

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

REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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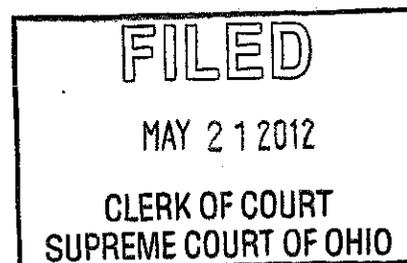


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ARGUMENT

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 anticipated many of the arguments being made by defendant and his amicus, and so the State will limit its discussion here to some key points in reply.

A.

Contrary to amicus OPD's argument, the State is not seeking the creation of any Fourth Amendment rights for its own benefit. Rather, it is asking that the limits of the Fourth Amendment and the federal exclusionary rule be recognized. Only Fourth Amendment violations will warrant suppression, and there is simply no recordation requirement in the Fourth Amendment. The Fourth Amendment only requires sworn information, not sworn recorded information. Excluding the detective's sworn oral information represents only an enforcement of Crim.R. 41(C), not an enforcement of the Fourth Amendment itself.

B.

Defendant misses the mark in attempting to distinguish *State v. Wilmoth*, 22 Ohio St.3d 251, 490 N.E.2d 1236 (1986), on its facts. The State was relying on statements of law in *Wilmoth*, including the statement therein that "[t]he exclusionary rule has been applied by this court to violations of a constitutional nature only." *Id.* at 262, quoting *Kettering v. Hollen*, 64 Ohio St.2d 232, 234-235, 416 N.E.2d 598 (1980). "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). These statements of law support the State’s position here, notwithstanding the differences in the facts in *Wilmoth*.

C.

Amicus OPD contends that courts must have discretion to control the presentation of evidence in suppression hearings. But the State is not demanding unfettered ability to present evidence. Rather, it is only seeking to have evidence admitted that is relevant to the Fourth Amendment issues being litigated in such hearings. A defendant claiming a Fourth Amendment violation can hardly be heard to complain when the State would seek to introduce evidence relevant to showing that there was no violation of the Fourth Amendment. That is the very issue being litigated.

On the other hand, relevance would be the measuring stick under the Fourth Amendment. As the State noted in its merit brief, Crim.R. 41(C) cannot be upheld as a mere evidentiary rule governing admissibility determinations. In this context, this particular “evidence” rule would operate as a de facto, substantive expansion of the Fourth Amendment by excluding evidence of sworn unrecorded information given to the issuing magistrate when the Fourth Amendment allows consideration of such sworn information in the issuance of the warrant.

Perhaps this is one of the reasons why the Evidence Rules were made inapplicable to suppression hearings. *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d

155, ¶ 17. Courts assessing whether a Fourth Amendment violation has occurred must be free to apply Fourth Amendment standards and must not be hampered by state-law evidentiary requirements that would de facto limit or enlarge the Fourth Amendment right.

D.

Defendant argues that the detective's testimony provides an example why recordation should be required, since the detective twice said "I believe" when discussing what he told Judge Peeples. But, notably, the detective did not say "I believe" in discussing whether he told the judge about the unitards: "I told her about the photographs of the unitards and the see-through unitards * * *." (T. 34)

In any event, whether or not the use of "I believe" reflected uncertainty, the fact remains that the Fourth Amendment only requires sworn information, not sworn recorded information. The evidence of what the detective told the issuing magistrate cannot be categorically excluded without operating to create a de facto expansion of the Fourth Amendment right. "[T]he Court's analysis must be guided by the requirements of the Fourth Amendment, not any preferences as to the best procedure for conducting warrant applications." *United States v. Donaldson*, 2012 WL 1142922, *11, n. 11 (S.D. Ga. 2012).

E.

Defendant also posits that the issuing judge's testimony would be inadmissible. The State does not dispute that a judicial mental-process privilege exists so that a judge's subjective mental processes are not subject to testimony in a proceeding challenging the validity of those processes. *TBC Westlake v. Hamilton Cty. Bd. of Revision*, 81 Ohio St.3d 58, 64, 689 N.E.2d 32 (1998). But even if purely subjective mental processes are excluded

from Judge Peeples' potential testimony, she could still testify about the detective's sworn oral testimony at the time of her approval of the warrant. Testimony about what the detective said under oath would not involve any subjective thought processes but rather what the detective told her.

F.

Amicus OPD suggests that there is no need to rule on this constitutional issue because the common pleas court also concluded that it did not believe the detective's testimony that he gave the information to the issuing judge. But several problems would preclude reliance on this "did not believe" theory.

