

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,

Plaintiff-Appellant,

vs.

LAWRENCE A. DIBBLE,

Defendant-Appellee.

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Case No. 2011-1569

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

Case No. 10AP-648

**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE LAWRENCE A. DIBBLE**

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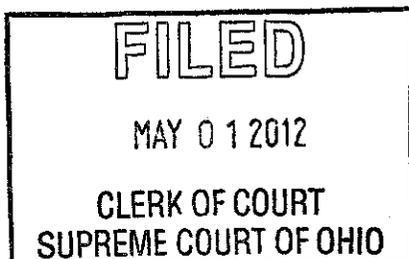


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STATEMENT OF THE CASE AND OF THE FACTS

In February of 2010, Police Detective Wuertz sought a search warrant from a Franklin County municipal court judge. *State v. Dibble*, 195 Ohio App.3d 189, 2011-Ohio-3817, ¶ 2. In the accompanying affidavit, Detective Wuertz alleged that Mr. Dibble had inappropriately touched E.S., a minor student of Mr. Dibble's. *Id.* at ¶ 3. The affidavit also alleged that Mr. Dibble had taken nude photographs of an adult female, E.K. *Id.* The affidavit referred to E.S. as Victim #1 and E.K. as Victim #2. *Id.* The municipal court judge approved the warrant, and Mr. Dibble's home was searched. *Id.* at ¶ 4. He was indicted on 20 counts of voyeurism and one count of sexual imposition. *Id.* None of the charges pertained to E.K. *Id.*

Mr. Dibble moved to suppress the evidence obtained from the search of his home. *Id.* at ¶ 5. He argued that the warrant was misleading by referring to E.K. as a "victim," because Detective Wuertz had no evidence or reasonable suspicion of any crime committed with respect to E.K. *Id.* At the hearing, Detective Wuertz acknowledged that he did not refer to E.K. as a victim in any other documents related to the investigation. *Id.* at ¶ 7. He also conceded that he had no information related to E.S. that gave him probable cause to search Mr. Dibble's home. *Id.* at ¶ 6. Finally, he acknowledged that he referred to E.K. as a "victim" "in order to get a search warrant." *Id.* Detective Wuertz also testified that he had orally presented other information to the municipal court judge about Mr. Dibble's relationships with E.S. and E.K., and about other photographs that Mr. Dibble took. *Id.* at ¶ 13.

After direct examination of Detective Wuertz, the trial court asked the prosecutor if he was admitting that the defense had met its burden, or if he was "simply cross-examining this witness to rebut [the defense's] burden." *Id.* at ¶ 8. Although the prosecutor replied that he was

“simply cross-examining the witness,” he addressed the merits of the motion to suppress at a requested closing argument. *Id.* at ¶ 8, 15.

In its written decision, the trial court granted the defendant’s motion to suppress, and concluded that there was insufficient evidence in the search warrant affidavit to justify the search of the defendant’s home. The trial court declined to consider Detective Wuertz’s testimony about his oral statements. *Id.* at ¶ 16. The court noted that the testimony was not recorded as required by Crim.R. 41(C), and also that Detective Weurtz’s testimony on this point lacked credibility. *Id.* The court declined to rule on the State’s motion for reconsideration because the State had already filed an appeal. *Id.* at ¶ 19.

The Tenth District Court of appeals overruled the State’s four assignments of error and affirmed the trial court. *Id.* at ¶ 53.

**STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The OPD focuses primarily on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research within the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an

interest in the present case insofar as this Court may address the constitutionality of rules that protect criminal defendants, the process by which the State may properly obtain a warrant, and the appropriate procedure during hearings conducted pursuant to *Franks v. Delaware*, 438 U.S. 154, 155, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). OPD urges this court to recognize Ohio law's protection of the Fourth Amendment rights of criminal defendants.

ARGUMENT

THE STATE'S PROPOSITION OF LAW 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.

The thrust of the State's argument is the uncontroversial proposition that a criminal rule cannot amend a constitutional provision or modify a substantive right. State's Brief at 17. But as applied to this case, that argument is a fallacy—Criminal Rule 41(C) does not modify a substantive right; rather, it determines, as a procedural matter, what evidence may be admitted to determine whether that substantive right has been protected.

In arguing otherwise, the State appears to assert that the Fourth Amendment somehow gives the State a constitutional right to have its evidence considered. But the Fourth Amendment protects individuals, not the State. *See, e.g., United States v. White*, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944). And the Rules of Criminal Procedure ensure the fair and correct application of that constitutional protection. "Ohio Crim.R. 1(B) instructs that the Rules of Criminal Procedure 'shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense

and delay.” *State v. Phillips*, 74 Ohio St.3d 72, 94, 656 N.E.2d 643 (1995). *See also State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶ 50 (Moyer, C.J., concurring.) The fact that the trial court complied with the Fourth Amendment and the Rules of Criminal Procedure does not render Crim.R. 41 unconstitutional.

The trial court relied on Detective Wuertz’s sworn statements to make two determinations. First, it determined that there was no probable cause to issue a warrant to search Mr. Dibble’s home: “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, June 1, 2010, p. 7. The court of appeals affirmed, holding that the record contained competent, credible evidence supporting the trial court’s factual determination. *Dibble* at ¶ 37. Second, the trial court determined that there was no good faith basis to obviate the warrant requirement. *Id.* at ¶ 47. In affirming this finding, the court of appeals reasoned that “[g]iven 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.” *Id.* (citing *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)). Both lower courts properly considered appropriately admitted evidence (including information that was not within the four corners of the affidavit), and determined that no exception to the warrant requirement applied.

The State argues that a court may look beyond the four corners of an affidavit in order to determine whether an officer has relied in good faith on the information presented in an otherwise invalid warrant. State’s Brief at 14 (citing *State v. Oprandi*, 5th Dist. No. 07CA5, 2008-Ohio-168). But Crim.R. 41 governs the evidence a court may admit in determining whether evidence should be suppressed, not the information on which an officer may reasonably rely in

order to establish good faith. The State fails to account for the trial court's reliance on Crim.R. 41(C), not as a basis for declining to suppress the evidence, but as one of two bases for declining to determine that an exception to the warrant requirement applied.

Accordingly, this Court should reject the State's First Proposition of Law, since it fails to account for the trial court's credibility determinations. But the proffered proposition of law is also defective in that invades the discretion of courts to control the presentation of evidence in their courtrooms, and further defective in that it presumes that the State has some unfettered right to the consideration of evidence where it fails to comply with the plain language of the Criminal Rules, and where no other basis for such a right exists. For these reasons, the appellate court's reasonable and reasoned judgment should be affirmed, and the State's appeal should be dismissed.

THE STATE'S PROPOSITION OF LAW II

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

The decisions of the Franklin County Court of Common Pleas and the Tenth District are in agreement that the repeated use of the term "victim" to describe the consenting adult E.K. in the search warrant affidavit was intentionally or recklessly false. Given the admissions of Detective Weurtz at the *Franks* hearing and the fact that the allegations regarding E.K. were the only basis to search the defendant's home, this judgment was well within the discretion of both courts.

In its review of the trial court's determination, the appellate court used the meaning of the term "victim" that is used by police officers, not lawyers. *Dibble* at ¶ 39 (observing that E.K. was described as a "victim" in the affidavit, but not in other police documents). But the State,

dissatisfied with the appellate court's conclusion, now urges this Court to revisit that court's reasonable application of a well-settled principle of law.

In *United States v. Ventresca*, the United States Supreme Court held that “courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.” *United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). The appellate court here applied *Ventresca* to affirm the trial court's conclusion that Detective Wuertz's use of the term “victim” was knowingly or recklessly false—even using a commonsense understanding of that term. *Dibble* at ¶ 44. The appellate court determined that Detective Wuertz simply but deceptively intended “victim” to have the plain meaning that the officer would have used every other day of his career. *Id.* at ¶ 43 (“Wuertz understood that 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 Wuertz's knowingly and intentionally including false information in the affidavit in order to establish probable cause.”)

The State would have a reviewing court strip away the context in which an officer actually used the contested language in a search warrant affidavit. State's Brief, p. 22. But the court's job is to assess the intentions of the officer that used the term to determine if his statements were intentionally or recklessly misleading. *Franks*, 438 U.S. at 155. Interpreting the term “victim” free from the context of the detective's normal use of that term provides no guidance as to the meaning the officer intended it to have. This undermines the purpose of the *Franks* determination.

In the context of a search warrant affidavit, and indeed in the context of any investigative activities by law enforcement, the term “victim” denotes the existence of a crime against that

victim. Admittedly, victimization can occur in a wide variety of circumstances, but a search warrant's use is to find evidence of a crime.

And Detective Wuertz described E.K. as a "victim" specifically to establish probable cause for the search of Mr. Dibble's house. He admitted at the *Franks* hearing that the relationship allegedly supporting the warrant for Mr. Dibble's home was a consensual one, that "Victim #2" had never been listed as a "victim" in any other investigative reports or documents, and that he knew there was no probable cause to search Mr. Dibble's house without the additional information regarding "Victim #2." Detective Wuertz's admissions provide a competent and credible basis for the conclusion of the trial and appellate courts that his use of the word "victim" to describe E.K. in the warrant affidavit was intentionally or recklessly misleading. *Dibble* at ¶ 44 (citing *Franks*).

The testing procedure announced in *Franks* gives the court a method to hold members of law enforcement accountable for the contents of their search warrant affidavits. When police officers control the investigation of a case, there must be a mechanism for ensuring that this investigation is proceeding legally, and only against individuals suspected of a crime. In investigating one crime, Detective Wuertz reported another consensual incident as having a "victim"—in short, he characterized this legal relationship as being a crime. The trial court applied the law reasonably in determining that this description in the affidavit was misleading and rendered the resulting warrant illegal, and the appellate court exercised proper discretion in deferring to the trial court's reasonable factual determination.

The trial court's ruling, and the appellate court's affirmance of that ruling, were both based on well-settled law and clear evidence. Just as the State's proposition of law suggests, the trial court analyzed Detective Wuertz's use the term "victim" in light of its meaning to

nonlawyers—the trial court’s analysis rests on that term’s meaning to *police officers*, officers like Detective Wuertz. As the appellate court recognized, the trial court’s decision rests on competent and credible evidence, and applies well-settled law. *Dibble* at ¶ 41-4. This Court need not revisit those sound determinations.

THE STATE’S PROPOSITION OF LAW III

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.

At the *Franks* hearing, the State specifically argued that the fruits of the search of Mr. Dibble’s home should not be suppressed. But the State protested on appeal that it was deprived of the opportunity to argue the merits of suppression. The appellate court held that there was no logic or legal basis to this contention, and the State has provided this Court with no reason to reassess that holding.

Franks v. Delaware allows a defendant to challenge, and the State to defend, the sufficiency of the evidence supporting a warrant. *Franks*, 438 U.S. at 155. The Supreme Court held that the defendant must make a preliminary showing that the supporting evidence is knowingly or recklessly false. *Id.* The trial court must then determine if the false information supporting a warrant requires suppression of evidence seized under that warrant. *Id.*

Here, Mr. Dibble submitted a motion alleging that the affidavit supporting the warrant for the search of his home was knowingly or recklessly false. The court of common pleas determined that the defense had made a sufficient showing to require a hearing regarding suppression. At the hearing, Mr. Dibble presented the testimony of Detective Wuertz to establish that he used the term “victim” in a manner that was false or misleading. The State had the opportunity to rebut the officer’s testimony regarding the *Franks* issue. But the State offered no

rebuttal. Instead, the State simply offered closing arguments addressing the merits of the defendant's suppression motion, arguing that there was sufficient probable cause to support the warrant. *Dibble* at ¶ 49-51.

The trial court's 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." *Id.* at ¶31. Noting that E.S. did not allege any improper conduct occurred at Mr. Dibble's home, the trial court found that there was no basis to admit the fruits of the search under the "good faith" exception to the warrant requirement. *Id.* at ¶ 45-52. The appellate court also held that, under the *Franks* procedure, the trial court's granting of the hearing was its decision that the threshold showing had been met. *Id.* at ¶29. The hearing itself was by its nature a hearing on suppression, on the substantive half of the *Franks* procedure. *Id.*

If the State was concerned that it had not presented evidence concerning the merits of the suppression issue, it waived any ability to appeal those concerns by actually addressing the merits of the suppression issue, both in a memorandum to the trial court in response to the initial *Franks* motion and even later in the hearing itself. The trial court plainly complied with the requirements of *Franks* by first granting the hearing and then ruling on the merits of suppression as a result of the hearing. The State offers no legal authority that compels any other conclusion, and, moreover, cannot demonstrate that it was prejudiced in any way by the trial court's procedure. *See id.* at ¶32.

The State argues that *State v. Whiting*, a case involving pre-indictment delay, shows that if the State misunderstands its burden, then the State is entitled to a new hearing on the correct burden. *State v. Whiting*, 84 Ohio St.3d 215, 702 N.E.2d 1199 (1998). But *Whiting* stands for the

opposite proposition—in *Whiting*, this Court simply noted in passing that “since the state's misstep on the production of evidence occurred before the trial court expressed its view that the state had no burden of going forward, *the state may not claim to have been misled* by the court's erroneous ruling.” *Id.* at 218 (emphasis added).

This case is directly analogous—the State's actions in calling no witnesses, offering no objections, and arguing the merits of suppression establish that the trial court did not mislead the State—the State chose its course of action throughout the hearing based on its own understanding of the law. The State cannot be allowed to allege surprise that the trial court reached the merits of suppression, when at the *Franks* hearing the State argued those merits and even went as far as inviting the trial judge to rule on the merits in the state's favor.

Even if the limited hearing circumscribed the State's ability to present evidence that suppression was improper, the State cannot establish that it was prejudiced by this ruling. The trial court's factual determination was based on Detective Wuertz's admission that the police had no probable cause to search Mr. Dibble's house without the evidence of the second “victim.” This admission provides a competent and credible factual basis for the trial court's determination that no probable cause existed for a search of Mr. Dibble's home. *Dibble* at ¶30. A warrant cannot issue unless there is “a nexus between the item to be seized and criminal behavior.” *Warden v. Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642; 18 L. Ed. 2d 782 (1967). In light of Detective Wuertz's statement that he knew “Victim #2” was not a victim of a crime, no proper warrant can issue for Mr. Dibble's home based on his relationship with “Victim #2.” And the affidavit does not establish any nexus between Mr. Dibble's criminal behavior and his home. Because no probable cause existed for the search of Mr. Dibble's home, the State has suffered no prejudice from the trial court's ruling.

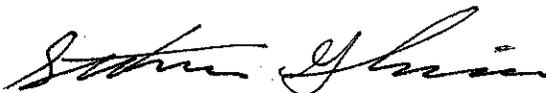
The trial court's suppression of the search of Mr. Dibble's home was based in correct and well-settled law, and it was supported by competent and credible factual determinations. The appellate court has already provided a logical and reasonable interpretation of events during the trial court hearing, and the State provides no basis for doubts about the judgment of the appellate court. This Court need not interfere with the sound factual findings and legal reasoning of those courts.

CONCLUSION

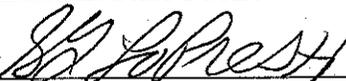
The Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the Tenth District Court of Appeals.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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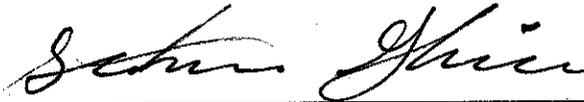
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE LAWRENCE A. DIBBLE** was forwarded by regular U.S. Mail, postage prepaid to Steven L. Taylor, Assistant Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215; Thomas Lindsey, Assistant City Attorney, 3600 Tremont Road, Upper Arlington, Ohio, 43221; Russell Carnahan, 3360 Tremont Road, Suite 230, Columbus, Ohio 43221; Scott Heenan, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202; and David Thomas, 511 South High Street, Columbus, Ohio 43215, on this 1st day of May, 2012.



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