ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO	: UPON APPEAL FROM THE STARK COUNTY
	: COURT OF APPEALS
APPELLANT	: FIFTH APPELLATE DISTRICT
	: CASE NO. 2012 CA 00099
	:
	: CASE NO. 13-1110
	:
	:
	:
vs.	:
	:
TODD E. BROWN	:
	:
	:
	:
APPELLEE	:

MEMORANDUM IN SUPPORT OF JURISDICTION

OF APPELLANT STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

On February 9, 2012, the Alliance Police Department obtained a search warrant from Judge Dixilene Park, Judge of the Court of Common Pleas of Stark County, Probate Division. The Alliance Police Department presented a sworn Affidavit and supplemental testimony under oath on the record in support of probable cause for the search warrant. Judge Park found sufficient probable cause and issued a search warrant. The search warrant was then executed upon a commercial business premises which was operated by the Appellee. As a result of evidence obtained during the execution of the search warrant and evidence found in plain view in the commercial business premises, the Appellee was charged with gambling in violation of ORC 2915.02 and operating a gambling house in violation of ORC 2915.03.

During the pendency of the misdemeanor gambling charges, Appellee filed a Motion to Suppress alleging, in part, that a Probate Judge was precluded from issuing search warrants pursuant to Ohio Revised Code Section 2931.01. A hearing was held on the Motion to Suppress before the magistrate of the Alliance Municipal Court. The magistrate issued a ruling recommending the evidence be suppressed as the Probate Judge lacked authority to issue search warrants, pursuant to ORC Section 2931.01. Appellant filed objections to the magistrate's ruling. The Alliance Municipal Court Judge adopted the magistrate's ruling in its entirety.

The Appellant properly perfected an appeal to the Fifth District Court of Appeals. On May 28, 2013, the Fifth District Court of Appeals issued a decision holding that the Probate Judge was not authorized to issue search warrants based the statutory language contained in ORC Section 2931.01(A); but reversed the decision of the trial court based upon the officer's good

faith exception noting that the police department had obtained search warrants from different judges from the Common Pleas Court, Probate Division as a matter of practice for many years.

The Fifth District Court of Appeals also noted that the Fourth Appellate District in State v. Johnston (Ohio App. 4th Dist.) 1986 WL 8799 previously ruled that the judge of the Court of Common Pleas, Probate Division does have the authority to issue search warrants. At that time, there was no court case, reported or unreported, which supported Appellee's position that the Judge of the Common Pleas Court, Probate Division was without authority to issue search warrants. The case was remanded to the Alliance Municipal Court for further proceedings.

Appellant then filed its Notice of Appeal to the Ohio Supreme Court based upon a substantial constitutional question and issue of public and great general interest.

THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST

State of Ohio Proposition of Law: A Common Pleas Court Probate Division Judge may issue search warrants upon a finding of probable cause.

The issue presented for review is a substantial constitutional question and is of public and great general interest. The Appellant requests the Supreme Court to reconcile a decision from the Fourth Appellate District in State vs. Johnston (Ohio App. 4th Dist.) 1986 WL 8799 and the decision reached by the Fifth Appellate District presented in this case. This issue also requests the Ohio Supreme Court to reconcile ORC Section 2931.01, which is a holdover from the general code, with ORC Section 2933.21 and Crim. Rule 41(A). Appellant submits that the Modern Courts Amendment to the Ohio Constitution adopted in 1968 and 1973 abolished the Probate Court as it existed at that time and which was referenced in 2931.01 at that time.

In order to obtain a search warrant, an affiant must present sufficient probable cause before a neutral magistrate before a court of record. ORC Section 2933.21 states in part "a judge of a court of record may, within his jurisdiction, issue warrants to search a house or place . . ." In addition, following the adoption of a Modern Courts Amendment to the Ohio Constitution, the Supreme Court promulgated Crim. Rule 41(A), which states in part, "a search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction . . ." However, ORC Section 2931.01 states, in part, "as used in Chapters 2931 to 2953 of the Revised Code . . .(B) "Judge" does not include the Probate Judge. (C) "Court" does not include the Probate Court."

