal court judge, noting not only that no "record" of the statements existed, but that Detective Wuertz' testimony about the statements also lacked credibility. Lastly, the court concluded Detective Wuertz' references to E.S. as a victim in the search warrant affidavit did not create probable cause for the search of defendant's home.

{¶17} The state filed a motion for reconsideration, arguing that although the June 29, 2010 hearing "was represented to be limited to the threshold question of whether the defense made a sufficient preliminary showing of the need for a full hearing," the court's "decision and entry prematurely reached the full merits of the issues, rather than merely determining whether a full hearing should occur." The state

claimed that, had the court proceeded with a full hearing, the municipal court judge who issued the search warrant for defendant's home would have testified to the additional information set forth in an affidavit attached to the motion for reconsideration.

{¶18} According to the affidavit, the judge confirmed she had a conversation with Detective Wuertz about defendant when the search warrant was requested, but a court reporter did not record the conversation or transcribe it. (Affidavit, ¶6.) In addition, the judge surmised Detective Wuertz did not lie to her when he referred to E.K. as a victim in the search warrant affidavit. Relying on her experience as a former assistant city prosecutor who not only was familiar with how police conduct their investigations but worked with victims and witnesses herself, the judge said, "I believe that the word 'victim' and the reference to 'victim #2' is broader than a reference to someone who is the victim of a criminal act for whom a criminal complaint may be filed at that point against a named defendant." (Affidavit, ¶5.)

{¶19} The judge also noted from her experience that "a victim may or may not evolve into a prosecuting witness," and she "understood from the affidavit that 'victim #2' had graduated and there was a touching believed to be inappropriate that was under continuing investigation by the Detective." (Affidavit, ¶5.) The trial court declined to rule on the motion for reconsideration because the state had already filed an appeal.

ii. Assignments of Error

{¶20} The state assigns the following errors on appeal:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT PREJUDICIALLY ERRED IN GOING BEYOND THE THRESHOLD QUESTION OF WHETHER THE DEFENSE HAD MADE A SUFFICIENT PRELIMINARY

SHOWING TO JUSTIFY A FULL HEARING ON THE MOTION TO SUPPRESS.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN CONCLUDING THAT THE DEFENSE HAD SHOWN INTENTIONAL OR RECKLESS FALSITY, ESPECIALLY IN LIGHT OF THE SWORN ORAL STATEMENTS MADE BY THE OFFICER CONTEMPORANEOUS TO THE JUDGE'S APPROVAL OF THE WARRANT.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN REFUSING TO FIND THAT THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIED.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN CONCLUDING THAT THE SEARCH WARRANT FOR DEFENDANT'S HOME COULD NOT HAVE ISSUED WITHOUT THE "VICTIM # 2" CHARACTERIZATION.

III. Motion to Strike

{¶21} Defendant filed a motion to strike sections of the state's brief that rely on the municipal court judge's affidavit, asserting the affidavit is not part of the appellate record since the trial court did not have it when it ruled on defendant's motion to suppress. Pursuant to App.R. 9(A), "[t]he original papers and exhibits thereto filed in the trial court * * * shall constitute the record on appeal in all cases." Here, the state submitted the affidavit to the trial court as part of its motion in response to the court's decision granting defendant's motion to suppress, and the affidavit was transmitted to this court as part of the record. Because the affidavit is part of the appellate record, we

deny defendant's motion to strike. We address later whether the evidence may be considered in determining the appeal.

IV. First Assignment of Error – Scope of Hearing

{¶22} The state's first assignment of error asserts the trial court erred when it granted defendant's motion to suppress following the June 29, 2010 hearing. The state contends the hearing was meant to address only whether defendant made a preliminary showing to justify a full evidentiary hearing.

{¶23} Defendant's motion to suppress asserted the warrant authorizing the search of his home was invalid because the accompanying affidavit contained false statements. In *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, the United States Supreme Court established the procedure for challenges to the veracity of a search warrant affidavit. The defendant initially must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and * * * the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155-56, 98 S.Ct. at 2676. At this preliminary stage, the defendant must provide "an offer of proof which specifically outlines the portions of the affidavit alleged to be false, and the supporting reasons for the defendant's claim." *State v. Roberts* (1980), 62 Ohio St.2d 170, 178, cert. denied, 449 U.S. 879, 101 S.Ct. 227. "This offer of proof should include the submission of affidavits or otherwise reliable statements, or their absence should be satisfactorily explained." *Id.* If the defendant satisfies his or her preliminary burden, the defendant is entitled to a hearing on his motion to suppress. *Franks*, 438 U.S. at 156, 98 S.Ct. at 2676.

{¶24} The state urges us to construe the two-step procedure in *Franks* as requiring two separate evidentiary hearings. Although the state points to no case law indicating the *Franks* analysis requires such a bifurcated process, the state asserts it was prejudiced when the trial court combined the two prongs of the *Franks* analysis into a single hearing and resolved them in a subsequent decision and entry.

