

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

: Case No. 14-0096

Plaintiff-Appellee,

:

vs.

:

On Appeal from the Mahoning County  
Court of Appeals, Seventh Appellate  
District

TRENT P. RAPP

:

Defendant-Appellant.

:

Court of Appeals Case No. 12 MA 117

:

:

---

MEMORANDUM IN SUPPORT OF JURISDICITON  
OF APPELLANT TRENT P. RAPP

---

SAMUEL G. AMENDOLARA (#0009316)  
(Counsel of Record)  
Boca Professional  
860 Boardman-Poland Road  
Suite 204  
Youngstown, OH 44512  
(330) 423-0409 / Telephone  
(330) 423-0411 / Fax  
[attyamendolara@yahoo.com](mailto:attyamendolara@yahoo.com)  
Counsel for Appellant Trent P. Rapp

PAUL J. GAINS (#0020323)  
Prosecuting Attorney

RALPH M. RIVERA (#0082063)  
Assistant Prosecuting Attorney

Mahoning County Prosecutor's Off.  
21 W. Boardman Street, 6<sup>th</sup> Floor  
Youngstown, OH 44503  
(330) 740-2330/ Telephone  
(330) 740-2008/ Fax  
[rivera@mahoningcountyoh.gov](mailto:rivera@mahoningcountyoh.gov)  
Counsel for Appellee State of Ohio.

FILED  
JAN 21 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

Page No.

**Explanation of Why This Case Presents a Case of Public or Great General Interest and Involves a Substantial Constitutional Question.....1**

**Statement of the Case and Facts.....3**

**Proposition of Law.....7**

Failing to require a law enforcement officer to corroborate hearsay statements made by a private citizen, which is the only basis in seeking a search warrant, violates a citizens Fourth Amendment right against unlawful search and seizures.

**Conclusion.....10**

**Certificate of Service..... 11**

**Appendix**

Judgment Entry.....A-1

Opinion.....A-2-12

Appx. Page

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL  
QUESTION**

The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution, declares that a citizen's right to "be secure in their persons, houses, papers and effects against unreasonable searches and seizures". Citizens are further protected by the admonition that "no Warrants shall issue but upon probable cause" The foregoing statements are the hallmark of constitutional guarantees against governmental intrusions of a United States citizen's personal privacy rights.

On December 6, 2013, the Seventh District Court of Appeals affirmed the decision of the Mahoning County Common Pleas Court denying Appellant Trent P. Rapp's ("Rapp") motion to suppress evidence gathered as a result of two search warrants. When reviewing the decision of the trial court, the Seventh District had the task of determining whether the trial court's findings were supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio App.3d 286, 288 But, from a review of the suppression hearing transcript it is clear that the trial court's decision to deny Rapp's motion to suppress was not supported by competent, credible evidence.

In this case, the trial court erroneously found that testimony elicited at the suppression hearing clearly demonstrated that the cooperating source had previously proven reliable to the Canfield Police Department. In fact, Detective McGivern testified that in both instances when the cooperating source provided information, other confidential sources were used to secure the search warrants. In fact, all the cooperating source every provided to Detective McGivern in the past were generalized non-specific hearsay statements.

Regarding the two search warrants executed on Rapp's home and computer the cooperating source informed detectives that Rapp printed counterfeit money from his computer, possessed cocaine and other illicit drugs in his home, engaged in sex with minors and had child pornography on his computer. But after speaking with the cooperating source, the detectives took no further action whatsoever to corroborate what the cooperating source was telling them. For example the detectives did not attempt to conduct any type of surveillance in order to corroborate the information being provided by the cooperating source. Likewise, the detectives did not request the cooperating source to wear a recording device to go into Rapp's home in order to obtain objective proof of the existence of criminal activity. Finally, the detectives did not issue any subpoenas for Rapp's computer and telephone records.

In short the detectives relied on the information provided by a private citizen without any corroboration. During his testimony at the suppression hearing Detective McGivern described the cooperating source as a 'troubled kid" and a "weird kid" who hung around the police station.

Because there was no objective evidence to support the cooperating source's statement, the detectives lacked probable cause to obtain the search warrants. Thus, the detectives had no right to search Rapp's home and his computer. Both the United States and Ohio constitutions do not support "the ends justify the means" approach used by law enforcement officers when they barge into a private citizen's home to see what if anything they can find prior to demonstrating that a constitutionally permissible basis existed for entering the home.