In the Modern Courts Amendment, the Ohio Constitution abolished the Probate Court and Probate Judge which had existed prior thereto. Prior to the Modern Courts Amendment, the

Probate Court was not a court of record; and the Probate Judge was not a judge of a court of record. Upon the adoption of the Modern Courts Amendment, a new court system was established in which all judges of the county common pleas courts became judges of courts of record.

Following the adoption of the Modern Courts Amendment, the Ohio Supreme Court also promulgated a new set of criminal rules. Crim. Rule 41(A) was adopted which permitted search warrants to be issued by a judge of a court of record within the court's territorial jurisdiction upon a finding of probable cause. Based upon the 1968 and 1973 amendments to the Ohio Constitution and the promulgation of Crim. Rule 41(A), the clear intent of the constitution and rule is to permit a judge of a court of record within its proper territorial jurisdiction to issue a search warrant upon the finding of probable cause.

Unfortunately, the Ohio State Legislature did not quite catch up with the full impact of the Modern Courts Amendment from 1968 and 1973. The Legislature re-adopted, en mass, sections of the Title 29 of the ORC. This re-adoption included ORC Sections 2931.01(B) and (C), to be effective on January 1, 1976.

The Fourth Appellate District in State v. Johnston has previously considered the same arguments presented in this case. This re-adoption included prior provisions of ORC Section 2931.01(B) and (C) which are relics of the old general code; and which referred to a Probate Judge in a Probate Court that ceased to exist upon the adoption of the Modern Courts Amendment 1968 and 1973. The Fifth Appellate District found Appellant's argument unpersuasive and found that the plain language of ORC Sections 2931.01 (B) and (C) remove the authority of the Probate Division Common Pleas Court judge to issue search warrants. Appellant maintains that ORC Sections 2931.01 (B) and (C) reference the Probate Judge and the Probate

Court which existed prior to the Modern Courts Amendment during which time the Probate Courts were not courts of record.

The authority of a magistrate to find probable cause and issue search warrants is a matter of substantial constitutional question. It must be clear in the State of Ohio as to which judges have the authority to issue search warrants. The contradictory results reached in the Fourth Appellate District and the Fifth Appellate district will lead to inconsistent application of the law. It is inconsistent if the State of Ohio permits judges of the Probate Division of the Common Pleas Court in the Fourth Appellate District to issue search warrants; but precludes judges of the Probate Division of the Court of Common Pleas in the Fifth Appellate District to issue search warrants. This inconsistency should be addressed and resolved by the Ohio Supreme Court as two Appellate Districts have issued contradictory holdings.

In addition to the Fourth Appellate District, other appellate districts have also issued opinions in unreported cases in which judges of the Probate Division of the Common Pleas Court have issued search warrants. These cases include State v. Bradley (Second Appellate District) Case No. Civ-A 93-CA-101, Nov. 23, 1993; State v. DeWald (Third Appellate District) Case No. 13-82-35, May 27, 1983; State v. Ridgeway (Fourth Appellate District) case no. 00CA19, 2001-OH-2655; State v. Cassidy (Eleventh Appellate District) Case No. 90L049, Nov. 15, 1991; State v. Tatonetti (Eleventh Appellate District) Case No. 1021, Jan. 7, 1983 and State v. Abrams (Twelfth Appellate District) Case No. 315, May 4, 1983. The Appellant notes that the authority of the judges of the Probate Division of the Court of Common Pleas was not challenged in the aforementioned cases. However, the Appellant submits these cases to the Court to further show it is not unusual for law enforcement to seek out judges, including judges of the Probate Division Court of Common Pleas for issuance of search warrants.