{¶25} To support its argument, the state notes defendant conceded at the beginning of the hearing that he did "need to make a preliminary showing for the specific issue I've raised here, so we would call Detective Andrew Wuertz from Upper Arlington Police Department." (Tr. 3.) After defendant presented Detective Wuertz' testimony, the trial court specifically asked the state whether it was "admitting" defendant satisfied its initial burden or whether the state intended to "simply cross-examinin[e] this witness to rebut his burden that [defendant] needs to make." (Tr. 22-23.) The state stated it was "simply cross-examining [the] witness." (Tr. 23.)

{¶26} Defendant responds to the state's argument by asserting the state waived its *Franks* argument. Defendant initially notes the state did not object in the trial court when the court combined the two *Franks* steps into one hearing. Secondly, defendant argues the state waived any objection when it argued the merits of defendant's motion to suppress both in its memorandum opposing defendant's motion and in its closing arguments during the hearing. The state argues it could not have waived its *Franks* argument in the trial court because the court was not clear that it intended to deviate from the *Franks* procedure until it issued its decision and entry granting defendant's motion to suppress.

{¶27} The procedure *Franks* outlined contemplates two distinct processes concerning an attack on a search warrant affidavit, one procedural and one more substantive. The first step in the *Franks* analysis requires a defendant to make a preliminary showing, presumably through a motion, that the search warrant affidavit contains intentionally false information. If the court determines the defendant made that preliminary showing, then defendant is entitled to a hearing on his motion. *Franks*, 438 U.S. at 155-56, 98 S.Ct. at 2676.

{¶28} The second step in the *Franks* analysis, the hearing, requires a defendant, in attacking the validity of a search warrant affidavit, not only to establish by a preponderance of the evidence that the affidavit contained intentionally or recklessly false information, but also to show that without that false information, the affidavit contained insufficient content to establish probable cause, meaning the fruits of the search must be suppressed. *Id.* The issue here is what the trial court intended when at the hearing it referred to defendant's initial burden.

{¶29} Defendant filed his motion to suppress on May 12, 2010, arguing the search warrant affidavit contained intentionally false information; the state opposed defendant's motion with a memorandum addressing the merits of defendant's arguments, but not referring to an initial showing under the procedural aspects of the first step of *Franks*. The trial court, through the act of granting a hearing on the matter, apparently concluded defendant satisfied his burden under the first step of *Franks* and was entitled to a hearing under the second step of *Franks*.

{¶30} Accordingly, when not only the trial court, but also defendant, consistent with his written motion that referred to a "preliminary showing" under the second step of

Franks, both mentioned defendant's "preliminary showing" and initial "burden" during the hearing, they referred to the second step of the *Franks* analysis requiring defendant to establish, by a preponderance of the evidence, that the affidavit contained intentionally false information. The trial court's decision and entry bolster such a conclusion by including the citation to, and explanation of, the second step of the *Franks* analysis in determining defendant, at the hearing, satisfied its initial burden of demonstrating the affidavit contained intentionally false information. (Decision and Entry, 3.)

{¶31} Further supporting the conclusion that the initial "burden" the trial court referred to was in the second step of the *Franks* analysis, the trial court's decision and entry specifically concluded that "the first prong of the *Franks* test has been satisfied," and then proceeded to determine whether "the remaining allegations in the warrant, without the false language, constitute probable cause." (Decision and Entry, 8.) Such language represents a straight-forward application of the two parts of the second step of the *Franks* analysis. The trial court properly complied with both steps of the two-step *Franks* analyses in granting defendant a hearing and then, based on the hearing, determining defendant's motion to suppress.

{¶32} Even if the trial court failed to comply precisely with the procedure in *Franks*, the state does not demonstrate prejudice. The state asserts only that it intended to call the municipal court judge, who issued the warrant, to testify about Detective Wuertz' sworn statements at the time he requested the warrant. A court, however, cannot rely on sworn testimony that was not properly recorded and transcribed. *State v. Shepcaro* (1975), 45 Ohio App.2d 293, 298 (concluding that pursuant to Crim.R. 41(C),

"supplemental testimony taken orally by the judge from an affiant" applying for a search warrant "will not be admissible at a hearing to suppress unless that testimony has been recorded by a court reporter or recording equipment, transcribed and made part of the affidavit"). Moreover, to the extent the municipal court judge would testify she believed Detective Wuertz was being truthful and his using the term "victim" was appropriate, such testimony would serve only to duplicate what is already known: the municipal court judge determined probable cause existed at the time she issued the search warrant. Had she not believed Detective Wuertz, she presumably would not have issued the warrant.

{¶33} For the stated reasons, the state's first assignment of error is overruled.

V. Second Assignment of Error – Intentional or Reckless Falsity

{¶34} The state's second assignment of error asserts the trial court erred in concluding defendant carried his burden to prove the affidavit supporting the search warrant contained intentional or reckless falsity.

{¶35} "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision granting the motion to suppress is twofold. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. *Id.*, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must independently determine, as a matter of law, whether the facts meet

the applicable legal standard. *Id.*, citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627.