This case invokes the discretionary jurisdiction of this Court by involving a felony, a question of a public or great general interest and a substantial constitutional question. The situation where a search warrant can issue solely by the statements of a private citizen, without any corroborating objective evidence is contrary to public interest and the constitutional rights guaranteed by the Fourth Amendment.

Clarity by this court is needed in regards as to when evaluating whether to issue a search warrant, a court should require any type of corroborating evidence independent of the hearsay statements of a private citizen. Permitting a search warrant to issue in cases with facts similar to those present here would allow law enforcement wide latitude in searching private citizen's homes without first establishing that probable cause exists to search the home. In essence, the decision below, taken to its logical conclusion allows a law enforcement officer to obtain a search warrant solely based upon hearsay statements made by a private citizen without any corroborating objective evidence supporting the statements.

For this reason, Defendant-Appellant Trent P. Rapp respectfully moves this court to accept this case as it clearly presents a question of a public or great general interest and a substantial constitutional question.

#### **STATEMENT OF THE CASE AND FACTS**

On July 23, 2009, 2011, Defendant –Appellant Trent P. Rapp (“Rapp”) was indicted by a direct presentment to the Mahoning County Grand Jury on the following charges: one count of trafficking in marijuana, a fifth-degree felony in violation of R.C. 2925.03 (A) (2) (C) (3) (a); one count of possession pf cocaine, fifth-degree felony in violation of R.C. 2925.11 (A) (C) (4) (a); one count of corrupting another with drugs,

fourth-degree felony in violation of R.C. 2925.02 (A) (4) (c) (C) (3); eight counts of illegal use of a minor in nudity oriented material or performance, fifth-degree felonies in violation of R.C. 2907.323 (A) (3) (B); four counts of pandering sexually oriented material, fourth-degree felonies in violation of R.C. 2907.322 (A) (5); and one count of possessing criminal tools, a fifth-degree felony in violation of R.C. 2923.24 (A) (C). On August 4, 2009, Rapp pled not guilty to all of the above identified charges.

On April 2, 2010, Rapp filed a motion to suppress the evidence obtained as a result of a search of his home on January 16, 2009 and a search of a computer owned by Rapp on January 21, 2009.. Rapp also filed a motion to suppress statements Rapp made to the police. On April 23, 2010, the Plaintiff-Appellee State of Ohio ("State") filed a reply in opposition to Rapp's motion to suppress.

On April 28, 2010, the trial court then ruled on Rapp's motion without first holding a hearing. The trial court reasoned that a hearing was not necessary because all of the information the court required to rule on the motion was contained in the search warrant affidavits. The court overruled Rapp's motion to suppress as to the evidence seized during as a result of the search warrant affidavits. But, the trial court sustained Rapp's suppression motion regarding the statements that Rapp made to the police prior to being read his Miranda rights.

On May 5, 2010, Rapp filed a motion for reconsideration, wherein he requested the court to hold a hearing prior to ruling on suppression motion. Rapp argued that a hearing would provide Rapp with due process and afford him an opportunity to cross examine the officers about the validity of the search warrant affidavits. On May 7, 2010, the State filed a reply in opposition to Rapp's motion for reconsideration. On May 21,

2010, the court granted Rapp's motion for reconsideration and scheduled a hearing for June 9, 2010. On June 9, 2010, the suppression hearing was continued until June 29, 2010.

At the suppression hearing, the State presented the testimony of Canfield Police Dept. Detective Brian McGivern and Beaver Township Police Dept. Detective Eric Datillo. Both of the State's witnesses were cross examined by defense counsel. At the conclusion of the hearing both sides requested that the court permit the filing of post-hearing briefs in order to assist the trial court in its decision.

Rapp filed his post-hearing brief on July 7, 2013. In his brief, Rapp argued that neither of the two witnesses admitted to taking any steps to corroborate the information that was being provided by the "cooperating source" Rapp also pointed out that because there was no testimony as to when the cooperating source actually witnessed the presence of criminal contraband in Rapp's home or the dates the "cooperating source" was last at Rapp's home prior to the search, the information provided was legally stale.

On July 22, 2010, the trial court issued its decision overruling Rapp's motion to suppress. In its entry the court opined that since the "cooperating source" had proven reliable in the past, the cooperating source was reliable. Concerning the issue of whether the statements of the "cooperating source" were legally stale, the court found that because the search warrant affidavit listed "dates of searches and interviews, both of which occurred within six days of the issuance of search warrant", Rapp's argument lacked merit.