The Modern Courts Amendment created a judicial system in which judges of the Common Pleas Court are all co-equal judges of courts of record. There may be divisions within the Common Pleas Court including General, Family, Juvenile, and Probate. However, the judges remain co-equal judges of courts of record.

The ability of a judge of the Probate Division of the Court of Common Pleas to be eligible to hear criminal matters has been upheld in State v. Cotton (1978) 56 Ohio St.2d 8, at pages 12-13. In Cotton, the Ohio Supreme Court found that ORC Section 2931.01 was ineffective to disqualify judges of the Probate Division of the Court of Common Pleas from serving on criminal cases. In the Cotton decision, the Supreme Court relied upon the 1968 and 1973 constitutional amendments which establish the Probate Division as a Division of the Court of Common Pleas. The Ohio Supreme Court in Cotton held:

> Section 4 of Article IV (as amended effective November 6, 1973, and adopted May 7, 1968) of the Constitution of Ohio provides for a Court of Common Pleas and that the Probate Division shall be a division of that court. Section 5(A)(3) of Article IV provides in part:
>
> "The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof * * *."
>
> R.C. 2931.01 is thus ineffective to disqualify judges of the Probate Division of a Court of Common Pleas from serving in criminal cases. Such automatic disqualification is contrary to the above provisions of the Constitution. Id.

Ironically, State v. Cotton (Ohio Fifth District) 1977 WL 200852, which is the appellate precursor decision for the Ohio Supreme Court of State v. Cotton, held that "There is no such thing as a "Probate Judge" as that malapropism was improvidently re-enacted by the Ohio Legislature after 1968." The Fifth District Court of Appeals continued in that decision and stated

"We consider R.C. 2931.01 (B) to be ineffective to disqualify common pleas judges elected to the probate division from service in criminal cases." Id.

In State v. Bays (1999) 87 Ohio St.3d 15 and State, ex rel Key v. Spicer (2001) 91 OhioSt.3d 469, the Supreme Court also reached a similar conclusion as it did in Cotton, above. While Cotton does deal with the authority of the Chief Justice of the Supreme Court to appoint judges to hear death penalty cases, the Supreme Court ruled that Ohio Revised Code Section 2931.01 does not preclude a judge of the Probate Division of the Court of Common Pleas from being appointed to hear a criminal case. The Cotton court found that judges of the Probate Division are eligible to be appointed to sit and decide criminal cases including death penalty cases. Ohio Revised Code Section 2931.01 does not strip the Probate Division Judge of the Common Pleas Court from being a judge of a court of record.

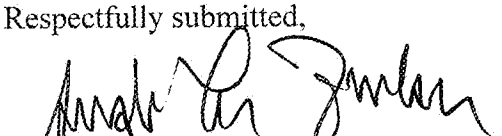
In order to be appointed to sit on a death penalty case, the Chief Justice must select a judge of a court of record. If the judge of the Probate Division of the Court of Common Pleas is a judge qualified to sit on a death penalty case then, Appellant submits, the judge of the Probate Division of the Court of Common Pleas must be a judge of a court of record authorized to issue search warrants.

The Appellant does not request that the Ohio Supreme Court find ORC Section 2931.01 unconstitutional. Rather, Appellant request the Ohio Supreme Court reconcile Ohio Revised Code Section 2931.01 with the Ohio Constitutional Amendments of 1968 and 1973, 2933.21 and Crim. Rule 41(A). Appellant requests the Ohio Supreme Court accept this case for a determination that the references the Probate Court and Probate Judge in ORC Section 2931.01 are references to the antiquated Probate Judge and Probate Court which were not courts of record.

CONCLUSION

For the reasons stated above, Appellant submits that this case does involve a substantial constitutional question and is a matter of public and great general interest. Appellant respectfully requests that this Court accept jurisdiction in this case so that this important issue may be reviewed on its merits and that the apparent inconsistencies with the decision from the Fourth Appellate District and the Fifth Appellate District in these cases be resolved.

