

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEE LAWRENCE A. DIBBLE

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STATEMENT OF FACTS

Appellee agrees with the statement of facts given in Appellant's Merit Brief.

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.

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

Criminal Rule 41(C) Prohibited Admission of the Detective's Unrecorded Testimony

The trial court's decision not to consider Detective Wuertz's statements had nothing to do with the fundamental constitutional principles embodied in the exclusionary rule. The constitutionality of Crim. R. 41(C) is simply not at issue here. Rather, it is a clearly worded rule of Ohio criminal procedure governing the admissibility of evidence at suppression hearings. In this

case, the rule simply rendered certain components of a detective's testimony inadmissible due to a failure to record as required. This failure to preserve testimony does not create a Fourth Amendment issue, and it does not support the radical finding that a state rule of criminal procedure is unconstitutional.

In order for the trial court to admit the testimony that the detective purportedly gave before the issuing judge, his testimony must have been recorded, transcribed, and incorporated into the affidavit. Crim. R. 41(C) plainly states:

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

Allowing only recorded testimony at a post-seizure hearing on a motion to suppress eliminates the subsequent bolstering of facts to support a finding of probable cause. *State v. Jaschik*, 85 Ohio App.3d 589, 594, 620 N.E.2d 883; *discretionary appeal not allowed*, 67 Ohio St.3d 1450, 619 N.E.2d 419 (1993). Furthermore, the incorporation of the statements eliminates the fear that a reviewing court will have to guess as to the actual statements made to the judge issuing the warrant. *Id.* at 596.

Pursuant to the foregoing analysis, the trial court acted appropriately in refusing to consider the detective's testimony. His purported statements to the Municipal Court Judge were neither recorded nor incorporated into the affidavit. There was no way for the Common Pleas Court Judge to determine exactly what was said to the issuing Judge. Indeed, the detective himself was apparently unsure of what he had said. He said "I believe" twice in describing his testimony to the

Judge. This is precisely the situation that Crim. R. 41(C) prohibits. The failure to record the affiant's oral testimony rendered it inadmissible in the hearing on Appellee's motion to suppress, and the Common Pleas Court correctly decided not to consider such testimony in the probable cause analysis.

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

***The Trial Court Acted Within Its Discretion in Finding That
Detective Wuertz Did Not Act in Good Faith***

Initially, the State argues that the trial court erroneously failed to consider the detective's unrecorded oral statements as applied to whether or not he acted in good faith pursuant to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). However, the good faith exception does not apply where a magistrate issues a warrant based on a deliberately or recklessly false affidavit. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). In reaching its finding pursuant to *Franks*, the trial court specifically found that Detective Wuertz was not credible after observing his "testimony, appearance, and demeanor." (Decision and Entry, p. 9.) That is a conclusion entitled to substantial deference, and there is no reason to overturn it on appeal pursuant to *Leon* or any other reason.

Appellant's Authority is Inapposite

In order to make its argument regarding the application of the oral statements to the probable cause analysis, the State relies on the Fourth United States Circuit Court of Appeals in *United States*

v. Clyburn, 24 F.3d 613 (4th Cir. 1994). In *Clyburn*, the Court held that the validity of a search warrant obtained by state officers is tested by the requirements of the Fourth Amendment and not by state law standards, when admissibility in a federal prosecution is at issue. State officers in that case supplemented a state court warrant with sworn, unrecorded testimony in violation of state law. However, the prosecution was brought in federal court. *Id.* at 615. The Fourth Circuit held that federal law controlled admissibility of the information and, accordingly, looked at Rule 41(C) of the Federal Rules of Criminal Procedure. *Id.* at 616. Because that rule only applied to federal officers and federal search warrants, the Court found that the rule had not been violated and that broad principles of the Fourth Amendment did not bar admission of the sworn, unrecorded testimony. *Id.* at 616-618.