{¶36} In his motion to suppress, defendant argued Detective Wuertz intentionally or recklessly included false information in his affidavit to create probable cause for the search warrant. To "successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.'" *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶31, cert. denied, 548 U.S. 912, 126 S.Ct. 2940, quoting *State v. Waddy* (1992), 63 Ohio St.3d 424, 441, quoting *Franks*, 438 U.S. at 155-56, 98 S.Ct. at 441. " 'Reckless disregard' means the affiant had serious doubts about the truth of an allegation." *Id.*, citing *United States v. Williams* (C.A.III., 1984), 737 F.2d 594, 602, cert. denied, 470 U.S. 1003, 105 S.Ct. 1354. "Omissions count as a false statement if 'designed to mislead, or * * * made in reckless disregard of whether they would mislead, the magistrate.'" *Id.*, quoting *United States v. Colkley* (C.A.4, 1990), 899 F.2d 297, 301. A person's intent or culpable mental state is a question of fact for the trial court. See, e.g., *Wissler v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 09AP-569, 2010-Ohio-3432, ¶33, quoting *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 2006-Ohio-2957, ¶57, quoting *B&J Jacobs Co. v. Ohio Air, Inc.*, 1st Dist. No. C-020264, 2003-Ohio-4835, ¶10; *State v. Mason*, 6th Dist. No. L-06-1404, 2008-Ohio-5034, ¶69, citing *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶106.

{¶37} The trial court factually concluded "Detective Wuertz's reasons for listing E.K. as a 'victim' only on the search warrant," but on no other documents introduced at

the hearing, "are intentionally misleading and false." (Decision and Entry, 5.) As the court explained, "Detective Wuertz fully understood at the time he petitioned the court for a search warrant that he did not have probable cause for any criminal charge against Defendant as it relates to [E.K.] and lacked a good faith belief that the information he possessed would lead to any future charges." (Decision and Entry, 5-6.) With that premise, the trial court specifically concluded "Detective Wuertz knowingly and intentionally included the false characterization of [E.K.] in order to create probable cause to search Defendant's home." (Decision and Entry, 7.) The record contains competent, credible evidence supporting the trial court's factual determination.

{¶38} The trial court relied on Detective Wuertz' own testimony that the detective had no probable cause either to search defendant's home regarding his conduct with E.S. or for a charge against defendant regarding his conduct with E.K. Indeed, the detective acknowledged he had no basis to search defendant's home apart from the activities related to E.K.

{¶39} Moreover, the trial court considered the three different forms Detective Wuertz used in his investigation where, though given the opportunity, Detective Wuertz never noted E.K. was a victim. Initially, the court pointed to the complaint filed regarding E.S. that failed to reference E.K. "as a victim or otherwise." (Decision and Entry, 6.) The court further observed that Detective Wuertz did not mention E.K. in the Arrest Information Form. Finally, Detective Wuertz did "not mention [E.K.] in his Ohio Uniform Incident U-10 Report and specifically notes that only '1' victim is involved." (Decision and Entry, 7.) Although Detective Wuertz testified he personally considered E.K. to be a victim, the court pointed out he never filed "a complaint, u-10 report, or arrest report

specifically as it pertains to [E.K.]" (Decision and Entry, 7.) Rather, the trial court found "Detective Wuertz knows the definition of victim and deliberately chose not to include [E.K.] in any of his other police documents." (Decision and Entry, 8.)

{¶40} The trial court, as the finder of fact, must determine issues of credibility and weight of the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Here, competent, credible evidence supported the trial court's factual determination that "Detective Wuertz knowingly and intentionally included the false characterization of [E.K.]" in the search warrant affidavit "in order to create probable cause to search Defendant's home." (Decision and Entry, 7.)

{¶41} The state nonetheless focuses on the meaning of the word "victim," arguing the detective personally believed E.K. to be a victim. See *United States v. Garcia-Zambrano* (C.A.10, 2008), 530 F.3d 1249, 1256 (noting an appellate court need not defer to a district court's interpretation of an affidavit "where the district court's interpretation of the affidavit is based solely on the court's reading of the written words in the affidavit"). *Garcia-Zambrano*, however, goes on to conclude that "[w]here the district court uses extrinsic evidence to determine what the affidavit means, [an appellate court] will reject the [lower] court's interpretation only if clearly erroneous." *Id.*

{¶42} Here, the trial court did not rely solely on the written affidavit. Rather, the trial court considered Detective Wuertz' testimony that sought to explain why the detective used the term "victim" to refer to E.K. in the affidavit but did not use that term to describe E.K. in any other documentation. The trial court specifically concluded Detective Wuertz "lacks credibility in regards to his reasoning of using [E.K.] in the affidavit." (Decision and Entry, 9.)