Respectfully submitted,



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Certificate of Service

I certify that I sent a copy of the foregoing by regular U.S. mail this 12th day of July, 2013 to:

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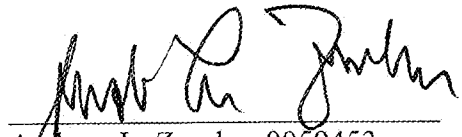

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NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
TODD E. BROWN	:	Case No. 2012CA00099
	:	
Defendant-Appellee	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Alliance Municipal Court, Case No. 2012 CRB 00190

JUDGMENT: Reversed and Remanded

A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By ..... Deputy
Date 5-28-13

DATE OF JUDGMENT:

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MAY CERTIFIED BY

Hoffman, J.

{¶1} Plaintiff-appellant the State of Ohio appeals the May 17, 2012 Judgment Entry entered by the Alliance Municipal Court granting Defendant-appellee Todd Brown's motion to suppress evidence.

{¶2} On February 9, 2012, Alliance Police Detective Bob Rajean obtained a search warrant from Judge Dixilene Park, judge of the Court of Common Pleas of Stark County, Probate Division. The warrant was executed on a commercial business operated by appellee, Todd Brown. As a result, appellee was charged with one count of gambling in violation of R.C. 2915.02 and one count of operating a gambling house in violation of R.C. 2915.03.

{¶3} On March 28, 2012, appellee filed a motion to suppress, claiming R.C. 2913.01 precluded the probate judge from issuing the search warrant. A hearing was held before a magistrate on April 4, 2012. By report and recommendation filed April 30, 2012, the magistrate agreed with appellee and recommended granting the motion. Appellant, the state of Ohio, filed objections. By judgment entry filed May 17, 2012, the trial court overruled the objections and approved the magistrate's report.

{¶4} It is from that entry, Appellant prosecutes this appeal, assigning as error:

I

{¶5} "THE TRIAL COURT ERRED WHEN IT ADOPTED THE MAGISTRATE'S RULING CONCLUDING THAT THERE WAS NO AUTHORITY ON THE PART OF JUDGE OF THE COMMON PLEAS COURT, PROBATE DIVISION TO ACT UPON A REQUEST FOR A SEARCH WARRANT."

II

{¶6} "THE TRIAL COURT ERRED WHEN IT ADOPTED THE MAGISTRATE'S RULING WHICH SUPPRESSED ALL ITEMS SECURED BY ALLIANCE POLICE DEPARTMENT IN A COMMERCIAL STRUCTURE INCLUDING THOSE ITEMS WHICH WERE LOCATED IN PLAIN VIEW IN AN AREA OPEN TO THE GENERAL PUBLIC."

III

{¶7} "THE TRIAL COURT ERRED WHEN IT GRANTED THE REMEDY OF SUPPRESSION OF EVIDENCE FOR A CLAIMED VIOLATION OF A STATUTORY PROVISION WHEN OFFICERS WERE ACTING IN GOOD FAITH ON A WARRANT BELIEVED TO BE VALID."

I

{¶8} The primary issue before this Court is whether a judge of the Court of Common Pleas, Probate Division, has the authority to issue a search warrant. For the reasons that follow, we think not.

{¶9} R.C. 2933.21 (**Search warrant**) states, in part:

> "A judge of a court of record may, within his jurisdiction, issue warrants to search a house or place..."

In conjunction thereto, Crim.R.41(A) (**Authority to issue warrant**) provides:

> "A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction..."

{¶10} However, R.C. 2931.01 states, "As used in Chapters 2931. to 2953. of the Revised Code... (B) 'Judge' does not include the probate judge. (C) 'Court' does not include the probate court."

{¶11} Appellant argues the probate judge and probate court were abolished by amendments to the Ohio Constitution in 1968 and 1973, and R.C. 2931.01 is "...a hold-over from the antiquated General Code, and refers to a prior time period when there actually existed a separate Probate Judge and separate Probate Court in Ohio." Appellant expounds the most plausible explanation for their exclusion from authority to issue search warrants is they were originally not courts of record. Appellant argues they became such by amendments to the Ohio Constitution in 1968 and 1973.