On January 26, 2012, Rapp pled no contest to trafficking in marijuana, possession of cocaine, corrupting another with drugs, one count of illegal use of a minor in nudity

oriented material or performance, two counts of pandering sexually oriented material and possessing criminal tools. In return the state dismissed the remaining seven counts of illegal use of a minor in nudity oriented material or performance and the remaining two counts of pandering sexually oriented material. Additionally, the state dismissed a separate indictment against Rapp for furnishing a false identification. The trial court accepted Rapp's pleas and found Rapp guilty.

The trial court held a sentencing hearing on May 30, 2012. At the conclusion of the hearing, the court sentenced Rapp to five years of community control sanctions, including a \$5,000.00 fine, a no contact order in regards to the victim, and 500 hours of community service. Finally, Rapp was classified as a Tier I sex offender.

Rapp filed a timely appeal in the Seventh District Court of Appeals. Rapp presented the following four assignments of error in his appellate brief:

**ASSGINMENT OF ERROR I** The trial court erred by overruling the motion to suppress evidence regarding the search of Defendant-Appellant's home, when the officers lacked probable cause to request a search warrant.

**ASSGINMENT OF ERROR II** The trial court erred by overruling the motion to suppress evidence regarding the search of Defendant-Appellant's computer, when the officers failed to take any steps whatsoever to confirm or deny the allegations offered by the private citizen.

**ASSGINMENT OF ERROR III** The trial court erred by overruling the motion to suppress evidence when the affidavits never listed a date that the cooperating source observed evidence of criminal activity, making whatever information that was provided "stale"

**ASSGINMENT OF ERROR IV** The trial court erred by overruling the motion to suppress evidence regarding the 2<sup>nd</sup> search warrant, at it was issued based solely on the defective issuance of the 1<sup>st</sup> search warrant, thereby rendering the evidence inadmissible.

Rapp requested the Seventh District Court of Appeals to reverse the decision of the trial court overruling Rapp's motion to suppress, and order Rapp's sentence vacated.

On December 6, 2013, the Seventh District issued its decision and journal entry affirming the trial court's judgment.

### PROPOSITON OF LAW

Failing to require a law enforcement officer to corroborate hearsay statements made by a private citizen, which is the only basis in seeking a search warrant, violates a citizens Fourth Amendment right against unlawful search and seizures.

Both R.C. 2933.23 and Ohio Crim. R. 41 (C) require that an affidavit supporting the issuance of a search warrant must describe the place to be searched, the things to be searched for and seized, the offense believed to be committed, and the facts giving rise to probable cause. Further, Ohio Arrest, Search and Seizure notes that:

"The affidavit must set forth in particular all facts that led the affiant to believe that the property for which the warrant would issue is at the address listed. Otherwise the warrant issued on that affidavit would be invalid."

Ohio Arrest, Search and Seizure, (Baldwin's 2009, p. 128)

In this case the detectives had no real "facts", only some hearsay allegations from a cooperating source that the detectives described as "troubled" and "weird" kid. Specifically, the cooperating source informed the detectives that marijuana, counterfeit money, personal computers and linens and pillows would be found in Rapp's home. But, in order to turn the allegations into "facts" the detectives should have taken some action to either confirm or deny the accuracy of the statements. Basically, the detectives heard a person (i.e. cooperating source) state that Rapp had engaged in various criminal acts, but then failed to take any action to confirm or deny whether those statements were true. The

detectives had no objective evidence; the detectives were merely acting on an unsubstantiated “hunch”.

While law enforcement officers may make reasonable references from the facts, they are not permitted to make unsupported conclusions as to the nature of an otherwise innocuous act and then somehow infer that a crime is being committed. Such a characterization is the product of a “hunch” and may not serve as a “fact” used to support an objectively reasonable suspicion.

At the time the detectives presented the search warrant affidavits to the issuing judge, the affidavit was required to set forth facts, not mere conclusions. There must be a factual basis from which a determination of probable cause can be reached. *Akron v. Williams* (1963), 175 Ohio St 186 in *Williams* the affidavit contained a statement that the affiant had “personal knowledge from a reliable source.” As the affidavit contained no facts upon which the knowledge was based, it was held to be insufficient. Without the additional information, a judge cannot make an independent determination that the criminal contraband will be found. Instead a judge would be relying on the officer’s unsubstantiated assertion. See *Ohio Arrest, Search, and Seizure*, supra, p. 128

Similarly, in *Illinois v. Gates* (1983), 462 U.S. 313, the United States Supreme Court opined that lower courts should use the “totality of circumstances” test when determining whether sufficient “probable cause” existed for a magistrate judge to issue a warrant. Under the “totality of circumstances” test, the information in the affidavit must establish a “fair probability” that contraband or evidence of a crime will be found in the place identified.

