

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

**AMICUS BRIEF OF CITY OF UPPER ARLINGTON IN SUPPORT OF PLAINTIFF-
APPELLANT STATE OF OHIO**

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FILED
MAR 12 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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INTEREST OF AMICUS CURIAE

Amicus Curiae City of Upper Arlington (Upper Arlington) has a substantial interest in this case. Upper Arlington is a city of approximately 34,000 residents with approximately 6,000 students within its borders. The Wellington School, where the defendant's victimization of young female students occurred, is located in Upper Arlington. Detective Andrew Wuertz is a member of the Police Department of the City of Upper Arlington. The City Attorney's Office for Upper Arlington prosecutes misdemeanor cases in the Franklin County Municipal Court and routinely advises the police officers of the Upper Arlington Police Department.

STATEMENT OF CASE AND FACTS

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

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Upper Arlington adopts the well-written arguments set forth in the State of Ohio's Merit Brief for each of the propositions of law. Upper Arlington does not want to waste the Court's time by repeating the same arguments and citing the same authorities. Therefore, Upper Arlington will focus its argument on those aspects of the propositions that are of particular concern to Upper Arlington and its interests.

Proposition of Law No. I

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.

It is important to note that Detective Andrew Wuertz testified during the hearing without objection concerning the sworn oral information he provided to Judge Peebles during the issuance of the search warrant. However, the trial court determined after the hearing was concluded that it would not consider Detective Wuertz testimony under Ohio Rule of Criminal Procedure 41(C). The trial court's refusal to consider Detective Wuertz testimony, combined with its later refusal to reopen the hearing to hear the testimony of Judge Peebles and its narrowly skewed interpretation of the word "victim", has resulted in the suppression of evidence that supported defendant being indicted on sixteen felony counts of voyeurism involving at least fourteen different minors.

The sworn statements that Detective Wuertz made to Judge People's regarding the defendant's grooming and manipulation of both victims starting in the seventh grade, including the required backrubs and his photographing of both victims in see-through unitards should have been considered by the trial court under the Fourth Amendment. During his testimony, Detective Wuertz stated that when he typed the warrant, he believed that Victim #2, E.K., was a victim and there would be a chance that the defendant would be charged regarding his conduct with E.K. The search warrant affidavit submitted to Judge People's represents this belief and demonstrates good-faith on the behalf of Detective Wuertz. Regardless of the Court's ruling on the constitutionality of Criminal Rule 41(C), Upper Arlington would urge this Court to find that the information provided by Detective Wuertz falls within the good-faith exception and to validate the search warrant issued by Judge Peebles.

By ruling that Detective Wuertz knowingly provided false information to the issuing magistrate, the trial court has done significant damage to both the reputation of Detective Wuertz

and the Upper Arlington Police Department. The Upper Arlington Police Department serves the approximately 34,000 residents of Upper Arlington. A survey conducted in 2006 assessing the police department and safety found that 88% of respondents believe that Upper Arlington officers are doing a competent job and 94% felt safe in Upper Arlington. City of Upper Arlington, *2006 Police/Safety Survey Results* (May 4, 2006), available at http://www.uaoh.net/egov/docs/1261451082_56549.pdf (accessed March 9, 2012). Community support of municipal police departments is necessary for officers and detectives to fulfill their duties of protecting the community and its residents. By determining that an officer made false representations to the court knowingly, the trial court has potentially undermined the trust and confidence that Upper Arlington residents have in the effectiveness of the police department. Further, for the court to determine that Detective Wuertz lacked good faith without hearing the opinion of the issuing magistrate judge, the ruling leads the community to question the integrity of Detective Wuertz. Because the lower court did not seek information from the magistrate prior to its ruling and the potential damage to community trust in municipal police departments, this Court should overrule the lower court's findings.

Proposition of Law No. II

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

In order to attack the validity of a warrant affidavit, the United States Supreme Court has held that the defendant 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.” *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d

667 (1978). While the United States Supreme Court has not defined “reckless disregard”, this Court has held that “[r]eckless disregard’ means that the affiant had serious doubts of an allegation's truth.” *State v. Waddy*, 63 Ohio St.3d 424, 441, 588 N.E.2d 819, 832, (1992) *citing United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984).