{¶43} The trial court noted most people would agree that "even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization," but such circumstances do not satisfy the constitutional standards for a search for criminal activity. (Decision and Entry, 7.) Read in that context, the trial court's including the Black's Law Dictionary definition of "victim" in its decision was not in an attempt to apply an overly rigid standard for language used in a search warrant affidavit, but to contrast the meaning "victim" ordinarily has in a criminal investigation, such as the various forms Detective Wuertz completed, with the detective's application of personal beliefs. The trial court determined Detective Wuertz understood E.K. was not a "victim" in the criminal sense, so his using that term six times in the search warrant affidavit, as compared to a single reference to E.S., amounted to Detective Wuertz' knowingly and intentionally including false information in the affidavit in order to establish probable cause.

{¶44} Because competent, credible evidence supports the trial court's specific factual determination that Detective Wuertz knowingly and intentionally included false information in his search warrant affidavit in order to establish probable cause to search defendant's house, the trial court's decision to suppress the evidence obtained as a result of the search complies with applicable law. *Franks*. The state's second assignment of error is overruled.

VI. Third Assignment of Error – Good Faith Exception

{¶45} The state's third assignment of error argues the trial court erred in refusing to apply the good-faith exception to the exclusionary rule.

{¶46} Under the good-faith exception, the Fourth Amendment exclusionary rule should not operate to suppress evidence officers obtained when acting in objectively reasonable reliance on a search warrant that a detached and neutral magistrate or judge issued but ultimately is determined to be lacking in probable cause. *United States v. Leon* (1984), 468 U.S. 897, 922-23, 104 S.Ct. 3405, 3420-21. "*Leon* teaches that * * * the police officer may rely upon the legal judgment and decision of the judge as to the propriety for the issuance of the warrant." *Columbus v. Wright* (1988), 48 Ohio App.3d 107, 112. More recently, the United States Supreme Court phrased the issue in terms of an officer's "objectively reasonable reliance" on a warrant. *State v. Geiter*, 190 Ohio App.3d 541, 2010-Ohio-6017, ¶39, appeal not allowed, 128 Ohio St.3d 1445, 2011-Ohio-1618, citing *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695.

{¶47} As the trial court noted in its decision, *Herring* involved a computer error that generated an invalid warrant, and the Supreme Court determined the police acted in good faith in relying on the defective warrant. Here, by contrast, no electronic or other mechanical error occurred. Instead, the trial court determined Detective Wuertz deliberately included false information in his affidavit in order to obtain the search warrant. Given that one of the primary goals of the exclusionary rule is to deter deliberate police misconduct, this is not a situation where the good-faith exception applies. *Herring*, 555 U.S. at 144, 129 S.Ct. at 702.

{¶48} Accordingly, the state's third assignment of error is overruled.

VII. Fourth Assignment of Error – Issuance of Search Warrant absent "Victim #2"

{¶49} The state's fourth assignment of error asserts the trial court erred in concluding the search warrant for defendant's home could not have issued without the "Victim #2" characterization used to describe E.K.

{¶50} Under *Franks*, if a defendant satisfies its burden that a search warrant affidavit contains intentionally false information, the search warrant remains valid only if the remaining allegations in the affidavit are sufficient to constitute probable cause. *Franks*, 438 U.S. at 156, 98 S.Ct. at 2676. Having determined Detective Wuertz' use of the "Victim #2" in the affidavit was intentionally false and misleading, the trial court looked to the remaining allegations in the affidavit. All that remained were E.S.' statements that defendant inappropriately touched E.S. while she was a student at school. Nothing in the affidavit ties E.S.' allegations to any criminal conduct or evidence at defendant's home. Indeed, the detective admitted that the affidavit, as it relates to E.S. only, presented no basis to search defendant's house.

{¶51} The state nonetheless asserts a warrant can issue for "mere evidence" having a nexus to criminal behavior. *Warden v. Hayden* (1987), 387 U.S. 294, 307, 87 S.Ct. 1642, 1650. Even if E.K. were not a victim in her own right, the state argues that E.K. was still a witness with valuable information regarding potential evidence at defendant's home that might aid in defendant's conviction for the crime committed against E.S.

{¶52} Although E.S. asserted defendant photographed her, she did not allege any conduct took place at defendant's home. She alleged defendant touched her inappropriately on school grounds and photographed her at an undisclosed location. We

note, however, E.K. mentioned the photographs and added that no inappropriate touching occurred with her at school, thus suggesting the photographs were taken at school. Further, E.K.'s statements about defendant's photographing her pertained solely to E.K.'s consensual conduct with defendant. E.K. did not allege defendant photographed anyone other than her, and she did not assert she had knowledge that defendant possessed explicit photographs of anyone other than her. Lastly, the affidavit supporting the warrant did not mention the photographs. Under *Hayden*, the state lacked probable cause to search defendant's home. Accordingly, the state's fourth assignment of error is overruled.

VIII. Disposition

{¶53} Having overruled the state's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Motion to strike denied;
judgment affirmed.*

TYACK, J. concurs.
FRENCH, J. dissents.

FRENCH, J., dissenting.

{¶54} In the second assignment of error, appellant contends that the trial court erred by concluding that Detective Wuertz intentionally included false information within the warrant affidavit in order to create probable cause for the warrant. I agree.

