ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO APPELLANT VS. TODD E. BROWN APPELLEE	:: :: :: :: :: :: :: :: ::	CASE NO. 2013-1110 On Appeal from the Court of Appeals Fifth Appellate District, Stark County

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MERIT BRIEF OF APPELLANT

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Statement of Operative Facts

The facts of this matter are generally not at issue.[1] On February 9, 2012, the Alliance Police Department obtained the search warrant in question from Judge Dixilene Park, Judge of the Court of Common Pleas of Stark County, Probate Division.[2] This warrant was issue to search 1160 East State Street, Alliance, Stark County, Ohio. 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.[3] Judge Park found sufficient probable cause and issued a search warrant at 7:55 p.m.[4] The search warrant was then executed upon a commercial business premise which was operated by the Appellee.[5]

The specific facts are found in both the search warrant and the complaint in this matter. In short form the facts are as follows. Appellee and his partners leased a commercial premise at the above address, obtained machines of chance and opened up under the name "Little Vegas". Undercover Alliance Police Officers and agents visited the premises and played these machines to determine whether they complied with the law. While playing on January 30, 2012, one officer cashed out and received cash from an attendant as his winnings.[6] Another played only a portion of his cash investment and was given cash as a "refund". This scenario was the probable cause presented to Judge Park.

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[1] The facts were not argued at the hearing of April 4, 2012. The parties stipulated that the issue at hand was a legal issue. See transcript at p 5.
[2] See Search Warrant.
[3] Id.
[4] See Search warrant.
[5] See Return and inventory attached to search warrant.
[6] See Affidavit.

Upon the search, officers found and seized the machines which were paying out cash, as well as cash and other items. Based on this evidence and the previous investigation the Appellees were charged with gambling in violation of R.C. 2915.02 and operating a gambling house in violation of R.C. 2915.03.[7]

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 R.C. 2931.01.[8] A hearing was held on the Motion to Suppress on April 4, 2012, before the Magistrate. The Magistrate issued a ruling recommending the evidence be suppressed as the Probate Judge did not have jurisdiction to hear the application for search warrant on April 30, 2012.[9] The State of Ohio filed an objection. On May 17, 2012, the Judge of the Alliance Municipal Court overruled the objections filed by the State of Ohio and adopted the Report and Recommendation of the Magistrate in its entirety.

The State Appealed to the Fifth District Court of Appeals. The issue presented in the appellate court was whether the Judge of the Court of Common Pleas, Probate Division has the authority to hear probable cause testimony, take oaths for an Affidavit for probable cause and issue search warrants.

The Fifth District found that the probate judge did not have jurisdiction to issue the search warrant at issue. However, the Fifth District reversed the portion of the ruling suppressing the evidence obtained stating that since officers had a good faith belief based on prior practice that the probate judge could issue search warrants. The Fifth

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[7] See generally inventory and Complaints.
[8] See Search Warrant and Affidavit.
[9] Id.

District noted that from that point forward, however, the probate judge would be prohibited from issuing search warrants in criminal cases.

It was from that ruling that the State of Ohio appealed, filing a Memorandum in Support of Jurisdiction in this Court.

Argument In Support of Proposition of Law

Proposition of Law

A "Probate Judge" has the Authority As a Division of the Ohio Court of Common Pleas to Hear Evidence and Issue Search Warrants on Criminal Matters within their Territorial Jurisdiction.

> "Giving rule-making powers over Ohio courts to the Supreme Court is essential and belated. It should have been done a generation ago."[10]

The root of this matter requires a decision on a simple premise. Who has control over the courts in Ohio? The State's position is that this authority rests in the Courts themselves, specifically in the Ohio Supreme Court. This authorization was given in 1968, by constitutional amendment, more specifically, the "Modern Courts Amendment".

Before 1968, the Ohio Court System had a different organization. A Common Pleas Court and a separate Probate Court existed. The "Probate Court" has a long history in Ohio. The first probate court in Ohio was first established by the Northwest Ordinance of 1787 in the Ohio territory.[11] In the original Ohio Constitution in 1802, the common pleas court had exclusive jurisdiction over probate matters. The Constitution of 1851 removed probate matters from the jurisdiction of common pleas courts and created in each county a separate probate court. Probate matters are generally regarded as wills, estates, sale of land by executors/administrators or guardians as well as marriage licenses. Between 1851 and 1932 the probate court also held limited

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[10]Dean Ivan Rutledge, Committee for Modern Courts in Ohio, Press Release April, 1968.

[11]Ohio Association of Probate Court Judges statement, Cleveland Law Library Association, FAQ.

jurisdiction in minor criminal offenses.[12] However, the probate court continued as a separate court from 1851-1968.

The Modern Courts Amendment, a constitutional referendum, changed this structure. After the Modern Courts Amendment of 1968 the Common Pleas Court subsumed the probate court as a division. It must be remembered that the Modern Courts Amendment was not only about combining the Probate Court with the Common Pleas court. It was a complete overhaul of the administration of the Ohio Judicial System.

This was not a new concept. In 1922 Chief Justice of the United States, William Howard Taft is attributed as stating:

> "Dependence upon action of Congress to affect reform and remove delays and to bring about speed in the administration of justice has not brought the best results, and some different mode should be tried. The failures of justice in this country, especially in the state courts, have been more largely due to the withholding of power from judges over proceedings before them than to any other cause; and yet judges have to bear the brunt of the criticism which is so general as to the results of present court action. The judges should be given power commensurate with their responsibility. 29 Ohio St. L.J. 828.

Prior to 1968 there were no judicial age limits, there were no record keeping requirements, assignments were voluntary, supreme court members were referred to as judges instead of justices, compensation was not uniform and the Supreme Court did not have an administrative director. See generally Milligan and Pohlman "The 1968 Modern Courts Amendment to the Ohio Constitution. 29 Ohio St. L.J. 811 (1968). The problem was described as: "there has been no one in charge of the Judicial System." 29 Ohio St. L.J. 811, 821. Each judge operated independently. While this was favorable for independent and fair decisions, administratively this created 400 separate

[12] Probate Court History, Miami County Probate Court, 2012.

administrative rules. See 29 Ohio St. L.J. at 821. Uniform administration of cases was lacking. Therefore, the Ohio State Bar Association and the Ohio judiciary argued that the general supervisory power should be vested in this Court.

The 1968 Modern Courts Amendment accomplished this. The main premise was:

> "The supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court."

The result was a unified court system in the State. Administrative authority over every court was then vested in the Ohio Supreme Court. 29 Ohio St. L.J. at 822. The Supreme Court now had plenary rule making ability. Finally, and relevant to the *instant* matter, court action with regard to rulemaking supersedes contradictory legislation. 29 Ohio St. L.J. at 829.