A close reading of *Clyburn* actually supports exclusion of the oral testimony in the case *sub judice*. The *Clyburn* Court examined the propriety of state and federal procedural rules governing admissibility of evidence at a suppression hearing. First, the Court found that the federal rule did not apply because its plain language only applied to federal agents acting on a federal warrant. *Id.* at 616. Implicit in this analysis is that the federal rule would have applied had the actors been federal and not state agents. Second, the Court found that federal proceedings are governed by federal and not state law. *Id.* Thus, a state law violation did not bar admission of the oral testimony. The *Clyburn* Court did not discount the validity of a state law. Rather, the Court held that it did not apply in a federal forum. In short, *Clyburn* actually supports the proposition that Rule 41(C) of the Ohio Rules of Criminal Procedure should apply to an Ohio trial court. It does not support the State's position.

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

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

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

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

Id. at 264.

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

Furthermore, the facts of *Wilmoth* make it readily distinguishable from the instant case. First, as the State concedes, unlike the officers in *Wilmoth*, Detective Wuertz's testimony was not recorded. Second, there was no urgency in the case *sub judice*. The State did not present any evidence of exigent or urgent circumstances, and there was no reason for the detective to have omitted so much information from the affidavit (such as the fact that the alleged offense occurred ten months ago). In *Wilmoth*, by contrast, destruction of evidence was apparently ongoing when the warrant was issued. Third, the trial court in this matter found that the detective acted in bad faith through his misleading characterization of "victim #2." Fourth, probable cause was the critical issue in this case. In *Wilmoth*, the officers were possessed of ample probable cause and the only issue was whether or not the violation of Rule 41 also violated the defendant's Fourth Amendment rights. Thus, *Wilmoth* does not support the positions of the State and *amicus curiae*.

Criminal Rule 41(C) Is Not Unconstitutional

According to Section 5(B), Article IV of the Ohio Constitution, "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." These rules of the court are the law of the court. They "must be as inflexibly followed by the court as a statute of the state." *Wood v. Ward*, 10 West.L.J. 505, 1853 WL 3650 (Washington Co. 1853). These rules must be procedural in nature.

“When a conflict arises between a rule and a statute, the rule will control on matters of procedure.” *State v. Weber*, 125 Ohio App.3d 120, 707 N.E.2d 1178 (1997). These rules, however, may not control matters of substantive law. “‘Substantive’ means that body of law which creates, defines and regulates the rights of the parties.” *Krause v. State*, 31 Ohio St.2d 132, 145, 285 N.E.2d 736, 744 (1972). Generally, “procedural” refers to the method of enforcing those rights. *Id.*

The point of the Rules of Criminal Procedure is to “have as many matters resolved at the pretrial stage as possible.” *State v. Hennessee*, 13 Ohio App.3d 436, 438, 469 N.E.2d 947, 949 (1984). The exclusionary rule is a rule of law which is substantive in nature. It is designed to protect a person’s constitutional rights. A motion to suppress, by contrast, is a procedural form: “It is the vehicle used to invoke the exclusionary rule.” *Id.* at 438. However, this case does not deal with a motion to suppress. This is not a case of suppression - it is a case of admissibility.

While rules of procedure may occasionally have a substantive effect, their construction is procedural in nature. *State v. Greer*, 39 Ohio St.3d 236, 245, 530 N.E.2d 382, 395 (1988). “These would include *rules* of practice, *courses* of procedure, and *methods* of review, but not the [underlying] rights themselves.” *Id.* For example, *Greer* presents a case of an underlying substantive right: the right to challenge jurors during voir dire. However, the application of that right is regulated by a Rule of Criminal Procedure, which dictates the time and manner of that challenge, as well as the number of challenges permitted. *Id.* at 246. However, this numerical restriction on the number of challenges during voir dire imposed by Crim.R. 24(C) does not “impact substantively upon the right to preemptorily challenge jurors, for the rule is not so restrictive as to constitute a de facto abrogation or modification of the right itself.” *Id.* Instead, it reasonably limits the number of

challenges. This Court has held that judicial economy is well within the purview of the Rules of Criminal Procedure. *Id.*

The unrecorded testimony in this case was not suppressed - it was simply not admitted. Criminal Rule 41(C) does not amend the Constitution or create an exclusionary rule. It simply provides the framework in applying that underlying right. Criminal Rule 41(C) does not unnecessarily restrict the admission of evidence - it simply requires that such evidence be recorded to be admissible. This, like the restriction on the number of challenges permitted during voir dire in *Greer*, does not constitute a *de facto* abrogation or modification of the right. While Criminal Rule 41(C) is a limitation, it is a reasonable limitation and well within the right of the Court to apply. Regulation is not abrogation, otherwise all of the Rules of Criminal Procedure would thus be considered unconstitutional. Criminal Rule 41(C) is a procedural rule, not a substantive rule.