{¶12} We believe there still exists a "probate judge" and a "probate court," although they are now recognized as a separate division of the Court of Common Pleas. We recognize the probate court is now considered a "court of record." But does this changed status render the exclusion found in R.C. 2931.01(B) and (C) of no consequence?

{¶13} The Ohio Supreme Court in *State v. Cotton* (1978) 56 Ohio St.2d 8, 12-13, found R.C. 2931.01 was ineffective to disqualify judges of the Probate Division of the Court of Common Pleas from serving on criminal cases, based upon the 1968 and 1973 constitutional amendments establishing the Probate Division of a Court of Common Pleas.[1] Because Section 5(A)(3) of Article IV of the Ohio Constitution authorizes the chief justice or acting chief justice to assign any judge of a court of common pleas or a division thereof to temporarily sit or hold court on any other court of common pleas or

---

[1] See *State v. Bays* (1999), 87 Ohio St.3d 15; and *State, ex rel. Key v. Spicer* (2001), 91 Ohio St.3d 469, for a similar result.

division thereof, the Ohio Supreme Court concluded a probate court judge could serve in criminal cases despite R.C. 2931.01.

{¶14} We find *Cotton* is not dispositive of the issue herein for the simple reason Judge Park was not assigned by the chief justice or acting chief justice pursuant to Section (5)(A)(3) to preside over a criminal case. In the absence of such a specific constitutional delegation of authority, we find no reason the legislature's directive in 2931.01(B) and (C) should be declared ineffective as it relates to excluding a probate court judge from having the authority to issue a search warrant.

{¶15} Appellant relies upon *State v. Johnson* (Ohio App.4th Dist.) 1986 WL 8799, in support of its argument. The *Johnson* court concluded R.C. 2931.01(B) and (C) are mere relics from [the] past and the phrase "judge of a court of record" in R.C. 2933.21 and Crim.R.41 is sufficiently specific to supersede the general definition of "judge" and "court" in R.C. 2931.01, under the rules of construction codified at R.C. 1.12 and 1.51.[2]

{¶16} R.C. 1.51 provides:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

---

[2] We find R.C. 1.12 of little or no consequence in determining the issue before us. R.C. 1.12 makes specific reference to special provisions as to service, pleadings, and competency of witnesses. We find such to be essentially procedural in nature. On the other hand, we find R.C. 2931.01 specifically defines a court's authority/jurisdiction to issue a search warrant, essentially a substantive provision.

{¶17} Appellee argues the *Johnson* court misapplied the above rules. We agree.

{¶18} R.C. 2931.01 (B) and (C) became effective January 1, 1976, nearly eight years after the 1968 and 1973 Modern Courts Amendments. Crim. R.41 was adopted January 1, 1973. R.C. 2933.21 became effective June 13, 1975. It is important to note the effective date of R.C. 2931.01 is the latest enactment. We cannot ignore, nor do we presume, the legislature's specific exclusion of a "probate judge" and the "probate court" found therein was an act of oversight or inadvertence. To the contrary, we find it an expression of the legislature's manifest intent.

{¶19} Applying R.C. 1.51, we opine the definition of "courts of record" in R.C. 2933.21 and Crim.R. 41 are general provisions in comparison to the specific exclusion of a probate judge and the probate court found in R.C. 2931.01(B) and (C). To the extent they cannot be reconciled to give effect to both, R.C. 1.51 states the special provision [R.C. 2931.01(B) and (C)] prevails as an exception to the general provision [R.C. 2933.21 and Crim.R.41] unless the general provision is the later adoption and the manifest intent is that the general provision prevail. But as previously stated, R.C. 2933.21 and Crim.R.41 were both enacted before the adoption of R.C. 2931.01(B) and (C). Assuming, arguendo, R.C. 2931.01(B) and (C) is a general provision and R.C. 2933.21 and Crim.R.41 are specific provisions, R.C. 2931.01(B) and (C) would be the "later adoption" and by it the legislature manifested its intent it prevail over the former because R.C. 2931.01(B) and (C) specifically excludes a probate judge or the probate court as used in Chapters 2931. to 2953. of the Revised Code.