Also, specific to the matter at hand, the Modern Courts Amendment abolished the "probate court" and established the probate division of the courts of common pleas. As a result, all probate judges are judges of the courts of common pleas. Ohio Constitution, Article IV, Section 4.

This constitutional amendment required the legislature to restate, modify or amend the Ohio Revised Code to reflect the new status of the probate division of the court of common pleas. The State proposes that the statute at issue here, R.C. 2931.01 is a statute that was missed or improperly re-codified not reflecting the changes made by the Constitutional Amendment. Regardless of this oversight, the State's position is that this is a procedural matter controlled by the Supreme Court and not by this conflicting statute.

As this Court previously stated:

> "The Modern Courts amendment conferred authority on the Supreme Court of Ohio to promulgate rules relating to matters of procedure in courts of Ohio, while the right to establish the substantive law in Ohio remained with the legislative branch of government. Procedural rules promulgated pursuant to the Modern Courts amendment supersede conflicting statutes that affect procedural matters but cannot 'abridge, enlarge, or modify any substantive right'."

Havel v. Villa St. Joseph 131 Ohio St.3d 235, 2012-Ohio-552, ¶2 (2012) quoting Milligan & Pohlman, supra.

The question of who can hear and authorize search warrants is a procedural matter. Appellant will demonstrate that this court has previously decided that the Supreme Court has the authority, through the criminal rules to determine this issue.

One of the "defining features" of a constitutionally executed search warrant is that it was issued by a judicial officer. United States v. Kone 591 F.Supp.2d 593, 605 (S.D.N.Y 2008).[13] The United States Supreme Court frequently employs the term magistrate to denote those public officials who may issue warrants. Shadwick v. City of Tampa 407 U.S. 345, 348 (1972). The United States Supreme Court has defined "magistrate" as "a public civil officer, possessing such power – legislative, executive or judicial - as the government appointing him may ordain." Compton v. Alabama 214 U.S. 1, 7 (1909).

The judge of the probate division of the court of common pleas is a judicial officer, duly elected by the citizens of each Ohio County.[14] The probate division judge is

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[13] Quoted in State v. Dulaney 3rd Dist. Paulding Case No. 11-12-04, 2013-Ohio-3985, ¶11.

[14] In Ohio, some counties combine the probate division with the juvenile division or the general division based on population and case load.

authorized via statute with enumerated powers and with other powers as a judge of the court of common pleas. These duties include the taking of oaths. R.C. 2101.05.

Various statutory provisions are at issue in this matter. Most important is the statute pertaining to the issuance of search warrants. It states in pertinent part as follows:

> **R.C. 2933.21 Issuance of search warrants.**
>
> A judge of a court of record may, within his jurisdiction, issue warrants to search a house or place:
>
> (E) For [any] gaming table, establishment, device, or apparatus kept or exhibited for unlawful gaming, or to win or gain money or other property, and for money or property won by unlawful gaming;
>
> The enumeration of certain property and material in this section shall not affect or modify other laws for search and seizure.
>
> Effective Date: 06-13-1975

Here, the search warrant was issued upon a finding of probable cause as required by statute. Probable cause, a substantive issue, is required before the authorization of a warrant, it is also has a statutory root found in:

> **R.C. 2933.22 Probable cause for search warrant.**
>
> (A) A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized.
>
> (B) A warrant of search to conduct an inspection of property shall issue only upon probable cause to believe that conditions exist upon such property which are or may become hazardous to the public health, safety, or welfare.
>
> Effective Date: 10-23-1972

Defendants-Appellees successfully argued below that the jurisdiction of the probate judge did not extend to the determination of probable cause and issuance of a

search warrant. This was the result of an antiquated statute which continues to use the outdated term "probate judge" which refers to a judge who no longer exists. The statute provides:

> **R.C. 2931.01 Definitions pertaining to jurisdiction and venue.**
>
> As used in Chapters 2931. to 2953. of the Revised Code:
>
> (A) "Magistrate" includes county court judges, police justices, mayors of municipal corporation[s], and judges of other courts inferior to the court of common pleas.
>
> (B) "Judge" does not include the probate judge.
>
> (C) "Court" does not include the probate court.
>
> (D) "Clerk" does not include the clerk of the probate court.
>
> Effective Date: 01-01-1976

This made sense before 1968 as the old "probate court" was not a court of record. It was not required to keep a record of its proceedings, therefore, it did not take oaths. Since oaths are an integral part of search warrants, it is logical as to why the old "probate court" was not permitted to issue search warrants. Now, however, as a court of record in the Common Pleas divisions, the Probate division, takes oaths and keeps a record of proceedings. See R.C. 2101.01 and 2101.05. Therefore the main barrier to justice is removed.

It is important to note at the outset that prior to the decision in this matter, no court of record in Ohio had determined that the Probate Division of the Court of Common Pleas lacks authority in this area.

The below decision of the Fifth District is in Direct Conflict with the Fourth District Decision in State v. Johnston 4th Dist. Hocking Case No. CA 412, 1986 WL 8799. It is

for this reason that Appellant argued that this matter was of great interest. In Johnston, the defendant was convicted by a three judge panel of two counts of aggravated murder with aggravating circumstances and sentenced to death. Johnston at *1. Upon appeal, he attempted to have his convictions overturned for various reasons, including that evidence pursuant to a search warrant were illegally obtained, arguing that the Probate-Juvenile judge did not have jurisdiction to issue search warrants.

The Johnston court disagreed finding that the Probate Division Judge is clearly a judge of record.

> "When we consider the history of the Ohio judiciary system we conclude that R.C. 2931.01(B) and (C) are merely relics from a past in which the probate courts were separate courts, not of record, with specific limited jurisdiction. The use of 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. Thus any judge of any court of record has authority to issue a search warrant Johnston at p. 17.

Appellant asks this court to follow the previously decided case in Johnston rather than the decision below. In support, appellant will demonstrate that the Criminal Rules follow the Johnston decision, as has this Court as well as other appellate courts throughout the state.

A. The Fifth Appellate District's Interpretation of the Statute Conflicts with the Criminal Rules.

The language of R.C. 2931.01 conflicts with Criminal Rule 2 and Criminal Rule 41. Further, as previously noted, the statutory language refers to the now defunct "probate court". The former rules followed since the former probate court would not be authorized to issue search warrants as its powers were very limited. However, after the Modern Courts Amendment, the Criminal Rules promulgated by the Ohio Supreme Court reflect the expanded authority of the probate division of the Common Pleas Court.