Therefore, in our case, the trial had the task of determining whether there was sufficient information presented to the judge issuing the two search warrants. It is clear that the detectives relied solely on the cooperating source's allegations. The detectives took no further steps to confirm or deny whether the cooperating source's allegations bore any resemblance to the truth. The detectives simply accepted the cooperating source's allegations as true and incorporated those statements into an affidavit and presented it to the issuing judge. The detectives did not possess specific and articulable facts to support the issuance of a search warrant.

Further, the detectives failed to establish any time frame when the cooperating source supposedly witnessed the criminal activity. In *State v. Hillegass* (2001), 144 Ohio App.3d 108, the court found that "A supporting affidavit that fails to give a any time frame for the events it describes, fails as a matter of law to demonstrate probable cause and a search warrant based solely on that affidavit is invalid." In *State v. Hollis* (1991), 98 Ohio App.3d 549, 554, the court stated that an affidavit in support of search warrant must present timely information and include facts so closely related to the time of the issuing warrant as to justify a finding of probable cause at that time.

Thus, in our case, since the alleged information was never connected to a specific date, the issuing judge had no knowledge regarding whether the information being presented was stale. During the suppression hearing the detectives admitted that they did not provide any additional information concerning a time frame to the issuing judge beyond that which was contained in the four corners of the affidavits. Absent this information, the judge had no legal authority or basis whatsoever to issue the search warrants.

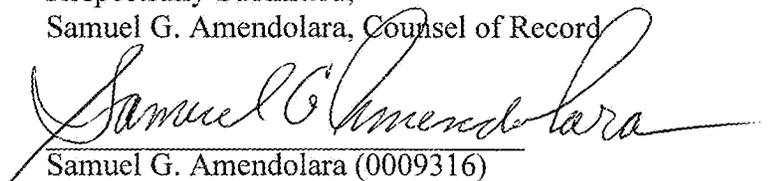
In summary, an unjustified seizure and search which provides probable cause to arrest cannot be justified as a search incident to arrest. *Smith v. Ohio* (1990), 494 U.S. 541. Here the seizure of Rapp's property was unreasonable from its inception and any and all illegal fruits of the seizure and search should have been suppressed.

The Seventh District's lack of analysis as to the "totality of the circumstances" allowed it quickly conclude that probable cause sufficient for the issuance of the search warrants existed. While, this quick action is understandable considering a court's crowded docket, it should not be a permissible result. Therefore, this Court should accept jurisdiction over Mr. Rapp's appeal to clarify to the courts of Ohio what is considered an acceptable analysis for a trial court to engage in when determining whether sufficient probable cause exists for the issuance of a search warrant, when the only basis to support the issuance of the warrant are unsubstantiated hearsay statements of one person.

### **CONCLUSION**

Based upon the foregoing reasons, Defendant-Appellant Trent P. Rapp respectfully requests that this Court accept jurisdiction in this matter.

Respectfully Submitted,  
Samuel G. Amendolara, Counsel of Record



Samuel G. Amendolara (0009316)  
Attorney for Appellant Trent P. Rapp  
860 Boardman-Poland Road  
Suite 204  
Youngstown, OH 44512  
(330) 423-0409 / Telephone  
(330) 423-0411 / Fax

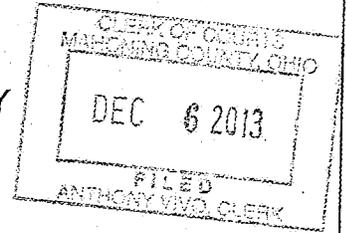
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Support of jurisdiction was forwarded by regular U.S. Mail to Ralph M. Rivera, Assistant Prosecuting Attorney at the Mahoning County Prosecutor's Office, 21 W. Boardman Street, 6<sup>th</sup> Floor, Youngstown, OH 44503 this 20 day of January 2014.