The State Lacked Probable Cause to Justify a Search of Appellee's Home

Ultimately, the Upper Arlington Police Department simply did not have probable cause for a search of Appellee's home. The four corners of the affidavit failed to (1) describe any criminal conduct involving "victim #2" or (2) set forth any nexus between Appellee's alleged conduct and a search of his residence. Thus, suppression was the appropriate remedy and the State's first assignment of error should be overruled.

The warrant affidavit stated the following:

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.

(Defense Ex. 1.)

It is fundamental that the Fourth Amendment requires "a nexus * * * between the item to be seized and criminal behavior." *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967). Thus, a search warrant only issues upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place. *Steagald v. United States*, 451 U.S. 204, 213, 101 S.Ct. 1642, 1648, 68 L.Ed.2d 38 (1981).

In assessing probable cause as to the location of evidence, the United States Supreme Court has held that "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332 (1983). It is the duty of a trial court reviewing

a search warrant “to ensure that the magistrate had a substantial basis for concluding the probable cause existed.” *State v. George*, 45 Ohio St.3d 325, 336, 544 N.E.2d 640, 650-51 (1989), *citing Gates*, 462 U.S. at 238-39.

The warrant affidavit in the instant case suffers from two fatal flaws that cannot be corrected by the State under any circumstance: (1) the conduct involving “victim #2” did not describe a crime and (2) the detective failed to draw any connection between the purported illegal activity and a search of Appellee’s residence. Although the suppression hearing revealed that this information was misleading, even the face of the affidavit did not contain sufficient information to justify the issuance of a search warrant for Mr. Dibble’s home.

First, the description of Appellee’s relationship with “victim #2” does not constitute illegal behavior. According to the affidavit, this person purportedly told the detective that she had engaged in consensual sexual activity after she had graduated from high school. There is no allegation of force or coercion or any other circumstances that would justify a criminal charge as it related to “victim #2.”¹ Therefore, the “victim #2” information did nothing to assist in the conclusion that a crime had been committed by Appellee.

Second, the affidavit did not draw any nexus between either of the alleged victims and a search of the residence. The detective failed to set forth any dates or locations for the alleged offense, and there is no information that evidence of the offense would be found in his residence. In the absence of evidence connecting these claims to Appellee’s residence, the detective made an

¹ The misleading nature of this description and the detective’s related admissions on this issue will be addressed below.

unsupported claim that computers, cameras, and digital media “may” contain correspondence and photographs to substantiate the women’s claims.

The State attempts to find probable cause in this case by arguing that Appellee took inappropriate pictures of “victim #2” and that these pictures may have been found in Appellee’s home. (Merit Brief of Appellant State of Ohio, p. 20.) However, the record is devoid of any testimony or other evidence in support of this position. The State also argues that suggestive pictures allegedly taken at school, with the permission of the subjects, provided probable cause to search Appellee’s home. Again, the State fails to offer any support for this conclusion

As the Supreme Court said in *United States v. Ventresca*, 380 U.S. 102, 108-109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), probable cause cannot be established by “affidavits which are purely conclusory, stating only the affiant’s * * * belief that probable cause exists without detailing any of the ‘underlying circumstances’ upon which that belief is based.” Here, there were no underlying circumstances to form a belief in the existence of evidence of a sex offense or any evidence in the place to be searched in this case. Therefore, even the four corners of the search warrant affidavit did not provide probable cause for a search of Appellee’s home and suppression was the appropriate remedy.

Conclusion

The trial court and court of appeals correctly concluded that Detective Wuertz’s statements to the judge should not have been considered. The oral testimony was not recorded or preserved in any way, and the statements were inadmissible pursuant to Crim. R. 41(C). Furthermore, Crim. R. 41(C) is a valid procedural rule and it is not unconstitutional in any way.