Criminal Rule 2 is the definitional section. It defines a judge as:

> (E) "Judge" means judge of the court of common pleas, juvenile court, municipal court, or county court, or the mayor or mayor's court magistrate of a municipal corporation having a mayor's court.

Certainly Judge Park met that definition. A review of the former Criminal Rule 2 demonstrates that terms which are found in the current R.C. 2931.01 have been removed from the Criminal Rules in recent amendments. For example, R.C. 2931.01 also includes "police justices" a term which was removed from Criminal Rule 2 in recent revisions. This demonstrates that this language is a holdover from the pre-Modern Courts Amendment. Criminal Rule 2 was most recently amended in July, 1990.

A major tenet of the Modern Courts Amendment was to put procedural power over the court system in the hands of the Ohio Supreme Court. This is done through the Criminal Rules. The specific section of the criminal rules for search and seizure is Criminal Rule 41.

Rule 41. Search and Seizure. (In pertinent part).

> (A) Authority to issue warrant. 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, upon the request of a prosecuting attorney or a law enforcement officer.

(C) Issuance and contents. (1) A warrant shall issue on either an affidavit or affidavits sworn to before a judge of a court of record or an affidavit or affidavits communicated to the judge by reliable electronic means establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the affidavit is provided by reliable electronic means, the applicant communicating the affidavit shall be placed under oath and shall swear to or affirm the affidavit communicated. (2) If the judge is satisfied that probable cause for the search exists, the judge shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant may be issued to the requesting prosecuting attorney or other law enforcement officer through reliable electronic means. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. 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. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

History. Effective: July 1, 1973; amended effective July 1, 2010.

The substantive power remains in the legislature. The definition of probable cause with regard to the alleged crime is a substantive issue. The question of who may decide what probable cause is a procedural matter and covered by Criminal Rule 41. Most importantly, and it must not be forgotten, the General Assembly has the power to determine what are crimes in the State of Ohio. The Court system must follow these laws and administer justice according to them. The constitutional referendum placed

the power to control the procedures that courts employ to administer justice in the Courts themselves. Therefore, this Court has the power to determine who can determine probable cause. This Court has done that through the Criminal Rules and previous decisions in this area. See generally State v. Cotton 56 Ohio St.2d 8 (1978). The Probate division of the common pleas court is a court of record under R.C. 2101.05. Criminal Rule 41 authorizes the probate division of the court of common pleas to hear probable cause and issue search warrants. As such the decision that the search warrant was invalid was improper.

B. This Court has Previously Determined that the Probate Division Has Authority as a Common Pleas Judge to hear and decide Criminal Matters.

Other Defendants have challenged the authority of the judge of the probate division to hear and decide criminal cases, all relying on the antiquated language of R.C. 2931.01. In each instance, this Court has rejected that argument. In fact, this Court spoke specifically on this matter in 1978 on another case arising out of the Fifth Appellate District. In State v. Cotton 56 Ohio St.2d 8 (1978), this Court determined a Probate Division Judge is qualified to sit on a three judge panel for a death penalty criminal case. The defendant in Cotton challenged the jurisdiction of the Probate Division Judge to hear a death penalty case, by relying on the language contained in R.C. 2931.01 (employing the same argument used by the Defendants in this case). The Supreme Court ruled:

> Appellants contention is without merit. 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.
>
> The lower court in Cotton stated this concept succinctly:
>
> Article IV, Section 4, of the Ohio Constitution as amended effective June 1968, operates to establish all judges on the panel as Common Pleas Judges. There is no such thing as a "Probate Judge" as that malapropism was improvidently re-enacted by the Ohio Legislature after 1968. State v. Cotton, 5th Dist. Stark Case No. 1611, 1977 WL 200852, page 7.

Each time, after Cotton, that Defendants have challenged the authority of the probate court to hear their cases, Cotton is cited as the seminal authority to determine that the probate court does, in fact, maintain jurisdiction and authority over those matters. Even after Cotton, this Court has again reiterated its holding as applicable law in the area.

In State, ex rel. Key v. Spicer 91 Ohio St. 3d 469 (2001), the Ohio Supreme Court stated unequivocally the R.C. 2931.01 "does not disqualify a probate court judge from presiding over criminal cases". Once again the court was confronted by a Defendant claiming the probate division judge was not qualified to be appointed to a criminal case by virtue of the old language in R.C. 2931.01. Continuing with its decisions, the Ohio Supreme Court ruled that the amendments to the Ohio Constitution significantly restricted the court system, and permitted judges of the probate division of the courts of common pleas to be appointed to criminal cases.

Spicer again supports the conclusion that judges of the probate division of the court of common pleas are significantly different from the former "probate judge". The amendment to the Ohio Constitution superseded the former statutory language of R.C. 2931.01.

In State v. Bays 87 Ohio St.3d 15 (1999), the Court was again faced with the argument that judges of the probate division of the Court of Common Pleas lacked the authority to sit on a three judge panel for death penalty cases. In that case again, Bays argued based on R.C. 2931.01, that the "probate judge" was not a judge of court of record. This Court disagreed. It reiterated its holding in State v. Cotton that judges of the probate division of the probate division of the court of common pleas are significantly different from the old "probate judge". Bays at p. 26. Significantly, the Court found that it was not ineffective assistance for his lawyer to fail to challenge the presence of the probate judge. Bays at 28, citing State v. McNeill 83 Ohio St.3d 438 (1998), this Court found that challenging the probate division jurisdiction was a rejected legal theory.

C. The Probate Court jurisdiction has been implicitly approved by courts when unchallenged by defendants.

Since 1968 several courts have heard cases where the authority of the court of common pleas probate division jurisdiction was not challenged. Many of these were decided after this Court's decision in Cotton which seemingly settled the law in this area. In State v. Ridgeway, 4th Dist. Washington Case NO. 00CA19, 2001-Ohio-2655, Ridgeway challenged the finding of probable cause to issue the search warrant and whether there was one search or two. The Fourth District did not even question the jurisdiction of the probate court, *sua sponte*. The Appeals Court upheld the search warrant, implicitly reaffirming the ability of the judge of the probate division to find probable cause and issue search warrants. See Ridegway at *1.

Similarly in State v. Cassidy 11th Dist. Lake Case No. 90-L-019, 1991 WL 239337, the 11th District was presented with a situation where an F.B.I. agent obtained a search warrant from the "probate judge". Cassidy at *1. Again, the issue at hand was the probable cause to issue the warrant. The 11th District upheld the search warrant indicating that "it is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Cassidy at *2. It is important to remember that the term magistrate has its own legal definition. The term magistrate refers to that the officer went to a "neutral and detached magistrate". Johnson v. United States 333 U.S. 20, 68 S.Ct. 367 (1948).