{¶55} Appellee argued in his motion to suppress that Detective Wuertz lied when referring to E.K. as a victim in the search warrant affidavit. To successfully attack the veracity of a search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either knowingly and intentionally or

with reckless disregard for the truth. *Franks v. Delaware* (1978), 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676. Even if the search warrant affidavit contains false statements of that type, the warrant is still valid unless, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." *Id.* at 156, 98 S.Ct. at 2676. Here, the trial court found that (1) the affidavit's characterization of E.K. as a "victim" was false and misleading, and (2) Detective Wuertz provided this false information knowingly, intentionally, and in order to create probable cause to search appellee's home.

{¶56} In reviewing appellee's motion to suppress, we must accept the trial court's factual and credibility determinations if they are supported by competent, credible evidence. See *State v. Tolliver*, 10th Dist. No. 02AP-811, 2004-Ohio-1603, ¶38. We need not, however, defer to the court's interpretation of the language of the warrant affidavit itself. See *United States v. Garcia-Zambrano* (C.A.10, 2008), 530 F.3d 1249, 1256 (holding that, where a district court's interpretation of a written warrant affidavit is based solely on the court's reading of the written words in the affidavit, the appellate court will not defer to the trial court's interpretation).

{¶57} Here, the trial court interpreted the term "victim" to mean, and only to mean, "a person who is the object of a crime." I conclude, however, that it was improper for the trial court to apply such a limited definition. Specifically, it is improper for a court to invalidate warrants by interpreting the accompanying affidavits in a "hypertechnical" manner because the affidavits are drafted by nonlawyers in the midst and haste of a criminal investigation. *United States v. Ventresca* (1965), 380 U.S. 102, 108-09, 85 S.Ct. 741, 746.

{¶58} Used more broadly, "victim" can mean (1) "a person who suffers from a destructive or injurious action," or (2) "a person who is deceived or cheated, as by his own emotions or ignorance, by the dishonesty of others, or by some impersonal agency." Webster's Encyclopedic Unabridged Dictionary (Random House 1997).

{¶59} The trial court noted that few people "would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization." I agree. And, applying this characterization to what may have occurred between E.K. and appellee, an affiant could have reasonably concluded that E.K. was a "victim" under a definition broader than the one the court imposed. Therefore, the characterization of E.K. as a victim was not false, and the trial court erred by suppressing the evidence on that basis.

{¶60} I have not considered whether suppression may be appropriate on other grounds. Rather, I would sustain appellant's second assignment of error only to the extent that it argued the trial court erred by concluding that the characterization of E.K. as a victim was false. Because the majority has determined otherwise, I respectfully dissent.

student aide and routinely gave him back massages in his office. Both girls allege that Defendant held himself out as a father figure to them. While there are no allegations by L.K. that relate to the period of time when she was a Wellington student or under the age of eighteen, L.K. told Detective Wuerz that Defendant took nude photographs of her that were inappropriate at his home located at 6595 Brock Street, Dublin, Ohio months after her graduation. Also, Defendant told L.K. that he needed to feel her heartbeat in order to connect with her at a different level. The Defendant instructed L.K. to remove her shirt and bra so that he could feel her heartbeat through her breast.

On February 3, 2010, Detective Wuerz appeared before Judge Peoples and requested that a search warrant be issued to search Defendant's residence. The search warrant sought evidence of the crime of Gross Sexual Imposition, including, but not limited to computers, videotapes, and any other types of electronic storage media. Detective Wuerz executed a search warrant which included a sworn attachment and evidence was seized based on this information. Defendant was subsequently arrested and charged with sixteen felony counts of Voyeurism and four misdemeanor counts of Voyeurism, along with one count of Gross Sexual Imposition.

On May 12, 2010, Defendant filed a Motion to Suppress Evidence. On June 3, 2010, the State of Ohio filed a Memorandum Contra. On June 29, 2010, the Court conducted a Suppression Hearing and heard the testimony of Detective Wuerz and admitted exhibits into evidence.

Procedural History

Ohio Rule of Criminal Procedure 41 sets out the requirements of the contents of a search warrant. Crim.R. 41(C) provides in pertinent part the following:

A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched *** name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located.

* * *

Upon the receipt of the warrant and affidavit, the Judge must find that there is probable cause to issue the warrant. *Id.* The 10th District Court of Appeals has held that a Judge may not consider oral testimony as probable cause unless the oral testimony is made under oath and recorded. *State v. Shepacro* (1975), 45 Ohio App. 2d 293.

In *Carroll v. United States* (1925), 267 U.S. 132, 162, probable cause exists when the affidavit demonstrates:

facts and circumstances within their [the officers swearing to the affidavits] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief [that the things to be searched for and seized were connected with a crime, and that they were to be found in the location sought to be searched].