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 non-lawyers.

The second proposition of law sets forth a well-settled principle of Fourth Amendment jurisprudence, and its application does not support a reversal of the courts below. The proposition that terms like “victim” should be interpreted in a non-technical way has been the law for many years. See *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

The Trial Court and Court of Appeals Did Not Apply a Hyper-Technical Definition of the Term “Victim”

Here, the trial court and the court of appeals did not apply any hypertechnical definitions to the detective. At the suppression hearing, the detective admitted that he used the term “victim #2” repeatedly in order to obtain the search warrant, but he failed to describe her as a victim in any other parts of the investigative record. He also admitted that he did not believe that she was a victim of crime, but that her information was necessary in order to gain access to Appellee’s residence. Based on this information, the trial court found the use of the term “victim” in that context was false and misleading, and the court of appeals agreed. Neither the trial court nor the court of appeals below applied any “hypertechnical” definition of the term “victim” to the detective’s affidavit. Instead, both courts noted that the detective’s use of the term was inconsistent and lacked credibility, and on that basis, suppression was warranted. This was a straight-forward application of the legal standards set forth by this Court and the United States Supreme Court for judging probable cause and search warrants.

Viewing the evidence objectively, the detective simply did not have any evidence of criminal activity by Appellee as it related to “victim #2.” The “victim” characterization was directly contrary to Ohio’s definitions of the term at R.C. 2930.01(H) and 2743.51(L). While a detective need not be

expected to recite these statutory provisions verbatim, a common sense interpretation of “victim” in the context of a search for crime should include, at a minimum, some connection to criminal behavior. Otherwise, the information is not relevant and need not have been included in the first place.

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

The Arguments of the State and Its Amicus Curiae

The briefs of the State and *amicus curiae* argue that it is “hypertechnical” to expect that Detective Wuertz should know that the term “victim” in a search warrant affidavit which seeks evidence of criminal activity should include some expectation that the person is a **victim of crime**. This defies common sense, because the only reason to use the term “victim” in this context is to look for evidence of a crime. Furthermore, none of the State’s *amici* address the fact that the detective did not describe the woman as a victim anywhere else in his file or that, because she was not a victim of crime, there was no reason to search Appellee’s home for evidence of criminal activity.

Instead, the State and its *amicus curiae* rely on caselaw from wholly different areas of law. The Ohio Prosecuting Attorneys Association cites three cases regarding post-release control and says that Detective Wuertz was merely trying to protect the identity of E.K. Capital City Lodge No. 9 of the Fraternal Order of Police relies on four cases that address the need to include information about

informant credibility in a search warrant affidavit, as well as a civil rights action that involve the disclosure (or lack) of exculpatory information to a defendant. The City of Upper Arlington expresses policy concerns about policing and the nature of Appellee's alleged behavior. However, none of the *amici* provide any authority to overcome the trial court's authority in determining the credibility of a police witness.

Conclusion

Under these circumstances, the trial court and court of appeals had competent, credible evidence that the detective's statements about "victim #2" were intentionally false or made with a reckless disregard for the truth. Those findings were based on well-settled principles of constitutional law, are entitled to substantial deference, and there is no need to reverse those decisions.

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

pleadings and the motion hearing transcript, the State had ample notice that the proceeding would cover both prongs of *Franks*.

This Issue Has Been Waived by the State

There is no question that the State has waived this issue. It is well-settled: “An appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.” *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), citing *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968).

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

The State's Caselaw is Inapposite

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

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

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

There Was No Prejudice to the State

The State cannot show any prejudice from the actions of the trial court. Simply put, the Upper Arlington Police Department obtained a warrant lacking in probable cause to justify a search of Appellee's residence. No amount of additional evidence or testimony would have created probable cause out of thin air. Based on the Detective Wuertz's testimony, the only information available at the time of the search was that Appellee had allegedly engaged in inappropriate contact with a student at school ten months before, that he had a relationship and photographed a former student outside of school, and that he had apologized to the first student. Even if Detective Wuertz told the Municipal Court Judge about Appellee's purported manipulative behavior, it did not suggest that evidence would be found in Appellee's home. Therefore there was no probable cause to support issuance of a warrant for that location. Accordingly, the trial court and the court of appeals correctly applied well-settled principles of Fourth Amendments analysis to suppress the results of the search.