In State v. Abrams 12th Dist. Preble Case No. 315, 1983 WL 4357, the 12th District reviewed a challenge as to the suppression of evidence obtained after a search warrant was signed by the probate division of the Preble County court of common pleas. The 12th District reversed the suppression of evidence and found the search warrant

valid. Abrams at p. 4. In Abrams again, the authority of that neutral and detached magistrate was not challenged.

Next is State v. Tatonetti 11th Dist. Geauga Case No. 1021, 1983 WL 6255, where the 11th District, Geauga County found that the judge of the probate court of the court of common pleas had authority to issue search warrants. It based that decision in part on the language of Criminal Rule 2.

The Tatonetti court further citied specific to the language in Crim. R. 41(A) which granted that authority:

> (A) Authority to issue warrant. A search warrant authorized by this rule may be issued by a judge of court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.

The current version of Criminal Rule 2 is substantially similar. It states:

> (E) "Judge" means judge of the court of common pleas, juvenile court, municipal court, or county court, or the mayor or mayor's court magistrate of a municipal corporation having a mayor's court.

The court found that these provisions, as previously cited above, gave the judge the authority to issue a valid search warrant.

The 2nd District reviewed this issue in the case State v. Bradley 2nd Dist. Champaign Case No. 93-CA-01, 1993 WL 485267. Again the court was confronted with a situation where a search warrant was signed by the judge of the probate division of the court of common pleas. The reliability of the confidential information was challenged. The appellate court found the search warrant was sufficient and upheld its issuance by the probate division. Bradley at p. 2.

This has also been the case more recently. In State v. Ridenour 4th Dist. Meigs Case No. 09CA13, 2010-Ohio-3373 the Meigs County Juvenile/Probate Judge issued a

search warrant to draw blood. In that case, the search warrant was issued in Meigs County and executed in Gallia County. The Defendant challenged the jurisdiction of the search since it was outside the territorial jurisdiction of the court. The 4th District rejected that argument and found that no constitutional violation occurred. Ridenour at ¶ 29. The court found that no prejudice had occurred on what the court called a "non-fundamental violation of Criminal Rule 41". Essentially, even thought the judge did not have technical territorial jurisdiction to issue the search warrant, it was upheld based on the circumstances of the case. Ridenour at ¶30.

Finally, State v. DeWald 3rd District Seneca Case No. 13-82-35, 1983 WL 7273. DeWald, as with the other cases cited, challenged the sufficiency of the probable cause in the affidavit presented to the judge of the probate and juvenile divisions. DeWald at p. 1. Again, the affidavit and search warrant were upheld by the appellate court.

These five appellate districts have implicitly agreed with the holding State v. Johnston that the probate division has the authority as a court of record and under the criminal rules to hear probable cause and issue search warrants.

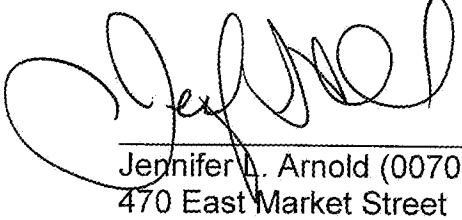
The word "Probate" has a Latin origin meaning "to prove". Detective Rajcan presented ample evidence to prove probable cause to a neutral and detached magistrate for the issuance of the search warrant for Appellees premises. The magistrate and the appeals court lost their way by finding that the antiquated language of R.C. 2931.01 prevented issuance of this search warrant. The dissent in the Fifth Appellate district recognized this. All of the authority available; be it case law, criminal rules and other statutory provisions, demonstrate that this provision is outdated and not good authority.

Furthermore, as demonstrated the Modern Courts Amendment took the authority from the hands of the General Assembly in procedural matters. This authority lies in the Supreme Court. This Court has previously decided that the Probate Division has the ability to issue search warrants based on a sworn finding of probable cause. This Court should take the opportunity to answer the premise presented as was intended by the Modern Courts Amendment. This Court controls procedural matters of the court system in Ohio.

Conclusion

Appellant State of Ohio requests that this Court determine that Judges of the Probate Division of the Common Pleas Court are elected judges of a court of record with authority to hear probable cause and issue search warrants. The State requests that this Court reverse the portion of the decision of the Fifth Appellate District which determined that the "probate judge" did not have authority to hear probable cause and issue a search warrant.

Respectfully submitted,



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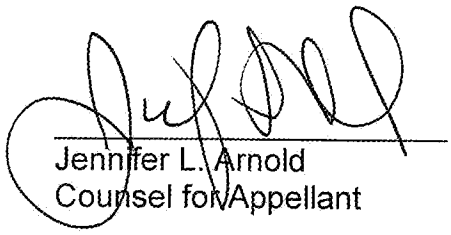
Certificate of Service

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail to Stephen J. Kandel, Esq. 101 Central Plaza South, Suite 1003, Canton, OH 44702 on this 10th day of January, 2014.



Jennifer L. Arnold
Counsel for Appellant

In the Supreme Court of Ohio

STATE OF OHIO	: UPON APPEAL FROM THE STARK COUNTY
	: COURT OF APPEALS
APPELLANT	: FIFTH APPELLATE DISTRICT
	: CASE NO. 2012CA00099
	:
vs.	:
	: CASE NO. 13-1110
TODD E. BROWN	:
	:
	:
	:
APPELLEE	:

Notice of Appeal of Appellant State of Ohio

Andrew L. Zumbar (0059453)
Law Director
(Counsel of Record)
Jennifer Arnold (070848)
Assistant Prosecutor
City of Alliance
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Attorneys for Appellant

Stephen J. Kandel
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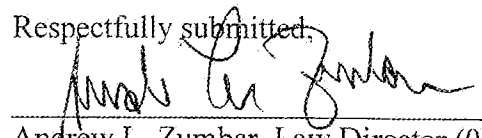
Attorney for Appellee Todd E. Brown

FILED
JUL 12 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio gives notice of appeal to the Supreme Court of Ohio from the judgment of the Stark County Court of Appeals, Fifth Appellate District, entered in case number 2012CA00099 on May 28, 2013. This case involves a substantial constitutional question and an issue of public and great general interest.