When the truthfulness of the attached affidavit is questioned, a hearing is required. Defendant must present a preliminary showing that there is a false statement made knowingly and intentionally, or with reckless disregard for the truth, by the affiant included in the sworn warrant affidavit. *Franks v. Delaware* (1978), 98 S. Ct. 2674. In *Franks*, the Supreme Court set out a two-prong test which would require the court to suppress evidence if a Defendant could prove that the search warrant was executed invalidly. *Id.* at 2676. First, Defendant must establish by a preponderance of the evidence the affidavit contained false statements that were made knowingly and intentionally or with a reckless disregard to the truth. Second, if the Defendant meets his burden and the affidavit's remaining content is insufficient to establish probable cause, the false material in the warrant must be voided and the fruits of the search excluded. *Id.*

Law & Argument

- I. Defendant claims the affidavit attached to the search warrant contained false and misleading information which was deliberately used to satisfy the existence of probable cause to support the search.

In the present matter, Defendant argues that Detective Wuertz knowingly and intentionally provided false and misleading information in his affidavit supporting the search

warrant presented to Judge Peeples. Specifically, Detective Wuertz admits that he mentions L.K. as Victim #2 six different times in order to get a search warrant. (Transcript pages 13 & 17. hereo after referred to as "Tr. ___") Detective Wuertz also admits that the activity for which L.K. complains occurred between two consenting adults. (Tr. 20) At the Motion to Suppress hearing on June 29, 2010, Defendant presented the following exhibits: (1) Search Warrant with the attached affidavit indicating two victims (Def. Ex. 1); (2) Complaint of E.S. for Gross Sexual Imposition (Def. Ex. 2); (3) Arrest Information Form including Detective Wuertz's statements of fact pertaining to E.S. (Def. Ex. 3); and (4) Ohio Uniform Incident ("U-10") Report indicating only one victim, E.S. (Def. Ex. 4). Defendant presented this evidence to show that Detective Wuertz falsely included the information of L.K. and referred to her as Victim #2 in the affidavit supporting the search warrant solely for purposes of creating sufficient probable cause to search Defendant's house.

II. The State of Ohio claims that the search warrant was valid and further that the good faith exception should prohibit the exclusion of the evidence regardless of the validity of the warrant.

The State claims that the use of the term "victim" by Detective Wuertz was not improper based on his personal belief that the events described to him by L.K. were not consensual and therefore she was a victim. In the alternative, the State argues that the misuse of the term "victim" does not rise to the level of being "intentionally" false or made "with reckless disregard for the truth" requiring the evidence to be suppressed. Moreover, the State cites *Herring v. United States*, supporting that even if the warrant was invalid, Upper Arlington Police acted in good faith while executing the search and therefore such evidence should not be suppressed.

- 1. This Court finds that Defendant proved by a preponderance of evidence that the affidavit supporting the search warrant contained false statements made knowingly and intentionally by Detective Wuertz.**

Detective Wuertz submitted an attachment to his affidavit for the search warrant (Def. Ex. 1) which reads in pertinent part with respect to L.K. (Victim #2) as follows:

Victim #2 was with Victim #1 while she made the report. Victim #2 stated she also had inappropriate contact with Dibble. Victim #2 stated that it was after she had graduated high school where Dibble had also been her teacher. Victim #2 stated that Dibble had taken photo's [sic] of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim #2 told investigators that Dibble used a digital camera to take the photo's [sic], and made her wear a pillow case over her head while he took them. *** Investigators from Upper Arlington believe Dibble's computers, camera's [sic], media storage devices, etc. may contain correspondence, and photos to substantiate Victim #1 and Victim #2's claims.

At the Suppression Hearing, Detective Wuertz testified that he understood that all references regarding Defendant's computer, camera, photos, telephone calls all related only to Victim #2. In fact, Detective Wuertz provides the following answers:

Q. And nothing about Victim #1 indicates anything that would lead you to believe that there was any type of computer conversation, phone calls, picture taking, or anything else, any of the information in your affidavit, your sworn statement here, as it applies to Victim #1. Is that fair to say?

A. Correct.

Q. So as it applies to Victim #1, it's fair to say also that there's no real probable cause to be searching the home of Mr. Dibble. Is that correct?

A. As far as what's written here, correct.

Q. Okay. You then identify someone you refer to as Victim #2. In fact, you used the term Victim #2 six times. Is that not correct?

A. Correct.

(Tr. 13)

Detective Wuertz was also questioned extensively about his use of the term "victim" as it relates to L.K. and the clear contradiction of the detective's failure to list L.K. on any of the three different documents that he routinely uses when investigating and filing criminal complaints. Detective Wuertz's reasons for listing L.K. as a "victim" only on the search warrant are intentionally misleading and false. Detective Wuertz fully understood at the time he petitioned

the court for a search warrant that he did not have probable cause for any criminal charge against Defendant as it relates to L.K. and lacked a good faith belief that the information he possessed would lead to any future charges. The following responses by Detective Wuertz yield no other conclusions:

Q. You never filed a charge against this girl or that involved this girl [Victim #2] ever, correct?

A. Correct.

Q. Okay. You never filled a report, a U-10 or another report, that indicates she's [Victim #2] a victim. Is that correct?

A. Correct.

Q. Okay. And yet you refer to her six times as victim in your sworn affidavit to get a search warrant.

A. That is correct.

Q. Okay. And only the information from her would be the probable cause basis to be able to search the home of Mr. Dibble, correct? At that point in time, detective, that's correct, is it not?

A. At that point in time.

(Tr. 21-22)

Q. And I guess that's ultimately my point. There is no probable cause for a charge against L.K, is there?

A. Against Mr. Dibble for L.K.

Q. Correct.

A. Right.

(Tr. 43-44)

Detective Wuertz has been a member of the Upper Arlington Division of Police for thirteen years and has served as a detective for the past three years. He is an experienced police detective. In the instant matter, Detective Wuertz completed three different forms that provided him opportunities to list L.K. as a victim. First, the Complaint of Victim #1 filed with the Franklin County Municipal Court fails to reference L.K. as a victim or otherwise. (Def. Ex. 2)

Second, there's no mention of L.K. in Detective Wuertz's Arrest Information Form. (Def. Ex. 3). Third, Detective Wuertz does not mention L.K. in his Ohio Uniform Incident U-10 Report and specifically notes that only "1" victim is involved. (Def. Ex. 4). Fourth, Detective Wuertz believes that Victim #2 is as much of a victim as Victim #1. Yet, the detective never files a complaint, u-10 report, or arrest report specifically as it pertains to Victim #2. Detective Wuertz states in his affidavit for the search warrant that he believes the Defendant's computers, cameras, media storage devices at his house may contain information to "substantiate Victim #1 and Victim #2's claims." However, this statement is rebutted by his own testimony and clearly illustrates the importance for Victim #2's inclusion in the affidavit.

This Court finds that Defendant has shown by a preponderance of the evidence that the affidavit supporting the search warrant contained false statements. Defendant's Motion to Suppress combined with the evidence provided at the Suppression Hearing on June 29, 2010, demonstrates that Detective Wuertz knowingly and intentionally made false statements in his affidavit to Judge Peoples. Detective Wuertz testified that he personally believes L.K. is a victim. However, his personal beliefs are not enough to show negligence or innocent mistake regarding the inclusion of the term "victim" in the affidavit. Detective Wuertz admitted that at that point in time (February 3, 2010) only the information from L.K.'s interview would be the probable cause basis for searching Defendant's home. (Tr. 22) This Court finds that Detective Wuertz knowingly and intentionally included the false characterization of L.K. in order to create probable cause to search Defendant's home.

Detective Wuertz chose to temporarily substitute his professional training and understanding of the law with his moral and personal feelings regarding whether L.K. is a "victim." This Court would find few people, if any, who would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization. However, if there

does not exist probable cause to satisfy our constitutional standards of reasonableness for a search of criminal activity, as defined by law, then such search is invalid.

According to Black's Law Dictionary the term "victim" is defined as a person who is the object of a crime. Detective Wuertz's use of the word "victim" when referring to L.K. in the affidavit supporting the search warrant is improper. Detective Wuertz knows the definition of victim and deliberately chose not to include L.K. in any of his other police documents.

The State claims that there were additional oral communications between Detective Wuertz and Judge Peoples, however, no record of which was presented as evidence. Therefore, the first prong of the *Franks* test has been satisfied.

The Court now considers if the remaining allegations in the search warrant, without the false language, constitute probable cause. The remaining allegations include the statements made by E.S. regarding the inappropriate touching while she was a student at The Wellington School. This Court finds that these statements taken individually do not constitute a probable cause to search Defendant's home for evidence of Gross Sexual Imposition. Nothing in E.S.'s testimony gives rise to evidentiary material located in Defendant's home. Therefore, the second prong of the *Franks* test is met and the warrant was not based on probable cause.

2. This Court finds that the "Good Faith" exception is not applicable.

The "Good Faith" exception discussed in *Herring* prohibits exclusion of evidence if the police have an objectionably reasonable good faith reliance under a warrant that is invalid. *Herring v. United States* (2009), 129 S. Ct. 695. In *Herring*, a computer error was the cause of the invalid warrant; therefore the court found the police were acting in good faith executing the warrant. In contrast, there was no electronic error to blame with the facts given in Detective Wuertz's sworn affidavit. Alternately, this present matter is comparable to the facts in *Franks*. *Franks v. Delaware, supra*. In *Franks*, the police included information from a fake informant

to obtain a search warrant. Here, Detective Wurtz inappropriately included L.K. in his affidavit as "Victim #2" in order to obtain the search warrant.

This Court observed Detective Wurtz's testimony, appearance, and demeanor and find that he lacks credibility in regards to his reasoning of using "Victim #2" in the affidavit and regarding the additional conversation with Judge Peeples. There is no additional evidence besides his personal testimony to indicate this was an innocent mistake or that he had additional conversations with Judge Peeples outside the language included in the affidavit.

- 3. This Court finds that the search violated the Defendant's constitutional rights afforded by the 4th Amendment and therefore the evidence obtained during the search is inadmissible.**

The Ohio Constitution Article 1, Section 14 states:

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 persons and things to be seized.