  
Samuel G. Amendolara (0009316)  
Counsel for Appellant Trent P. Rapp



STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT



STATE OF OHIO, )  
 )  
 PLAINTIFF-APPELLEE, )  
 )  
 V. )  
 )  
 TRENT P. RAPP, )  
 )  
 DEFENDANT-APPELLANT. )

CASE NO. 12 MA 117

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common  
Pleas of Mahoning County, Ohio  
Case No. 09CR819

JUDGMENT:

Affirmed

APPEARANCES:

For Plaintiff-Appellee

Paul Gains  
Prosecutor  
Ralph M. Rivera  
Assistant Prosecutor  
21 W. Boardman St., 6<sup>th</sup> Floor  
Youngstown, Ohio 44503

For Defendant-Appellant

Attorney Samuel G. Amendolara  
860 Boardman-Canfield Road  
Suite 204  
Youngstown, Ohio 44512

Attorney Dennis A. DiMartino  
1032 Boardman-Canfield Road  
Suite 103  
Youngstown, Ohio 44512-4238

JUDGES:

Hon. Gene Donofrio  
Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite

Dated: December 6, 2013

DONOFRIO, J.

{¶1} Defendant-appellant, Trent Rapp, appeals from a Mahoning County Common Pleas Court judgment denying his motion to suppress evidence found in his home when police executed search warrants based on information provided by a "cooperating source."

{¶2} On January 15, 2009, it came to the attention of Canfield Police Detective Brian McGivern that counterfeit \$100 bills were found at the Mahoning County Career and Technical Center (MCCTC). Det. McGivern spoke to one of the students who had a counterfeit bill. This student, a juvenile, was an ongoing "cooperating source" (CS) with Canfield Police. The CS had provided the police with information during the preceding year about drugs in Canfield, which led to at least two arrests and two convictions.

{¶3} The CS was employed by appellant, who police knew to be the owner of the Canfield Dairy Queen. The CS told Det. McGivern he had received the \$100 bill from appellant's residence, that appellant made the counterfeit bills on his computer, and appellant had "stacks" of counterfeit bills in his residence located in Beaver, Ohio. The CS further told Det. McGivern that appellant always had a large amount of marijuana at his residence and allowed Canfield High School students to use marijuana at his residence. Additionally, the CS told police appellant performed oral sex on him on numerous occasions and compelled CS to perform oral sex on him. The CS told police appellant threatened to dismiss him from his job if he did not continue to engage in the sexual activity. Finally, the CS told police appellant had numerous surveillance cameras located inside of his residence.

{¶4} Based on this information, Det. McGivern, along with Beaver Police Detective Eric Datillo, filed an affidavit for a search warrant of appellant's residence on January 21, 2009. The trial court issued the search warrant that day (warrant one).

{¶5} The detectives executed the warrant and recovered numerous items including, suspected marijuana and cocaine, counterfeit money, computers,

videotapes, and computer equipment.

{116} On January 26, 2009, Det. Datillo filed an affidavit for another search warrant to allow agents at the Ohio Bureau of Criminal Identification and Investigation to search appellant's computers and computer equipment that were seized during the execution of warrant one. The trial court issued the search warrant that day (warrant two).

{117} Subsequently, a Mahoning County Grand Jury indicted appellant on one count of trafficking in marijuana, a fifth-degree felony in violation of R.C. 2925.03(A)(2)(C)(3)(a); one count of possession of cocaine, a fifth-degree felony in violation of R.C. 2925.11(A)(C)(4)(a); one count of corrupting another with drugs, a fourth-degree felony in violation of R.C. 2925.02(A)(4)(c)(C)(3); eight counts of illegal use of a minor in nudity oriented material or performance, fifth-degree felonies in violation of R.C. 2907.323(A)(3)(B); four counts of pandering sexually oriented matter, fourth-degree felonies in violation of R.C. 2907.322(A)(5); and one count of possessing criminal tools, a fifth-degree felony in violation of R.C. 2923.24(A)(C). Appellant pleaded not guilty.

{118} Appellant filed a motion to suppress the evidence obtained as a result of the two search warrants and to suppress statements he made to police subsequent to the execution of the warrants and his arrest.

{119} The trial court first ruled on the motion without holding a hearing. Initially, it pointed out that appellant's motion was untimely. Nonetheless, it went on to address the merits. The court found a hearing was unnecessary because all of the information needed was contained in the search warrant affidavits, which appellant attached to his motion. The court went on to overrule appellant's motion as to the evidence seized as a result of the search warrants. The court sustained appellant's motion as to the statements appellant made to police prior to being read his Miranda rights and ordered those statements suppressed.

{110} Appellant filed a motion for reconsideration, which the trial court granted so that it could hold a hearing.