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:

Stephen J. Kandel
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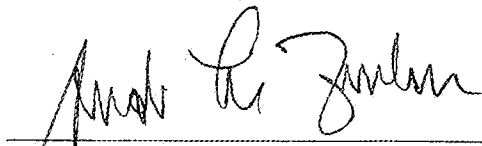
Attorney for Todd E. Brown, Appellee



Andrew L. Zumbar (0059453)
Law Director, City of Alliance

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NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY OHIO
13 MAY 28 PM 2:36

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:

APPEARANCES:

For Plaintiff-Appellant

ANDREW ZUMBAR
470 East Market Street
Alliance, OH 44601

For Defendant-Appellee

STEPHEN J. KANDEL
101 Central Plaza South
Suite 1003
Canton, OH 44702

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

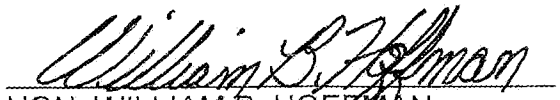
{¶42} In light of our analysis and disposition of the State's third assignment of error, we find the second assignment of error moot.

{¶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.

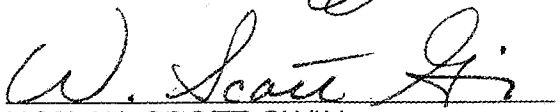
By Hoffman, J.

Gwin, P.J. concurs

Farmer, J. dissents



HON. WILLIAM B. HOFFMAN



HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

Farmer, J., dissents

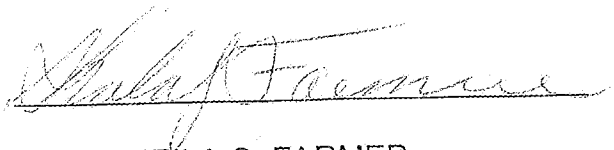
{¶44} I respectfully dissent from the majority's opinion in Assignment of Error I. While the majority recognizes that the probate court is now considered a "court of record," it concluded a probate judge does not have the authority to issue search warrants under R.C. 2931.01(B) and (C).

{¶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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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

FILED
ALLIANCE
MUNICIPAL COURT
2012 APR 30 AM 8: 24

IN THE ALLIANCE MUNICIPAL COURT
STARK COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF,

vs.

TODD E. BROWN,

DEFENDANT.

CASE NO. 2012CRB 00190

REPORT OF MAGISTRATE AND RECOMMENDATION

This matter came on for suppression hearing on April 4, 2011 before the Magistrate on the issue of the issuance of a search warrant by the Judge of the Stark County Court of Common Pleas, Probate Division for the premises located at 1160 East State Street, Alliance, Stark County, Ohio on February 9, 2012. Present was Attorney Andrew Zumbar on behalf of the State of Ohio, Defendant and his counsel, Stephen Kandel.

At the commencement of the hearing, the parties stipulated to the submission of the recorded testimony and the transcript of the proceedings before Judge Park in support of the warrant, the affidavit in support of the warrant and the inventory of the items seized after the execution of the search. These items were marked and admitted, without objection, as Joint Exhibits A and B. The parties further stipulated that Judge Dixie Park signed the warrant and that she is the duly elected Probate Judge of the Stark County Court of Common Pleas. Counsel for the parties submitted their arguments for the suppression of the evidence obtained from the search warrant issued by Judge Park by oral argument, without the presentation of further testimony or evidence.

The Magistrate makes the following findings of fact and conclusions of law.

Officers of the Alliance Police Department sought the issuance of a warrant to search the premises of 1160 East State Street, Alliance, Stark County, Ohio on February 9, 2012. The location of the search is within the jurisdiction of the Alliance Municipal Court. The officers presented their affidavit in support of the warrant and testimony to Judge Park, the elected judge of the Probate Division of the Stark County Common Pleas Court. No information was presented as to whether or not Judge Lavery, the elected judge of the Alliance Municipal Court, was available. Following the presentation of evidence and the affidavit, Judge Park issued the requested warrant. The warrant and subsequent search was conducted and evidence seized giving rise to charges being filed against the Defendant and the matter has proceeded before this Court.

Counsel for the Defendant argues that, pursuant to R.C. 2931.01(B), a Probate Division judge is not authorized to execute search warrants. R.C. 2931.01 states:

> As used in Chapters 2931. to 2953. of the Revised Code:
>
> (A) "Magistrate" includes county court judges, police justices, mayors of municipal corporations, and judges of other courts inferior to the court of common pleas.
> (B) "Judge" does not include the probate judge.
> (C) "Court" does not include the probate court.
> (D) "Clerk" does not include the clerk of the probate court.
> Effective 1-1-76

R.C. Chapter 2933 sets forth the laws in the State of Ohio for search warrants. Pursuant to this statute, Defendant states that the warrant was invalid because a probate judge issued it and all items seized are fruits of the poisonous tree of that invalidity.

Counsel for the State argues that the probate court is a division of the court of common pleas and pursuant to Criminal Rule 2, judges of the court of common pleas are judges of a court of

record. He argued Criminal Rule 41(A) grants authority to issue a search warrant to a judge of the court of record. The State further states that, pursuant to R.C. 2101.24(C), probate judges have plenary power to administer oaths and therefore grant search warrants in criminal cases.

Jurisdiction over all crimes and offenses is vested in the court of common pleas, general division, unless such jurisdiction specifically and exclusively is vested in other divisions of the court of common pleas or in the lower courts. State ex rel v. Whitfield, (1986) 27 Ohio St.3d 4. A statutory assignment to one division of a court confers on that division exclusive jurisdiction to determine the matters assigned. Perkins Local Dist. Bd. Of Edn. v. Wooster City School Dist.. Bd. Of Edn., (2009) 183 Ohio App.3d 638, quoting Keen v. Keen, 157 Ohio App.3d 379. The jurisdiction of the courts of common pleas and its divisions is determined by legislative enactment. Art. IV, Section 4(B), Ohio Constitution. Where a special statutory method for determining a particular type of case is provided, and especially in the case where a statutory method is exclusive, bypass would circumvent a clear legislative scheme for jurisdiction. Grossman v. City of Cleveland Heights, (1997) 120 Ohio App.3d 435.