Upper Arlington would submit that the defendant failed to make the preliminary showing necessary to warrant a hearing on the issue, and certainly not enough to make an actual finding of reckless disregard. There is no indication in the record that would support a finding that Detective Wuertz did not believe the information put forth in the affidavit to be true or that he had any doubts about the information. The lower courts reliance on Detective Wuertz’s choice to list Victim #1 E.S. on an Ohio Uniform Incident Report and the fact he did not list Victim #2 E.K. is a very narrow interpretation of the word “victim” and ignores Detective Wuertz un rebutted testimony, that he believed that Victim #2 was a victim of the defendant’s grooming and manipulation (T. 35-37).

The defendant was a teacher who ran the theatre program at the Wellington School. Both witnesses were young, female, high school students who participated in the theatre program. Both witnesses placed their trust in the defendant during the time he served as their teacher. The trial court was wrong in not understanding that any female student subjected to the required backrubs, being photographed in see-through unitards without undergarments, and the manipulation of the student-teacher relationship that eventually allowed him to deceive her into permitting him to photograph her vagina was not a victim.

The request of defendant to receive shirtless back rubs with from female high school students is both clearly inappropriate. The fact that the defendant asked the victims to close the door prior to the backrubs indicates that he knew his behavior was inappropriate and that he was

abusing his relationship and role as a teacher. Beyond the backrubs, defendant's photographing of both E.S. and E.K. in nude unitards without any undergarments can only have served a sexual purpose for the defendant. This behavior clearly crosses the boundaries of the teacher-student relationship and Detective Wuertz correctly expressed great concern to the issuing magistrate about the possible use and dissemination of these pictures on the internet.

The lower court also acknowledged that control wielded by older men in a relationship with younger females can lead to victimization. As stated by the court, "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 violated grounds of immorality and may create some measure of victimization." Decision and Entry, at 7. Considering both the control existing in the teacher-student relationship and that exerted by older men over young women, Detective Wuertz's description of both females as "victims" was neither untruthful nor unreasonable. In fact, it is an opinion that would undoubtedly be shared by virtually every parent of a female student that was subjected to the defendant's actions.

The trial court's narrowly skewed interpretation of the word "victim" unfairly branded Detective Wuertz as having presented false information to the issuing magistrate. As noted by Judge French in her dissent, the word "victim", if "[u]sed more broadly 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.'" *State v. Dibble*, 2011-Ohio-3817, 195 Ohio App.3d 189, ¶ 58 citing Webster's Encyclopedic Unabridged Dictionary (Random House 1997). Defendant telling Victim #2 that he needed to photograph Victim #2's vagina because her internal "power was so strong he couldn't look at it

very long” and “that eventually he would get to the point where he would go inside to touch the energy” (T. 36-37) was clearly an attempt to deceive Victim #2.

Upper Arlington is also concerned with the characterization that the nude photographs taken by a teacher of a former student’s vagina while she wore a pillow case on her head were “consensual”. Intensifying the egregious nature of the defendant’s behavior is the public concern about both the “nature of sex crimes and the impact that can result from sexual victimization.” Center for Sex Offender Management: A Project of the U.S. Department of Justice, Office of Justice Programs, *Legislative Trends in Sex Offender Management*, http://www.csom.org/pubs/legislative_trends.pdf (accessed March 6, 2012).

The safety of children within a community is of paramount concern not only to those living in the community, but also to those sending their children to learn in the community. Ensuring that children at school are safe from sexual predators is a key concern for community members and, has translated to the wide spread implementation of sex offender registration laws that limit the proximity a sex offender may live or work to a school. In the current case, the defendant not only sexually exploited two young women; he did so while employed as a teacher at their school. The seriousness and deplorable nature of defendant’s behavior is a paramount concern to all communities that seek to protect their children from sex offenders and the trial court’s narrow interpretation of the word “victim” ignores the special protection that our laws and communities require for children.

To disregard the serious allegations against the defendant and, instead, focus on the word choice of a police officer, ignores the interest of a community to prevent sexual predators from victimizing children. Following the outcome of the trial court and the Tenth District fails to offer this basic protection from sexual predators to students and community members. The trial

court's granting of the motion to suppress because Detective Wuertz correctly characterized both young women as "victims" in an affidavit is both unfair and against the public interest of protecting children from sexual predators.