{¶20} Appellant's first assignment of error is overruled.

III

{¶21} In *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, the United States Supreme Court established a good faith exception regarding insufficient or defective search warrants. The *Leon* court held:

{¶22} "This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. (Footnote omitted.) In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. '[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' Id., 428 U.S., at 498, 96 S.Ct., at 3054 (BURGER, C.J., concurring). Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. (Footnote omitted.)

{¶23} "We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. '[S] earches pursuant to a warrant will rarely require any deep inquiry into reasonableness,' *Illinois v. Gates*, 462 U.S., at 267, 103 S.Ct., at 2347 (WHITE, J., concurring in judgment), for 'a warrant issued by a magistrate

normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.' *United States v. Ross*, 456 U.S. 798, 823, n. 32, 102 S.Ct. 2157, 2172, n. 32, 72 L.Ed.2d 572 (1982). Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 815–819, 102 S.Ct. 2727, 2737–2739, 73 L.Ed.2d 396 (1982), (Footnote omitted) and it is clear that in some circumstances the officer (Footnote omitted) will have no reasonable grounds for believing that the warrant was properly issued."

{¶24} Under the good faith exception espoused in *Leon*, the exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unlawful. *State v. Oprandi,* 5th Dist. No. 07-CA-5, 2008-Ohio-168.

{¶25} We agree with the State's position the officers herein acted in good faith when executing the search warrant according to *Leon.* Alliance City Prosecutor Andrew Zumbar testified at the suppression hearing herein,

{¶26} "The Court: Okay. But you have a town whether it's the Alliance Municipal Court judge duly elected, you also have a general division judge who resides nearby, is there a reason not only in your case, but in any cases you've cited why the probate judge heard the search warrant?

{¶27} "Mr. Zumbar: In this particular case before the Court?

{¶28} "The Court: Or in the ones you cite or both?

{¶29} "Mr. Zumbar: I don't believe it's clear in the cases. That question that you've asked is not answered in the cases that you've - - that I've presented to the Court, you know, why did the probate judge hear this. In terms of this case, the Stark County Common Pleas, Court, Probate Division judges have been haring probable cause for search warrants dating back at least to R.R. Denny Clunk. I can tell this Court as an officer before this Court, I have personally secured warrants from Judge Clunk himself when he was a probate division judge of the common pleas court and then subsequently when he began as acting judge of the Alliance Municipal Court as well. But that was the very first time that I secured a warrant from the probate judge was when Judge Clunk was on the bench. It goes back that far.

{¶30} "The Court: Okay. So, it's judge shopping.

{¶31} "Mr. Zumbar: No, ma'am.

{¶32} "The Court: Okay.

{¶33} "Mr. Zumbar: No, Ma'am. If- -if the judge is available that's who they- - they go to whatever judge they can get their hands on at that time.

{¶34} "The Court: Whatever judge is available. So, in choosing you contact the other judges and they either don't answer- -unavailable, is that...

{¶35} "Mr. Zumbar: I can't state specifically, I was not the prosecutor who submitted the probable cause in this case. I do know that other judges of the common pleas division have been solicited from time to time. I'm directly aware of the fact that- - Judge Sinclair has issued warrants. I'm directly aware that Judge Brown has issued warrants. I'm directly aware of the fact that not only has Judge Lavery issued conservatively speaking, five hundred (500) search warrants."

{¶36} Tr. at p. 28-29.