The Modern Courts Amendment, adopted May 18, 1968, conferred authority on the Supreme Court of Ohio to promulgate rules on matters of procedure in the courts of Ohio, while the right to establish substantive law remained with the legislative branch of government. While procedural rules supersede conflicting statutes that affect procedural matters, they cannot abridge, enlarge or modify any substantive right. The threshold issue at hand centers on whether R.C. 2931.01 is a substantive or procedural law. Substantive law has been defined as that body of law which creates, defines and regulates the rights of parties, referring to common law, statutory and constitutionally recognized rights. Krause v. State,(1972) 31 Ohio St.2d 132. Procedural law

proscribes method of enforcement of rights or obtaining redress, Roe v. Planned Parenthood Southwest Ohio Region, (2009) 122 Ohio St.3d 399. A statute may create a right when it contains mandatory language. State v. Coffman, (2001) 91 Ohio St.3d 125. It is a well settled rule of statutory construction the a court is required to first look at the words of the statute to determine legislative intent. State ex rel Loyd v. Lovelady, (2006) 108 Ohio St. 3d 86. A plain reading of R.C. 2931.01 clearly indicates an intent to preclude probate judges from the issuance of search warrants in criminal matters under R.C. Chapter 2933. If the language unambiguously and distinctly expresses the sense of the legislative body, it must be applied as written. State v. Smorgala, (1990) 50 Ohio St.3d 222.

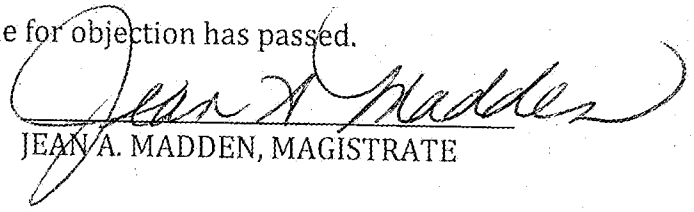
The power to define the jurisdiction of the courts of common pleas rests in the General Assembly and such courts may only exercise such jurisdiction as is expressly granted to them by the legislature. Seventh Urban, Inc. v. University Circle, (1981) 67 Ohio St.2d 19. The court of common pleas is a court of general jurisdiction, embracing all matters at law and in equity that are not denied to it. The probate court is a court of limited jurisdiction, exercising such powers are conferred on it by statute and the constitution of the state. Saxton v. Seiberling, (1891) 48 Ohio St. 554. "The probate court shall have plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by statute." R.C. 2101.24. This is not to say that a probate judge may never hear criminal cases. Section 5(A)(3), Article IV of the Ohio Constitution grants the chief justice, or acting chief justice, the power to assign any judge of a court of common pleas or a division thereof to temporarily sit on any other court of common pleas or division thereof. The General Assembly enacted R.C. 2503.04 pursuant to this constitutionally conferred authority, permitting the chief justice to assign

judges from other counties to relieve overcrowding. R.C. 1901.10 allows the judge of a single-magistrate municipal court to appoint an acting judge in his absence. As noted in the State's argument, probate judges have presided over criminal matters pursuant to Superintendent Rule 3(B)(2). Rules of Superintendence do not supersede or invalidate any conflicting statutory provisions. The Constitution requires the chief justice or acting chief justice to make assignments of judges to various courts when necessary. Such assignments are to be made upon the request of a probate judge, a juvenile court judge, other division judge or a municipal court judge or when a judge is temporarily absent, incapacitated or otherwise unavailable. Furthermore, Section 4, Article IV of the Constitution of Ohio provides that probate court is a division of the Court of Common Pleas and, pursuant to Section 5(A)(3) of Article IV, the chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or division thereof to temporarily sit on any other court of common pleas or division thereof. The operative wording here is the assignment of a judge by the chief justice or acting chief justice. Judicial power in criminal cases must be exercised strictly in accord with the statutes.

A judge of a court of record is not specifically defined and therefore must be afforded meaning from the words used. A court of record is one whose proceedings are contained within its record. As such a court of record speaks through its journal entries. In the instant matter, it is not disputed that probate court is a court of record. A court of record may issue warrants within its jurisdiction. R.C. 2933.21. This would require the issuing court to have authority to issue the warrant. Authority of a judge to preside over matters in another court or another division must, by law, be pursuant to statutory assignment, without which such judge would have no authority to act on matters outside his or her jurisdiction.

Therefore, based upon the arguments presented and the existing case law, R.C. 2931.01 is clearly non-ambiguous as to its application. Furthermore, the court finds no evidence of the probate judge presided over the issuance of the search warrant by appointment of the chief justice or acting chief justice. No evidence was presented that the judge of the Alliance Municipal Court was temporarily unavailable, incapacitated or that he had appointed the probate judge to act in his absence. There was no authority on the part of the probate judge to act on the request for the search warrant. Accordingly, the search warrant signed by said judge of the probate court is void for lack of jurisdiction and all evidence seized as a result is suppressed as fruits of the invalid warrant. The Defendant's Motion is therefore granted.

IT IS THE RECOMMENDATION of this Magistrate to the Court that the finding of the Magistrate be adopted after the appropriate time for objection has passed.



JEAN A. MADDEN, MAGISTRATE

CLERK TO SERVE: Andrew Zumbar, Esq., Prosecuting Attorney
Stephen Kandel, Esq., Attorney for Defendant

NOTICE

YOU HAVE FOURTEEN (14) DAYS FROM THE DATE OF THIS REPORT TO OBJECT TO THE MAGISTRATE'S RECOMMENDATION. AFTER THAT TIME, THE CASE WILL BE FORWARDED TO THE JUDGE OF THIS COURT FOR FINAL JUDMENT ENTRY CONSIDERATION. THE JUDGE MAY REVIEW THE ELECTRONIC RECORD OF YOUR HEARING WHEN CONSIDERING YOUR OBJECTION. IF YOU WISH TO HAVE A TRANSCRIPT PREPARED, YOU MUST MAKE ARRANGEMENTS WITH THE COURT REPORTER.

FILED
ALLIANCE
MUNICIPAL COURT
2012 MAY 17 AM 8: 22

IN THE ALLIANCE MUNICIPAL COURT
STARK COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF,

vs.

TODD E. BROWN,

DEFENDANT.

CASE NO. 2012 CRB 00190

JUDGE ROBERT G. LAVERY

JUDGMENT ENTRY

This matter came on for review of the Report and Recommendation of the Magistrate filed April 30, 2012 upon the Objection to the Magistrate's finding filed by the Plaintiff on May 11, 2012.

The Court has reviewed the transcript of the hearing, the transcript of the search warrant at issue and the Report and Recommendation of the Magistrate. The Court has also made an independent review of the law applicable in this matter and finds the recommendation of the Magistrate to be well-founded. Accordingly, Plaintiff's objection is overruled and the recommendation of the Magistrate is approved.

IT IS HEREBY ORDERED that Defendant's Motion to Suppress is granted.

THIS IS A FINAL APPEALABLE ORDER

ROBERT G. LAVERY
JUDGE

CLERK TO NOTIFY: Andrew Zumbar. Esq.
Stephen Kandel, Esq.

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§ 4.04 Common pleas court

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(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the Supreme Court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968. Former

§ 4 repealed.)