The Constitution along with the rules of Criminal Procedure in Ohio allow for the protection of all individuals and their basic civil rights. Search warrants issued and executed without probable cause undermines the entire criminal justice system and strips individuals of their fundamental rights.

The protection of one's privacy is a fundamental right created by this country's founding fathers. Our fundamental rights are cornerstone to our democratic society. It is the principal duty of the judiciary to uphold the rights of the citizens.

Over one hundred years ago, United States Supreme Court Justice Bradley discussed the principles of search by the government into man's privacies of life and that governmental searches affect the very essence of constitutional liberty and security. Justice Bradley states the main problem with the principal:

[i]s not the breaking of [defendant's] doors and the rummaging of his drawers, that constitutes the essence of the offence; but it is the

invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence - it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. *Boyd v. United States*, 116 U.S. 616, 630.

Lord Camden in 1765 stated: "It is very certain, that the law obligeth no man to accuse himself" that search for evidence is disallowed upon the same principle." *Entick v. Carrington* (1765), 19 Howel's State Trials 1029, 1073.

Over time, warrants were created by the Courts to allow government officials limited rights to search into one's personal property. Search warrants are issued under limitations and restraints since there is a strong presumption to avoid violating one's fundamental right to privacy. There are also several circumstances in which warrants are not necessary prior to the search. None of the exceptions apply to this case, so this Court will not discuss those.

Here, Detective Wuertz falsely included L.K. in his affidavit supporting the search warrant. In the Search Warrant (Def. Ex. 1) it is clear that the only charge was Gross Sexual Imposition, which was not what L.K. was alleging. Detective Wuertz's personal subjective view regarding L.K.'s victim status is not credible evidence. In *Terry*, the Court states that the subjective view of the police officers does not determine the scope of reasonableness or probable cause. *Terry v. Ohio*, 367 U.S. 643. Moreover, in *Herring*, "the pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers." *Herring v. United States*, 129 S. Ct. 695, 703.

This Court finds fundamental civil rights to be paramount. Under *Mapp*, this Court must exclude any illegally seized evidence. *Mapp v. Ohio* (1961), 367 U.S. 643. Therefore, the evidence seized from Defendant's home is inadmissible.

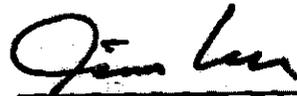
Conclusion

Since the penalties of abuse of process are so severe, this Court promotes and encourages following the process set out by law. When the proper procedure is not followed, it not only

infringes on the constitutional rights of defendants who are by law presumed innocent unless proven guilty but it also greatly affects the rights of the victim to bring their abusers to justice.

Accordingly, it is hereby ORDERED that Defendant's Motion to Suppress Evidence is GRANTED and ORDERED that all evidence seized from Defendant's home is INADMISSABLE.

IT IS SO ORDERED.



TIMOTHY S. HORTON, JUDGE

COPIES TO:

Daniel Hawkins, Esq.
373 South High Street, 15th Floor
Columbus, Ohio 43215
Prosecutor

J. Scott Weisman, Esq.
601 South High Street, 1st Floor
Columbus, Ohio 43215
Counsel for Defendant

Amendment 4

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.

§ 5 Other powers of the Supreme Court

(A)(1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court.

(2) The Supreme Court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the Supreme Court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

(Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968.)

2933.23 Search warrant affidavit.

A search warrant shall not be issued until there is filed with the judge or magistrate an affidavit that particularly describes the place to be searched, names or describes the person to be searched, and names or describes the property to be searched for and seized; that states substantially the offense in relation to the property and that the affiant believes and has good cause to believe that the property is concealed at the place or on the person; and that states the facts upon which the affiant's belief is based. The judge or magistrate may demand other and further evidence before issuing the warrant. If the judge or magistrate is satisfied that grounds for the issuance of the warrant exist or that there is probable cause to believe that they exist, he shall issue the warrant, identifying in it the property and naming or describing the person or place to be searched.

A search warrant issued pursuant to this chapter or Criminal Rule 41 also may contain a provision waiving the statutory precondition for nonconsensual entry, as described in division (C) of section 2933.231 of the Revised Code, if the requirements of that section are satisfied.

Effective Date: 11-20-1990

RULE 41. Search and Seizure

(A) Authority to issue warrant. A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.

(B) Property which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any: (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

(C) Issuance and contents.

(1) A warrant shall issue on either an affidavit or affidavits sworn to before a judge of a court of record or an affidavit or affidavits communicated to the judge by reliable electronic means establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the affidavit is provided by reliable electronic means, the applicant communicating the affidavit shall be placed under oath and shall swear to or affirm the affidavit communicated.

(2) If the judge is satisfied that probable cause for the search exists, the judge shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant may be issued to the requesting prosecuting attorney or other law enforcement officer through reliable electronic means. 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 judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses the affiant may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed, and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

(D) Execution and return with inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken, or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The

inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. Property seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant.

(E) Return of papers to clerk. The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk.

(F) Definition of property and daytime. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 7:00 a.m. to 8:00 p.m.

[Effective: July 1, 1973; amended effective July 1, 2010.]