{¶11} At the suppression hearing, the court heard testimony from Detectives McGivern and Datillo. The court found that as to warrant one, the CS's information was sufficiently reliable and the time frame of the investigation was established. As to warrant two, the court found because warrant one was valid, warrant two was not based on information obtained as a result of an illegal search.

{¶12} Appellant subsequently entered into a plea agreement with plaintiff-appellee, the State of Ohio. Pursuant to the agreement's terms, appellant entered a no contest plea to trafficking in marijuana, possession of cocaine, corrupting another with drugs, one count of illegal use of a minor in nudity oriented material or performance, two counts of pandering sexually oriented material, and possessing criminal tools. In exchange, the state dismissed the remaining seven counts of illegal use of a minor in nudity oriented material or performance and the remaining two counts of pandering sexually oriented material. The state also dismissed another indictment against appellant for furnishing false identification. The trial court accepted appellant's plea and entered findings of guilt.

{¶13} The court later held a sentencing hearing where it sentenced appellant to five years of community control sanctions, including a \$5,000 fine, a no contact order with the victim, and 500 hours of community service. Additionally, the court classified appellant as a Tier I sex offender.

{¶14} Appellant filed a timely notice of appeal on June 26, 2012.

{¶15} Appellant raises four assignments of error each of which asserts the trial court erred in overruling his motion to suppress. Thus, the same standard of review applies to each assignment of error.

{¶16} Our standard of review with respect to a motion to suppress is first limited to determining whether the trial court's findings are supported by competent, credible evidence. *State v. Winand*, 116 Ohio App.3d 286, 288, 688 N.E.2d 9 (7th Dist.1996), citing *Tallmadge v. McCoy*, 96 Ohio App.3d 604, 608, 645 N.E.2d 802 (9th Dist.1994). Such a standard of review is appropriate as, "[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of fact and is in

the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Venham*, 96 Ohio App.3d 649, 653, 645 N.E. 2d 831 (4th Dist.1994). An appellate court accepts the trial court's factual findings and relies upon the trial court's ability to assess the witness's credibility, but independently determines, without deference to the trial court, whether the trial court applied the appropriate legal standard. *State v. Rice*, 129 Ohio App.3d 91, 94, 717 N.E.2d 351 (7th Dist.1998). A trial court's decision on a motion to suppress will not be disturbed when it is supported by substantial credible evidence. *Id.*

{¶17} Appellant's first assignment of error states:

THE TRIAL COURT ERRED BY OVERRULING THE MOTION TO SUPPRESS EVIDENCE REGARDING THE SEARCH OF DEFENDANT-APPELLANT'S HOME, WHEN THE OFFICERS LACKED PROBABLE CAUSE TO REQUEST A SEARCH WARRANT.

{¶18} Appellant argues that the detectives here had no "facts" in the affidavit for warrant one but only "allegations." He claims they had to do something to confirm or deny the allegations made by the CS. Without conducting some investigation into the CS's allegations, appellant asserts the detectives lacked any specific and articulable information concerning alleged criminal activity. Therefore, appellant contends, the trial court should have suppressed the evidence obtained during the search of his home.

{¶19} The Ohio Supreme Court has held:

In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply

to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.

*State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph two of the syllabus. Given the standard, in this case we must simply determine whether we can say the detectives' affidavit provided a substantial basis for the issuing court's conclusion that there was a fair probability marijuana, counterfeit money, personal computers, and linens and pillows would be found in appellant's residence. *Id.* at 330. Search warrants and their accompanying affidavits enjoy a presumption of validity. *State v. Wallace*, 7th Dist. Nos. 11 MA 137-11 MA 155, 2012-Ohio-6270, ¶27.

{¶20} Regarding the reliability of the CS, the trial court pointed to the statement in the affidavit that the CS "has proven reliable in the past to Canfield Police Department Investigations." The court acknowledged this statement was somewhat vague, but it found that given the standard it was to apply in determining if probable cause existed, the affidavit was sufficient.

{¶21} A judge may find probable cause exists for a search warrant based on hearsay provided there is a substantial basis (1) for believing the source of the hearsay to be credible and (2) for believing there is a factual basis for the information furnished. Crim.R. 41(C)(2).