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2101.01 Probate division - location - equipment - employees.

(A) A probate division of the court of common pleas shall be held at the county seat in each county in an office furnished by the board of county commissioners, in which the books, records, and papers pertaining to the probate division shall be deposited and safely kept by the probate judge. The board shall provide suitable equipment or other necessary items for the safekeeping and preservation of the books, records, and papers of the court and shall furnish any books, forms, and stationery, and any machines, equipment, and materials for the keeping or examining of records, that the probate judge requires in the discharge of official duties. The board also shall authorize expenditures for accountants, financial consultants, and other agents required for auditing or financial consulting by the probate division whenever the probate judge considers these services and expenditures necessary for the efficient performance of the division's duties. The probate judge shall employ and supervise all clerks, deputies, magistrates, and other employees of the probate division. The probate judge shall supervise all probate court investigators and assessors in the performance of their duties as investigators and assessors and shall employ, appoint, or designate all probate court investigators and assessors in the manner described in divisions (A)(2) and (3) of section 2101.11 of the Revised Code.

(B) As used in the Revised Code:

(1) Except as provided in division (B)(2) of this section, "probate court" means the probate division of the court of common pleas, and "probate judge" means the judge of the court of common pleas who is judge of the probate division.

(2) With respect to Lorain county:

(a) From February 9, 2009, through September 28, 2009, "probate court" means the domestic relations division of the court of common pleas, and "probate judge" means each of the judges of the court of common pleas who are judges of the domestic relations division.

(b) The judge of the court of common pleas, division of domestic relations, whose term begins on February 9, 2009, and successors, shall be the probate judge beginning September 29, 2009, and shall be elected and designated as judge of the court of common pleas, probate division.

(C) Except as otherwise provided in this division, all pleadings, forms, journals, and other records filed or used in the probate division shall be entitled "In the Court of Common Pleas, Probate Division," but are not defective if entitled "In the Probate Court." In Lorain county, from February 9, 2009, through September 28, 2009, all pleadings, forms, journals, and other records filed or used in probate matters shall be entitled "In the Court of Common Pleas, Domestic Relations Division," but are not defective if entitled "In the Probate Division" or "In the Probate Court."

Amended by 129th General AssemblyFile No.52,SB 124, §1, eff. 1/13/2012.

Amended by 128th General AssemblyFile No.9,HB 1, §101.01, eff. 7/17/2009.

Effective Date: 08-05-1998; 12-20-2005

2101.05 Oaths and depositions.

A probate judge may administer oaths, take acknowledgment of instruments in writing required to be acknowledged, and take depositions.

Depositions taken according to sections 2319.05 to 2319.31, inclusive, of the Revised Code, to be used on the trial of civil cases, may be taken and used on the trial of any question before the probate court.

Effective Date: 10-01-1953

2915.02 Gambling.

(A) No person shall do any of the following:

(1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking;

(2) Establish, promote, or operate or knowingly engage in conduct that facilitates any game of chance conducted for profit or any scheme of chance;

(3) Knowingly procure, transmit, exchange, or engage in conduct that facilitates the procurement, transmission, or exchange of information for use in establishing odds or determining winners in connection with bookmaking or with any game of chance conducted for profit or any scheme of chance;

(4) Engage in betting or in playing any scheme or game of chance as a substantial source of income or livelihood;

(5) Conduct, or participate in the conduct of, a sweepstakes with the use of a sweepstakes terminal device at a sweepstakes terminal device facility and either:

(a) Give to another person any item described in division (VV)(1), (2), (3), or (4) of section 2915.01 of the Revised Code as a prize for playing or participating in a sweepstakes; or

(b) Give to another person any merchandise prize, or a redeemable voucher for a merchandise prize, the wholesale value of which is in excess of ten dollars and which is awarded as a single entry for playing or participating in a sweepstakes. Redeemable vouchers shall not be redeemable for a merchandise prize that has a wholesale value of more than ten dollars.

(6) Conduct, or participate in the conduct of, a sweepstakes with the use of a sweepstakes terminal device at a sweepstakes terminal device facility without first obtaining a current annual "certificate of registration" from the attorney general as required by division (F) of this section;

(7) With purpose to violate division (A)(1), (2), (3), (4), (5), or (6) of this section, acquire, possess, control, or operate any gambling device.

(B) For purposes of division (A)(1) of this section, a person facilitates bookmaking if the person in any way knowingly aids an illegal bookmaking operation, including, without limitation, placing a bet with a person engaged in or facilitating illegal bookmaking. For purposes of division (A)(2) of this section, a person facilitates a game of chance conducted for profit or a scheme of chance if the person in any way knowingly aids in the conduct or operation of any such game or scheme, including, without limitation, playing any such game or scheme.

(C) This section does not prohibit conduct in connection with gambling expressly permitted by law.

(D) This section does not apply to any of the following:

(1) Games of chance, if all of the following apply:

(a) The games of chance are not craps for money or roulette for money.

(b) The games of chance are conducted by a charitable organization that is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization

is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code.

(c) The games of chance are conducted at festivals of the charitable organization that are conducted not more than a total of five days a calendar year, and are conducted on premises owned by the charitable organization for a period of no less than one year immediately preceding the conducting of the games of chance, on premises leased from a governmental unit, or on premises that are leased from a veteran's or fraternal organization and that have been owned by the lessor veteran's or fraternal organization for a period of no less than one year immediately preceding the conducting of the games of chance.

A charitable organization shall not lease premises from a veteran's or fraternal organization to conduct a festival described in division (D)(1)(c) of this section if the veteran's or fraternal organization already has leased the premises twelve times during the preceding year to charitable organizations for that purpose. If a charitable organization leases premises from a veteran's or fraternal organization to conduct a festival described in division (D)(1)(c) of this section, the charitable organization shall not pay a rental rate for the premises per day of the festival that exceeds the rental rate per bingo session that a charitable organization may pay under division (B)(1) of section 2915.09 of the Revised Code when it leases premises from another charitable organization to conduct bingo games.

(d) All of the money or assets received from the games of chance after deduction only of prizes paid out during the conduct of the games of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code;

(e) The games of chance are not conducted during, or within ten hours of, a bingo game conducted for amusement purposes only pursuant to section 2915.12 of the Revised Code.

No person shall receive any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of any game of chance.

(2) Any tag fishing tournament operated under a permit issued under section 1533.92 of the Revised Code, as "tag fishing tournament" is defined in section 1531.01 of the Revised Code;

(3) Bingo conducted by a charitable organization that holds a license issued under section 2915.08 of the Revised Code.