Most importantly, the common pleas court's mishandling of the hearing (see Proposition of Law # 3) meant that the prosecution had no reason to present the corroboration that would have been provided by Judge Peeples, who would have corroborated the existence of the additional conversation between herself and the detective. Had the court not mishandled the hearing, the State could have presented Judge Peeples' testimony, and the common pleas court likely would have believed the detective's testimony on the issue of what was presented orally to Judge Peeples.

In addition, the Tenth District majority relied exclusively on Crim.R. 41(C) to conclude that the State had not been prejudiced by the mishandling of the hearing, contending that Judge Peeples' testimony about their conversation would have been inadmissible under Crim.R. 41(C) anyway. Tenth Dist. Op. ¶ 32. The validity of that "no prejudice" conclusion is now fully before this Court and a ruling thereon is necessary in order to determine whether the inability to call Judge Peeples prejudiced the State.

Third, the common pleas court's treatment of the issue under Crim.R. 41(C) was irregular and prejudiced the State. The detective's testimony about the giving of the sworn oral information had been *admitted* at the hearing without objection. The first time the issue of Crim.R. 41(C) had been raised was in the court's decision and entry stating that it could not consider the unrecorded information. Had the prosecutor been given fair notice at the hearing that the court would exclude the evidence as a matter of law, the prosecutor could have developed the record more fully by proffer by presenting proffers of both the testimony of the detective and the testimony of the judge on that point. If fair notice had been given, then, the court would not have been reaching any credibility determination at all, but, rather, would have been excluding the oral conversation as a matter of law. The court's after-the-fact decision to exclude the evidence, therefore, should not be used to preclude appellate review of the question of exclusion, merely because the court reached a credibility determination that it should not have reached on that issue if it had properly given the State notice of its intent to exclude such evidence as a matter of law.

Finally, the court's assessment of credibility was also tainted by its unduly-legalistic views of who qualifies as a "victim." (See Proposition of Law # 2) Had the court not hamstrung its assessment of falsity with its narrowly legalistic definition of "victim" as only involving crime victims, the court would not have been so inclined to rule against the detective's credibility.

G.

Defendant's motion to suppress did not challenge the facial sufficiency of the warrant, but defendant now contends that the common pleas court's suppression ruling can

be upheld on that basis. Given the defense failure to raise the issue in the common pleas court, the issue is at best premature (or, at worst, forfeited). Judge French in dissent below would have left the door open to argue other suppression issues on remand.

In any event, this facial-sufficiency argument *still* would require a ruling on the constitutionality of Crim.R. 41(C). Under the argument the State is pursuing here, the courts would not be limited to the four corners of the written search-warrant affidavit. The courts also would need to consider the sworn oral information. The detective's oral sworn statements to Judge Peeples can be used to support the issuance of the warrant. Per those sworn oral statements, 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 confirming the manipulation and grooming described in the accounts given by E.S. and E.K. As noted in the State's merit brief here, there is a reasonable inference that offenders tend to hoard sexual images and secrete them in secure places, like their home. Even if E.K. was not a "victim," E.S. was such a victim, and the police could search for the unitard photos of E.S., E.K., and others in defendant's home.

In reviewing the sufficiency of probable cause in a search warrant, it is not the role of a trial court or an appellate court to substitute its judgment for that of the issuing magistrate. *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph two of the syllabus. Rather, the reviewing court is "simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id.* In *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the court adopted a totality of the circumstances approach to search warrant challenges. Great deference should be granted to

the issuing magistrate's determination, and doubtful or marginal cases should be resolved in favor of upholding the warrant. *Id.*; *Massachusetts v. Upton*, 466 U.S. 727, 732-33, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984).

Even though the detective's affidavit did not describe crimes against E.K., her allegations related to photo-taking described therein were still relevant to support the issuance of the warrant for defendant's home. As noted in the State's merit brief, 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*, 132 S.Ct. 1235, 1247-48, 1248 n. 7, 182 L.Ed.2d 47 (2012). Whether or not E.K. was 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 defendant's modus operandi that would aid in the conviction of defendant for the crime committed against E.S.

H.

In conclusion, the detective's sworn oral information was admissible and usable under the Fourth Amendment to support the warrant, as would be Judge Peoples' testimony about what the detective told her under oath. Criminal Rule 41(C) would be unconstitutional to the extent it would be used to preclude evidence of what the detective told Peoples under oath, evidence that the Fourth Amendment and statutory law allows.

The State's first proposition of law warrants relief.

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.

Defendant and his amicus contend that there is only one acceptable meaning of “victim” in the context of a search warrant affidavit, i.e., a “victim” being a victim of crime. They do not dispute that E.K. could be considered a “victim” under the broader understanding of “victim” as someone who has been wronged, deceived, or manipulated. Indeed, even the common pleas court conceded that E.K. had been victimized, a concession which defendant and his amicus fail to acknowledge.