By ruling that Detective Wuertz use of the word "victim" was intentionally or recklessly false, the court also calls into question the very credibility of the police officer. As noted in the *Amicus Curiae* brief by the Fraternal Order of Police, *Brady v. Maryland* requires the state to disclose any material that affects the credibility of a state's witness. Fraternal Order of Police Amicus Brief at 2. Under the current ruling of the court of appeals, simply because Detective Wuertz characterized the two females in his affidavit as "victims" the state will most likely have to disclose this information to defense counsel in any future cases involving Detective Wuertz. Upper Arlington has provided Detective Wuertz with well over 1500 hours of police training at considerable expense to the residents of Upper Arlington. The trial court's factually and legally unsupported ruling has made that training meaningless if defense counsel in future cases can argue that Detective Wuertz intentionally misled the issuing magistrate.

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.

The trial court converted the preliminary showing into a full *Franks* hearing without providing notice to the prosecution and then made a factual determination that the Detective Wuertz lacked good faith and had intentionally misled the issuing magistrate without affording the State an ability to present the testimony of the magistrate that issued the search warrant. Judge Peeple's testimony would have supported Detective Wuertz' testimony that he honestly believed that Victim #2 was a victim, clarified that the issuing magistrate understood that a person can be a "victim" without being a prosecuting witness on a criminal complaint, and

established that the issuing magistrate was not misled by Detective Wuertz use of the word “victim” (Trial Rec. 41, ¶ of Peeples affidavit).

One of the reasons for requiring trial courts to notify litigants that the court is moving from one stage of the proceedings to the next is that litigants base their hearing strategy – including the number of witnesses to subpoena – on the burden and standard of proof necessary for a particular stage. Examples would include preliminary hearings and motions to suppress for lack of probable cause. Since the probable cause standard at these hearings is less than the beyond a reasonable doubt standard needed at trial, the prosecution does not need to present its entire case and may not subpoena all of its witnesses to testify.

The Upper Arlington City Attorney’s office will routinely proceed at a motion to suppress hearing on an OVI case with only the arresting officer, even though there may be one or more additional officers that could testify about the defendant’s condition. Upper Arlington does this to both shorten the length of the hearing and to limit the need to take police officers off the street or to pay overtime for off-duty police officers. However, if a trial court had the ability to convert a motion to suppress hearing into a trial on the merits, Upper Arlington would have to subpoena all potential witnesses for every motion to suppress hearing.

The trial court’s action of converting a preliminary showing into a full *Franks* hearing is functionally no different than a court telling the parties it was holding a probable cause hearing and then making a finding of guilt or innocence without notifying the parties that the hearing had been converted to a trial on the merits. In both instances, the standards of proof are different, neither party would normally expect to present all of its evidence, and one of the parties would not have been required to present any evidence.

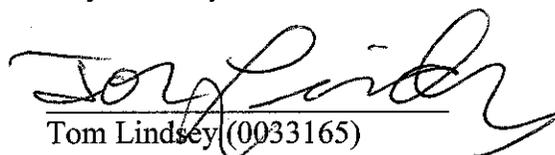
Upper Arlington would concur with the State that the defendant failed to make the necessary preliminary showing to even warrant a *Franks* hearing and that the decision of the trial court granting the motion to suppress should be reversed without the need for further hearing. However, at the very least, Upper Arlington would respectfully urge this Court to remand this case to the trial court for a *Franks* hearing so that Judge Peeples can testify about the sworn oral statements given by Wuertz at the time she approved the warrant and that Detective Wuertz use of the word “victim” did not mislead her in granting the search warrant.

CONCLUSION

For all the foregoing reasons, *Amicus*, on its own behalf and on behalf of the over 6,000 school age residents that it seeks to protect, respectfully requests that this Court reverse the judgment of the Tenth District Court of Appeals and remand the case to the trial court for further proceedings consistent with this Court’s opinion.

Respectfully submitted,

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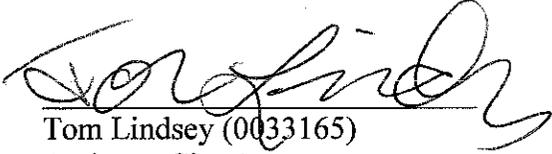
I hereby certify that a copy of the foregoing has been served this 12th day of March, 2012

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