{¶22} A statement by the affiant-officer that the informant has been reliable in the past is generally sufficient to show the informant's reliability. *State v. Karr*, 44 Ohio St.2d 163, 166, 339 N.E.2d 641 (1975). "The fact that an informant has provided reliable information in the past gives the magistrate a definite indication of credibility." *Id.* But it is also strongly advised that the affiant provide facts as to the number of past incidents the informant helped with, the manner of information

provided, and the degree of accuracy so that the judge can be fully informed of the grounds for the informant's reliability. *Id.*

{¶23} In this case, the affidavit for warrant one specifically stated the CS "has been proven reliable in the past to Canfield Police Department Investigations as the CS supplied information which lead to the arrest and conviction(s) of others, which also included execution of search warrant(s)." By making this statement in the affidavit Det. McGivern vouched for the CS's credibility and provided a substantial basis for believing the CS to be credible.

{¶24} And as to the factual basis for the information furnished, the CS's information came from his own observations of appellant's home. The basis of knowledge is sufficient from an unnamed informant when it is the informant's personal observation, which is then related to the affiant. *State v. Blair*, 7th Dist. No. 95-JE-8, 1996 WL 342215, \*3 (June 18, 1996).

{¶25} Appellant contends that the detectives had a "reckless disregard for the truth" because they failed to confirm or deny the accuracy of the CS's statements. In support, he cites to *State v. Waddy*, 73 Ohio St.3d 424, 588 N.E.2d 819 (1992), where the Court stated that in order to "successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.'" *Id.* at 441, quoting *Franks v. Delaware* (1978), 438 U.S. 154, 155-156, 98 S.Ct. 2674, 57 L.Ed.2d 667.

{¶26} What appellant fails to recognize, however, is that "[t]he right in *Franks* to attack the truthfulness of averments in a search warrant affidavit is restricted solely to false or untruthful statements by the affiant and not hearsay statements of others, including confidential informants." (Emphasis added.) *State v. Clark*, 4th Dist. No. 92 CA 485, 1993 WL 216319, \*5, fn. 2 (June 22, 1993). There is no indication in this case that the detectives acted with reckless disregard for the truth in the statements they made. Instead, they truthfully reported what the CS told them. And while this is clearly hearsay, hearsay is an acceptable basis for a search warrant application.

*State v. Wilson*, 156 Ohio App.3d 1, 2004-Ohio-144, 804 N.E.2d 61, ¶11 (8th Dist.); Crim.R. 41(C)(2).

{¶27} Additionally, an affidavit based solely on hearsay by confidential informants has been upheld in the past. For instance, in *State v. Taylor*, 82 Ohio App.3d 434, 612 N.E.2d 728 (2d Dist.1992), the court found sufficient an affidavit that stated a confidential informant had personally seen large amounts of cocaine being prepared for distribution within the past 24 hours at the house to be searched and the affiant officer relied on assurances from another officer, who relayed the informant's statements to the affiant, that the informant was reliable and had given information in the past that had led to felony arrests.

{¶28} Thus, the trial court properly found the affidavit for warrant one contained sufficient statements regarding the CS's reliability and the CS's statements were sufficient probable cause on which to base the warrant.

{¶29} Accordingly, appellant's first assignment of error is without merit.

{¶30} Appellant's second assignment of error states:

THE TRIAL COURT ERRED BY OVERRULING THE MOTION TO SUPPRESS EVIDENCE REGARDING THE SEARCH OF DEFENDANT-APPELLANT'S COMPUTER, WHEN THE OFFICERS FAILED TO TAKE ANY STEPS WHATSOEVER TO CONFIRM OR DENY THE ALLEGATIONS OFFERED BY THE PRIVATE CITIZEN.

{¶31} In this assignment of error, appellant makes the same argument as he did in his first assignment of error. He argues that the detectives, with reckless disregard for the truth, failed to take any steps to corroborate the CS's allegations. This time he urges, however, that the trial court should have suppressed the evidence obtained during the search of his computer.

{¶32} As discussed in detail in appellant's first assignment of error, there was evidence that the CS had proven reliable in the past, the CS relayed his personal observations to the detectives, and hearsay is acceptable in an affidavit for a search

warrant. And while corroborating evidence would have bolstered the detective's affidavit, appellant can point to no case law that requires an officer to corroborate the information given by a confidential informant who has been proven reliable in the past.

{¶33} Accordingly, appellant's second assignment of error is without merit.

{¶34} Appellant's third assignment of error states:

THE TRIAL COURT ERRED BY OVERRULING THE MOTION TO SUPPRESS EVIDENCE WHEN THE AFFIDAVITS NEVER LISTED A DATE THAT THE COOPERATING SOURCE OBSERVED EVIDENCE OF CRIMINAL ACTIVITY, MAKING WHATEVER INFORMATION WAS PROVIDED "STALE."

{¶35} Here appellant asserts the affidavit for warrant one was insufficient because it did not contain a timeframe for when the CS witnessed the criminal activity or evidence.

{¶36} A search warrant affidavit must present timely information and include facts so closely related to the time of issuing the warrant as to justify a finding of probable cause at that time. *State v. Hollis*, 98 Ohio App.3d 549, 554, 649 N.E.2d 11 (11th Dist.1991). When examining whether information contained in a search warrant's affidavit is stale, courts should consider (1) the character of the crime; (2) the criminal; (2) whether the thing to be seized is perishable and easily transferable or of enduring utility to its holder; (4) the place to be searched; and (5) whether the information in the affidavit relates to a single isolated incident or protracted ongoing criminal activity. *State v. Pritt*, 7th Dist.-12-114, 2002-Ohio-4487, ¶13. There is no arbitrary time limit on how old information can be; the alleged facts simply must justify the conclusion that the contraband is present on the premises to be searched. *State v. Jones*, 72 Ohio App.3d 522, 526, 595 N.E.2d 485 (6th Dist.1991).

{¶37} In the present case, the trial court found the affidavit set out a sufficient timeline. The court noted the affidavit listed dates of searches and interviews, both of

which occurred within six days of the issuance of the search warrant.

{¶38} The affidavit for warrant one stated that on January 15, 2009, Det. McGivern was briefed by the school resource officer regarding counterfeit bills seized at the MCCTC. That same day, Det. McGivern went to the CS's house where he consensually searched the CS's bedroom and located another counterfeit bill. The CS told Det. McGivern the counterfeit money was taken from appellant's residence. The CS told Det. McGivern that appellant "has" stacks of counterfeit bills in his residence and identified appellant's address. The CS also told Det. McGivern that appellant "always has" a large amount of marijuana at his residence and "allows" Canfield High School students to use it. The next day, during an interview, the CS told Det. McGivern that he is employed by appellant, appellant performed oral sex on him on numerous occasions, appellant compelled the CS to perform oral sex, and appellant threatened to dismiss the CS from his job if he did not "continue" to engage in sexual activity.

{¶39} The better practice here would have been to include information as to when exactly the CS had seen the drugs and counterfeit money at appellant's residence. But the use of the words "has," "always has," "allows," and "continue" justify a conclusion that Det. McGivern was not facing an isolated incident here. Instead, the CS's statements indicated an on-going, present occurrence and demonstrated the items were likely located in appellant's house at the time. And the CS made these statements to Det. McGivern just days before the search warrant was issued. Given that we are to afford great deference to the judge's determination of probable cause and resolve marginal cases in favor of upholding the warrant, it was reasonable for the issuing judge to have concluded the CS's information was not stale and marijuana, counterfeit currency, and other contraband were currently located at appellant's residence as part of an on-going affair.

{¶40} Accordingly, appellant's third assignment of error is without merit.

{¶41} Appellant's fourth assignment of error states:

THE TRIAL COURT ERRED BY OVERRULING THE MOTION

TO SUPPRESS EVIDENCE REGARDING THE 2ND SEARCH WARRANT, AS IT WAS ISSUED BASED SOLELY ON THE DEFECTIVE ISSUANCE OF THE 1ST SEARCH WARRANT, THEREBY RENDERING THE EVIDENCE INADMISSIBLE.

{¶42} Finally, appellant argues warrant two was invalid because it was issued solely as a result of the items seized during the execution of warrant one thus rendering it "the fruit of the poisonous tree."

{¶43} Evidence obtained by the exploitation of an illegal search must be suppressed as the "fruits of the poisonous tree." *State v. Haslam*, 7th Dist. No. 08-MO-4, 2009-Ohio-696, ¶25. The information in the affidavit for warrant two was based in large part on the evidence seized in the execution of warrant one and also repeated the information contained in the affidavit for search warrant one. Because warrant one was valid, appellant's "fruits of the poisonous tree" argument fails because there is no "poisonous tree."

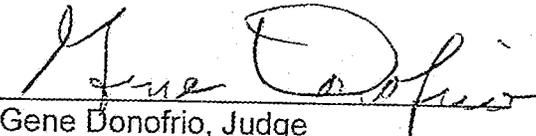
{¶44} Accordingly, appellant's fourth assignment of error is without merit.

{¶45} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, J., concurs.

Waite, J., concurs.

APPROVED:

  
Gene Donofrio, Judge