(E) Division (D) of this section shall not be construed to authorize the sale, lease, or other temporary or permanent transfer of the right to conduct games of chance, as granted by that division, by any charitable organization that is granted that right.

(F) Any person desiring to conduct, or participate in the conduct of, a sweepstakes with the use of a sweepstakes terminal device at a sweepstakes terminal device facility shall first register with the office of the attorney general and obtain an annual certificate of registration by providing a filing fee of two hundred dollars and all information as required by rule adopted under division (H) of this section. Not later than the tenth day of each month, each sweepstakes terminal device operator shall file a sweepstakes terminal device monthly report with the attorney general and provide a filing fee of fifty dollars and all information required by rule adopted under division (H) of this section. All information

provided to the attorney general under this division shall be available to law enforcement upon request.

(G) A person may apply to the attorney general, on a form prescribed by the attorney general, for a certificate of compliance that the person is not operating a sweepstakes terminal device facility. The form shall require the person to include the address of the business location where sweepstakes terminal devices will be used and to make the following certifications:

(1) That the person will not use more than two sweepstakes terminal devices at the business location;

(2) That the retail value of sweepstakes prizes to be awarded at the business location using sweepstakes terminal devices during a reporting period will be less than three per cent of the gross revenue received at the business location during the reporting period;

(3) That no other form of gaming except lottery ticket sales as authorized under Chapter 3770. of the Revised Code will be conducted at the business location or in an adjoining area of the business location;

(4) That any sweepstakes terminal device at the business location will not allow any deposit of any money, coin, or token, or the use of any credit card, debit card, prepaid card, or any other method of similar payment to be used, directly or indirectly, to participate in a sweepstakes;

(5) That notification of any prize will not take place on the same day as a participant's sweepstakes entry; and

(6) That the person consents to provide any other information to the attorney general as required by rule adopted under division (H) of this section.

The filing fee for a certificate of compliance is two hundred fifty dollars. The attorney general may charge up to an additional two hundred fifty dollars for reasonable expenses resulting from any investigation related to an application for a certificate of compliance.

A certificate of compliance is effective for one year. The certificate holder may reapply for a certificate of compliance. A person issued a certificate of compliance shall file semiannual reports with the attorney general stating the number of sweepstakes terminal devices at the business location and that the retail value of prizes awarded at the business location using sweepstakes terminal devices is less than three per cent of the gross revenue received at the business location.

(H) The attorney general shall adopt rules setting forth:

(1) The required information to be submitted by persons conducting a sweepstakes with the use of a sweepstakes terminal device at a sweepstakes terminal device facility as described in division (F) of this section; and

(2) The requirements pertaining to a certificate of compliance under division (G) of this section, which shall provide for a person to file a consolidated application and a consolidated semiannual report if a person has more than one business location.

The attorney general shall issue a certificate of registration or a certificate of compliance to all persons who have successfully satisfied the applicable requirements of this section. The attorney general shall post online a registry of all properly registered and certified sweepstakes terminal device operators.

(I) The attorney general may refuse to issue an annual certificate of registration or certificate of compliance to any person or, if one has been issued, the attorney general may revoke a certificate of registration or a certificate of compliance if the applicant has provided any information to the attorney general as part of a registration, certification, monthly report, semiannual report, or any other information that is materially false or misleading, or if the applicant or any officer, partner, or owner of five per cent or more interest in the applicant has violated any provision of this chapter.

(J) The attorney general may take any necessary and reasonable action to determine a violation of this chapter, including requesting documents and information, performing inspections of premises, or requiring the attendance of any person at an examination under oath.

(K) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender previously has been convicted of any gambling offense, gambling is a felony of the fifth degree. Notwithstanding this division, failing to file a sweepstakes terminal device monthly report as required by division (F) of this section or the semiannual report required by division (G) of this section is a misdemeanor of the first degree.

Amended by 130th General Assembly File No. 14, HB 7, §1, eff. 9/4/2013.

Amended by 129th General AssemblyFile No.126,HB 386, §1, eff. 6/11/2012.

Amended by 128th General AssemblyFile No.38,HB 519, §1, eff. 9/10/2010.

Effective Date: 07-01-2003

2915.03 Operating a gambling house.

(A) No person, being the owner or lessee, or having custody, control, or supervision of premises, shall:

(1) Use or occupy such premises for gambling in violation of section 2915.02 of the Revised Code;

(2) Recklessly permit such premises to be used or occupied for gambling in violation of section 2915.02 of the Revised Code.

(B) Whoever violates this section is guilty of operating a gambling house, a misdemeanor of the first degree. If the offender previously has been convicted of a gambling offense, operating a gambling house is a felony of the fifth degree.

(C) Premises used or occupied in violation of this section constitute a nuisance subject to abatement pursuant to sections 3767.01 to 3767.99 of the Revised Code.

Effective Date: 07-01-1996

2931.01 Definitions pertaining to jurisdiction and venue.

As used in Chapters 2931. to 2953. of the Revised Code:

(A) "Magistrate" includes county court judges, police justices, mayors of municipal corporation[s], and judges of other courts inferior to the court of common pleas.

(B) "Judge" does not include the probate judge.

(C) "Court" does not include the probate court.

(D) "Clerk" does not include the clerk of the probate court.

Effective Date: 01-01-1976

2933.21 Issuance of search warrants.

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

(A) For property stolen, taken by robbers, embezzled, or obtained under false pretense;

(B) For weapons, implements, tools, instruments, articles or property used as a means of the commission of a crime, or when any of the objects or articles are in the possession of another person with the intent to use them as a means of committing crime;

(C) For forged or counterfeit coins, stamps, imprints, labels, trade-marks, bank bills, or other instruments of writing, and dies, plates, stamps, or brands for making them;

(D) For obscene materials and materials harmful to minors involved in a violation of section 2907.31 or 2907.32 of the Revised Code, but only so much of such materials shall be seized as are [is] necessary for evidence in a prosecution of the violation;

(E) For [any] gaming table, establishment, device, or apparatus kept or exhibited for unlawful gaming, or to win or gain money or other property, and for money or property won by unlawful gaming;

(F) For the existence of physical conditions which are or may become hazardous to the public health, safety, or welfare, when governmental inspections of property are authorized or required by law.

The enumeration of certain property and material in this section shall not affect or modify other laws for search and seizure.

Effective Date: 06-13-1975

2933.22 Probable cause for search warrant.

(A) A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized.

(B) A warrant of search to conduct an inspection of property shall issue only upon probable cause to believe that conditions exist upon such property which are or may become hazardous to the public health, safety, or welfare.

Effective Date: 10-23-1972