Detective Wuertz was basing his use of “victim” as to E.K. on this broader understanding of victim. By the time he drafted the search warrant affidavit, he knew that defendant had in effect brain-washed and manipulated E.K. beginning when she was still in school. “It was just all very similar to the way that he had kind of cultivated [E.S.] along.” (T. 30) The bare-back massages were one example. The photographing of the girls in the unitard suits was another example. E.K. “confirmed about the photos that were taken of them in the unitard suits * * *.” (T. 30) As a father figure to E.K. and E.S., and generally as theater director, defendant deceived these and other young girls with lies about needing to take photographs of them in the see-through unitard suits. The lies continued into adulthood for E.K., with defendant manipulating her into naked photography sessions to discern her “internal energy.” E.K. was a “victim” under most understandings of that term.

The only way the word “victim” could not apply to E.K. would be to say that she was not a victim *of crime*. But even this contention is doubtful, as the photographing of someone else’s child in a see-through unitard under such circumstances likely violated criminal law. R.C. 2907.323(A)(1) (illegal use of minor in nudity-oriented material).

In any event, the question is not whether it makes more sense to limit “victim” to crime victims in search warrant affidavits. Rather, the question is whether the detective was duty-bound to be aware of such a limitation and duty-bound to only refer to persons as “victims” who were victims of crime.

No known legal doctrine requires that such a narrow definition be applied to search warrant affidavits. Indeed, the opposite is true, as such affidavits are often prepared by nonlawyers, i.e., police, and it is well settled that courts should not invalidate warrants based on “hypertechnical” readings of affidavits drafted by nonlawyers in the midst and haste of a criminal investigation. *United States v. Ventresca*, 380 U.S. 102, 108-109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

It would be particularly unfair to apply this new, narrow, and across-the-board definition of “victim” after Detective Wuertz drafted this particular affidavit. He had no way of knowing that such a limited definition would be imposed. E.K. was a “victim” in the well-known, broader sense of that term, and so he could not foresee any harm in choosing “Victim # 2” as an acceptable shorthand phrase to maintain E.K.’s privacy. To Detective Wuertz, the “victim” characterization was not false, let alone intentionally or recklessly false on his part.

Moreover, Detective Wuertz was acting in good faith so as to allow application of the good-faith exception to the federal exclusionary rule. He could not have known that judges acting after the fact would enforce a narrow definition of “victim” that was limited to crime victims. The good-faith exception fully applies to excuse an officer’s failure to

anticipate changes in the law. *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

Defendant and his amicus also contend that Wuertz included the references to E.K. for the sole purpose of establishing probable cause to search defendant's home. But such an "intent" would not establish that the "victim" reference was intentionally or recklessly false. E.K. *was* a victim. Moreover, as noted elsewhere in the State's merit brief and this brief, E.K. did not even need to be a "victim" in order for defendant's photographing of her vaginal area to be relevant to the issues of modus operandi and sexual purpose. Like E.S., E.K. had been cultivated, manipulated, and "brain washed" by defendant, and defendant's actions toward E.K. were relevant to the prosecution of defendant for illegally touching E.S. with a sexual purpose. Evidence of defendant's long-term sexual purposes directed toward E.K., even as an adult, was the proper object of a search for evidence that was relevant to defendant's crime toward E.S.

In addition, given defendant's photographing of the girls as minors in see-through unitards, probable cause to search defendant's home could be established anyway, regardless of the "victim" reference as to E.K. The detective disclosed the unitard incidents to the judge. The detective did not need to lie about E.K. being a "victim" in order to obtain a warrant to search defendant's home for digital photographic evidence.

Finally, the common pleas court's conclusions about intentional or reckless falsity cannot be upheld based on the theory that there was competent, credible evidence to support that factual finding. The court's conclusions were fundamentally based on the incorrect legal premise that "victim" can only mean "crime victim." Once that premise is

rejected, the court's analysis falters and stumbles from there. The court even conceded that E.K. could be considered a "victim" when it stated that "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. Having found that E.K. suffered "some measure of victimization," the court could not conclude that the "victim" reference was false, let alone intentionally or recklessly false on the detective's part.

The State's second proposition of law warrants relief.

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.

Having anticipated the arguments of defendant and his amicus, the State stands by its third proposition of law and its arguments thereunder.

The State's third proposition of law warrants relief.

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.¹

Respectfully submitted,

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¹ If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 21st day of May, 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; Scott M. Heenan, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, counsel for Ohio Prosecuting Attorneys Assn.; and Stephen Goldmeier, Assistant State Public Defender, Office of the State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for Ohio Public Defender.


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