The State attempts to show prejudice by arguing that Judge Peoples would have testified in opposition to Appellee's motion to suppress evidence. Although the issue is not before this Court, it is doubtful that a Municipal Court Judge could have testified on behalf of the prosecution at all, as the State proposes in its Brief. Such testimony would have placed defense counsel in the untenable position of cross-examining a sitting judge regarding her judicial actions.

There is considerable doubt that a judge may testify in a subsequent proceeding as to the mental processes which she performed in deciding a case. In *Fayerweather v. Ritch*, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904), the United States Supreme Court held that a trial judge was incompetent to testify about the basis of his earlier decision for the purpose of determining whether the issue was actually litigated and therefore barred by the doctrine of *res judicata*. The Court wrote:

The testimony of the trial judge, given six years after the case had been disposed of, in respect to the matters he considered and passed upon, was obviously incompetent.... [N]o testimony should be received except of open and tangible facts—matters which are susceptible of evidence on both sides. A judgment is a solemn record. Parties have a right to rely on it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.

See also, *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941) ("examination of a judge would be destructive of judicial responsibility"); *In re Disqualification of Schweikert*, 110 Ohio St.3d 1209, 1211, 850 N.E.2d 714, 715-16 (2005), citing *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984) (where a party sought a judge's disqualification from a post-trial hearing, the Ohio Supreme Court said a judge is not "under any duty to take the witness stand * * * and explain his mental processes").

CONCLUSION

This case is simple. The Fourth Amendment requires warrants based on probable cause. Police cannot mislead, overstate, or gloss the facts in a search warrant affidavit. There is nothing novel about the issues before the Court. The courts below evaluated the search warrant affidavit and made concise determinations based on well-settled Fourth Amendment jurisprudence. These decisions cannot be disturbed without upsetting years of federal and state precedent. The judgments should, therefore, be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was duly served upon (1) Counsel for the State of Ohio, Ron O'Brien and Steven L. Taylor, Franklin County Prosecutor's Office, 373 South High Street, Columbus, Ohio 43215, (2) Counsel for *Amicus Curiae* Ohio Prosecuting Attorneys Association, Joseph T. Deters and Scott M. Heenan, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, (3) Counsel for *Amicus Curiae* Fraternal Order of Police, Capital City Lodge Nine, Russell E. Carnahan and Robert M. Cody, Hunter, Carnahan, Shoub, Byard & Harshman, 3360 Tremont Road, Suite 230, Columbus, Ohio 43221, and (4) Counsel for *Amicus Curiae* City of Upper Arlington Jeanine Hummer and Tom Lindsey, Upper Arlington City Attorney's Office, 3600 Tremont Road, Upper Arlington, Ohio 43221, on May 1, 2012, by regular United States mail.



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Crim R 24 Trial jurors

(A) Brief introduction of case. To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) Examination of prospective jurors. Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array or, in the alternative, to permit individual examination of each prospective juror seated on a panel, prior to any challenges for cause or peremptory challenges.

(C) Challenge for cause. A person called as a juror may be challenged for the following causes:

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury that found the indictment in the case.

(4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (C)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (C) of this rule shall be determined by the court.

(D) Peremptory challenges. In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of exercising peremptory challenges. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused.

Nothing in this rule shall limit the court's discretion to allow challenges under this division or division (D) of this rule to be made outside the hearing of prospective jurors.

(F) Challenge to array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with

law. A challenge to the array shall be made before the examination of the jurors pursuant to division (B) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) Alternate jurors.

(1) Non-capital cases. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases. The procedure designated in division (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict.

(H) Control of juries.

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(a) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases. After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases. After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer. Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) Taking of notes by jurors. The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) Juror questions to witnesses. The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

(1) Require jurors to propose any questions to the court in writing;

(2) Retain a copy of each proposed question for the record;

(3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;

(4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;

(5) Read the question, either as proposed or rephrased, to the witness;

(6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;

(7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.