{¶37} In addition, the State's appellate brief offered a litany of appellate cases demonstrating the common practice of probate division judges issuing search warrants throughout the State of Ohio. See, *State v. Bradley*, 2nd Dist. No. CIV A 93-CA-101, November 23, 1993; *State v. Dewald,* 3rd Dist. No. 13-82-35, May 27, 1983; *State v. Ridgeway,* 4th Dist. No. 00CA19, 2001-Ohio-2655; *State v. Cassidy*, 11th Dist. No. 90L049, November 15, 1991; *State v. Tatonetti*, 11th Dist. No. 1021, January 7, 1983; *State v. Abrams,* 12th Dist. No. 315, May 4, 1983.

{¶38} As noted supra in *Johnson*, there was existing appellate authority, albeit from another appellate district and which we have herein found to be unpersuasive, to support a probate judge's authority to issue a search warrant.

{¶39} Accordingly, at the time the officers executed the search warrant herein, the past practice of the court and the police, as well as the law of other jurisdictions, lead the officers to believe in good faith the search warrant was valid.

{¶40} However, this Court having now found the probate court judge does not have authority to issue search warrants, the State is now on notice in any future actions and executions of search warrants, those search warrants issued by a probate division may no longer be relied upon in good faith per *Leon*, supra.

{¶41} The State's third assigned error is sustained.

II

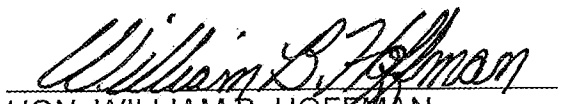
{¶42} In light of our analysis and disposition of the State's third assignment of error, we find the second assignment of error moot.

{¶43} The judgment of the Alliance Municipal Court is reversed, and the matter remanded to that court for further proceedings in accordance with the law and this opinion.

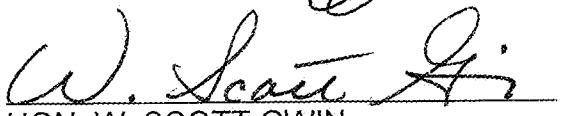
By Hoffman, J.

Gwin, P.J. concurs

Farmer, J. dissents



HON. WILLIAM B. HOFFMAN



HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

Farmer, J., dissents

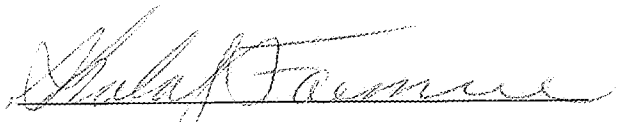
{¶44} I respectfully dissent from the majority's opinion in Assignment of Error I. While the majority recognizes that the probate court is now considered a "court of record," it concluded a probate judge does not have the authority to issue search warrants under R.C. 2931.01(B) and (C).

{¶45} Based upon the decisions in *Cotton, Bays, and Johnston* as cited in the majority opinion, I would find R.C. 2931.01 does not prohibit a probate judge from issuing search warrants.

{¶46} In ¶ 14, the majority dismisses the *Cotton* decision on the fact that "Judge Park was not assigned by the chief justice or acting chief justice pursuant to Section (5)(A)(3) to preside over a criminal case." I would find an assignment by the chief justice not to be necessary because Judge Park is a member of the Court of Common Pleas. In fact, Judge Park has the statutory authority to appoint other common pleas judges to act as probate judge. R.C. 2101.37.

{¶47} I specifically disagree with the majority's opinion that an archaic statute governs sub judice, when in fact the passage of the 1968 Modern Courts Amendment has placed all of the judges on the Court of Common Pleas on equal footing.

{¶48} I concur with the majority's opinion on Assignment of Error II. I would reverse the case on both assignments of error.



HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
TODD E. BROWN	:	
Defendant-Appellee	:	CASE NO. 2012CA00099

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NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

For the reasons stated in our accompanying Opinion, the judgment of the Alliance Municipal Court is reversed, and the matter remanded to that court for further proceedings in accordance with the law and our Opinion. Costs to Appellee.

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER