

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-06-116
 :
 - vs - : OPINION
 : 7/9/2012
 :
 CHAUNCY LAVONN QUINN, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-01-0103

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HENDRICKSON, J.

{¶ 1} Appellant, Chauncy Lavonn Quinn, appeals his conviction in the Butler County Court of Common Pleas for possession of marijuana and possession of cocaine. For the reasons stated below, we affirm the decision of the trial court.

{¶ 2} On December 9, 2010, Detective Sam Adams from the Special Operations Unit of the Middletown Police Department obtained a search warrant for 804 Elwood Street. The search warrant was based on two facts. First, Middletown Police Department had received

complaints that the individual living at 804 Elwood, Allen Starks, was allowing others to store a large amount of marijuana and cocaine in the home. It was alleged that the marijuana and cocaine were "then being distributed in and around the city of Middletown to be sold for profit." The affidavit did not include when the police heard of this information or the complainant's basis of knowledge or reliability.

{¶ 3} Second, the search warrant was based on a "trash pull" conducted at 804 Elwood, where police officers inspected three garbage bags that had been discarded in an alley. The search warrant was issued within 72 hours after officers conducted the trash pull. During the trash pull, Detective Adams found "several torn baggies, marijuana cigarettes, loose marijuana, as well [as] a small baggie of marijuana." Detective Adams also discovered saran wrapped packages, common in shape and size to the packaging of a kilogram of cocaine, which contained a substance that tested positive for cocaine or crack cocaine. Moreover, "[a] large saran wrapped package with tape around the outside was also located and found to have contained a large amount of [m]arijuana inside it." Several documents that were addressed to Allen Starks of 804 Elwood Street were also found in the garbage.

{¶ 4} On December 13, 2010, Detective Adams and other Middletown police officers executed the search warrant. The search warrant contained a provision which allowed officers to search "all persons" in the residence. While police officers were performing the search, appellant approached the residence, climbed the steps, and opened the front screen door to the home. Appellant possessed a key, but the parties contest whether appellant used this key to gain entry. Detective Adams testified that appellant then saw the police officers, turned around, and ran. Appellant tripped coming off the front porch and Detective Adams made contact with him and secured him. Thereafter, a search was conducted where cocaine and marijuana were found on appellant's person.

{¶ 5} Appellant was indicted on two counts of possession of cocaine and one count

of possession of marijuana. Appellant filed a motion to suppress the evidence, arguing that the search warrant was unconstitutional and that officers violated his constitutional rights when they searched him pursuant to the warrant. Thereafter, the trial court denied the motion to suppress and appellant pled no contest to the charges in the indictment. Appellant was sentenced to twelve months imprisonment. Appellant now appeals, asserting the following assignments of error:

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED IN OVERRULING THE MOTION TO SUPPRESS.

{¶ 8} Assignment of Error No. 2:

{¶ 9} IF THE SEARCH WARRANT WAS INVALID, WHETHER THE ARRESTING OFFICER POSSESSED PROBABLE CAUSE TO SEIZE AND SEARCH THE APPELLANT.
[SIC]

{¶ 10} For ease of discussion, we will discuss appellant's first and second assignments of error together. In appellant's first assignment of error, he argues that the trial court erred when it denied his motion to suppress. Specifically, appellant contends, 1) the search of the garbage violated the Ohio Constitution; 2) the search warrant was not based on probable cause; 3) the "all persons" provision in the search warrant was invalid; and 4) the search warrant does not fall within the "good faith" exception.

{¶ 11} We begin by noting that appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Davenport*, 12th Dist. No. CA2008-01-011, 2009-Ohio-557, ¶ 6; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. When considering a motion to suppress, the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility. *State v. Eyer*, 12th Dist. No. CA2007-06-071, 2008-Ohio-1193, ¶ 8. In turn, the appellate court must accept the trial court's findings of fact so long as they are supported by

competent, credible evidence. *State v. Lange*, 12th Dist. No. CA2007-09-232, 2008-Ohio-3595, ¶ 4; *State v. Bryson*, 142 Ohio App.3d 397, 402 (8th Dist.2001). After accepting the trial court's factual findings as true, the appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *State v. Forbes*, 11th Dist. No. CA2007-01-001, 2007-Ohio-6412, ¶ 29; *State v. Dierkes*, 12th Dist. No. 2008-P-0085, 2009-Ohio-2530, ¶ 17.

{¶ 12} The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and provides that " * * * no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Generally, evidence obtained as a result of an illegal search or an illegal search warrant will be excluded. *State v. Dubose*, 12th Dist. No. CA2008-01-007, 2008-Ohio-5933, ¶ 11-12. The exclusionary rule, while not an express mandate found in the Fourth Amendment, is inherent in its protective language and "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *State v. Cobb*, 12th Dist. No. CA2007-06-153, 2008-Ohio-5210, ¶ 22; *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405 (1984).

I. Constitutionality of Trash Pull

{¶ 13} In appellant's first argument, he urges this court to find that the Ohio Constitution provides greater protection than the Fourth Amendment of the U.S. Constitution and prohibits warrantless trash pulls. Thus, appellant's argument is that the search warrant which authorized the police to search him was unlawful as it was based on a trash pull that violated the Ohio Constitution. Therefore, the evidence found on appellant should be suppressed.

{¶ 14} The United States Supreme Court has found that the protections of the Fourth

Amendment of the U.S. Constitution do not extend to garbage that is voluntarily left for trash collection in an area which is susceptible to open inspections and "[a]ccessible to animals, children, scavengers, snoops, and to other members of the public." *California v. Greenwood*, 486 U.S. 35, 40, 108 S.Ct. 1625 (1988). Although the U.S. Supreme Court has found that the Fourth Amendment does not protect garbage left at roadsides, the Court has held that a state may impose greater restrictions on police activity pursuant to its own state constitution than is required by federal constitutional standards. *Id.* at 43.

{¶ 15} Section 14, Article I of the Ohio Constitution provides that the "right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated." This language is "virtually identical to the language of the Fourth Amendment." *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶ 10, fn.1. "The Ohio Supreme Court has held that [the] Ohio Constitution does not impose greater restrictions or broader guarantees than the Fourth Amendment regarding the legality of searches and seizures." *State v. Johnson*, 190 Ohio App.3d 750, 2010-Ohio-5808, ¶ 45 (12th Dist.), citing *State v. Robinette*, 80 Ohio St.3d 234, 238 (1997). "[W]here the provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by the Ohio Constitution are coextensive with those provided by the United States Constitution." *Robinette*. Further, the Ohio Supreme Court has reasoned that it is reluctant to "impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment." *Id.* at 239.

{¶ 16} We decline to extend the protections of the Ohio Constitution beyond the scope of protection provided by the Fourth Amendment of the U.S. Constitution for trash pulls. We note that this court has repeatedly held that neither the Ohio Constitution nor the Fourth Amendment protects garbage that is voluntarily left for trash collection. *State v. Young*, 12th

Dist. No. CA2005-08-074, 2006-Ohio-1784, ¶ 16; *State v. Ackers*, 12th Dist. No. CA2007-07-163, 2008-Ohio-4164, ¶ 10. In *Young*, this court reasoned that garbage voluntarily left for trash collection in an area which is susceptible to open inspections is not protected by the Fourth Amendment because "garbage is accessible to the public, anyone is free to examine it. Therefore the police are likewise free to search it for evidence of criminal activity." *Id.* at ¶ 16.

{¶ 17} We also find the cases on which appellant relies in support of his argument unpersuasive. Although the courts in these cases expanded the constitutional protections for garbage, both courts applied their own respective state constitutions in reaching that decision. In *State v. Hempele*, 120 N.J. 182, 195, 576 A.2d 793 (1990), the New Jersey Supreme Court reasoned that a police officer must possess a warrant to conduct a trash pull. However, the New Jersey Supreme Court has a clear history of departing from the U.S. Supreme Court jurisprudence; it noted that the court had found on several occasions that the parallel provision in the New Jersey Constitution "affords our citizens greater protection against unreasonable searches and seizures than does the [F]ourth [A]mendment." *Id.* Moreover, *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind.2005), is also inapposite to this case because the Indiana Supreme Court uses a different test than the U.S. Supreme Court and the Ohio Supreme Court in determining whether a search is reasonable.¹

{¶ 18} Thus, in light of the Ohio Supreme Court's reluctance to expand the Ohio Constitution, our previous cases, and the lack of persuasive reasons appellant advances to enlarge the Ohio Constitution's protections, we find that appellant did not have a

1. The Indiana Supreme Court evaluates the constitutionality of searches by looking at the reasonableness of police conduct under a totality of the circumstances. *Litchfield* at 359. Both the U.S. Supreme Court and the Ohio Supreme Court evaluate the constitutionality of searches by whether a defendant has a subjective expectation of privacy which society is prepared to see as objectively reasonable or whether the government has physically intruded upon the property of a defendant." *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507 (1967); *State v. Gould*, 131 Ohio St.3d 179, ¶ 20 (2012); *United States v. Jones*, 132 S.Ct. 945 (2012).

constitutionality protected privacy interest in the garbage. Therefore, the evidence obtained from appellant's person should not be suppressed on the basis that the police officers violated the Fourth Amendment when they conducted a trash pull.

II. Probable Cause for Search Warrant

{¶ 19} In appellant's second issue, he argues that the evidence should be suppressed because the trash pull and complaints about drug activity contained in the affidavit did not establish probable cause for the issuance of the search warrant.

{¶ 20} As stated above, the Fourth Amendment requires that all warrants should issue upon probable cause. Evidence that is obtained in violation of the Fourth Amendment is subject to exclusion. *Dubose*, 12th Dist. No. CA2008-01-007, 2008-Ohio-5933 at ¶ 11-12. However, the exclusionary rule does not apply when police properly execute a legal warrant issued by a detached magistrate and supported by probable cause. *State v. George*, 45 Ohio St.3d 325 (1989). A search warrant may be issued upon a showing of probable cause based upon the totality of the circumstances presented in an affidavit. *State v. Goins*, 5th Dist. No. 05-8, 2006-Ohio-74, ¶ 12, citing *George*. In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *George* at paragraph one of the syllabus, following *Illinois v. Gates*, 462 U.S. 213, 238-239, 103 S.Ct. 2317 (1983).

{¶ 21} When reviewing the decision to issue a warrant, neither a trial court nor an appellate court will conduct a de novo determination as to whether the affidavit provided sufficient probable cause. *Cobb*, 12th Dist. No. CA2007-06-153, 2008-Ohio-5210 at ¶ 24. Instead, a reviewing court need only ensure that the issuing judge had a substantial basis for

concluding that the probable cause existed based on the information contained in the four corners of the affidavit filed in support of the warrant. *Id.*; *State v. Landis*, 12th Dist. No. CA2005-10-428, 2006-Ohio-3538, ¶ 12. Therefore, the trial court's finding of probable cause should be given great deference and any "doubtful or marginal cases should be resolved in favor of upholding the warrant." *Cobb* at ¶ 15, citing *George* at paragraph two of the syllabus.

{¶ 22} The first paragraph of the affidavit which states that the Middletown Police Department has received complaints about drug activity at 804 Elwood, standing alone, is insufficient to establish probable cause to justify the issuance of the search warrant. Pursuant to Crim.R. 41(C), "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." It is imperative that the affidavit establish that the information coming from the anonymous source was timely. *State v. Akers*, 12th Dist. No. CA2007-07-163, 2008-Ohio-4164, ¶ 20. In this case, there is no way to determine whether this information was timely or stale as the first paragraph does not mention when the Middletown Police Department received complaints regarding the drug activity. The first paragraph is also lacking because it did not indicate the complainant's "basis of knowledge" and "some underlying circumstances supporting the affiant's belief that the informant is credible." *State v. King*, 12th Dist. No. CA2008-03-085, 2008-Ohio-5840, ¶ 15. Thus, due to these insufficiencies, we find that probable cause was not established for the search warrant based solely upon these complaints.

{¶ 23} We do, however, find that the remaining portion of the affidavit provided the necessary probable cause for the issuance of the warrant. As discussed above, Ohio recognizes that a trash pull of garbage voluntarily left out does not violate the Ohio

Constitution's or Fourth Amendment's prohibitions against unreasonable searches. *Young*, 12th Dist. No. CA2005-08-074, 2006-Ohio-1784 at ¶ 16. The next step is then to determine whether the second paragraph of the affidavit which stated that illegal drugs were found in Starks' garbage established sufficient probable cause for the warrant to be issued. In *State v. Akers*, this court found that although an affidavit for a search warrant was deficient in regards to a confidential informant's tip, the search warrant was still valid because the affidavit recited evidence of illegal drug activity from a trash pull. This court stated,

[t]he junk mail tied the contents of the trash bags to 1101 Noyes Avenue, and the existence of the marijuana remains provided probable cause to search the home for marijuana regardless of who lived there. This same information also provided partial corroboration of the information that the police had received indicating that Akers was involved in drug trafficking out of 1101 Noyes Avenue.

Id. at ¶ 22.

{¶ 24} Similarly, in this case, police found many illegal drugs in the trash, including marijuana cigarettes, loose marijuana, a large "saran" wrapped package that contained marijuana, and a large saran wrapped package that contained cocaine. Moreover, the affidavit stated that documents found in the garbage of 804 Elwood Street tied the garbage to the residence.

{¶ 25} We also note that several other districts have come to this conclusion as well. In *State v. McGorty*, 5th Dist. No. 2007-CA-00257, 2008-Ohio-2643, ¶ 16, the court reasoned that the search warrant was supported by probable cause even when the affidavit did not provide adequate information of the confidential informant's tip because a trash pull corroborated the informant's tip. *See State v. Robinson*, 7th Dist. No. 10-CO-37, 2011-Ohio-6639 (sufficient probable cause established when confidential source's information was stale and uncorroborated but trash pull showed illegal drug activity).

{¶ 26} Therefore, we find that the magistrate had a substantial basis for concluding

that probable cause existed for issuing the search warrant.

III. "All Persons" Provision in Search Warrant

{¶ 27} In appellant's third issue, he argues that the search warrant does not meet the criteria for an "all persons" warrant pursuant to *State v. Kinney*, 83 Ohio St.3d 85 (1998).

{¶ 28} In *State v. Kinney*, the Supreme Court of Ohio held that "all persons on the premises" warrants are valid and do not violate the Fourth Amendment in limited circumstances. *Id.* at 90. "Where there is probable cause to support the search of every person within the warrant's scope, [an all persons on the premises warrant] will not be held invalid." *Id.* The Court noted the danger that an "innocent person may be swept up in a dragnet and searched." *Id.* at 95. Therefore, probable cause is more likely to exist when the search is to be conducted at night and the search of all persons will be conducted in a private residence. *Id.* at 96.

{¶ 29} In addition to probable cause, the court in *Kinney* also mandated a particularity requirement.

An "all persons" clause may still be carefully tailored to its justifications if probable cause to search exists against each individual who fits within the class of persons described in the warrant. The controlling inquiry is whether the requesting authority has shown probable cause that every individual on the subject premises will be in possession of, at the time of the search, evidence of the kind sought in the warrant. If such probable cause is shown, an "all persons" provision does not violate the particularity requirement of the Fourth Amendment.

Id.

{¶ 30} The court also stated "all persons" warrants are often appropriate in situations involving drug transactions. "Individuals who are present in a drug trafficking residence raise special concerns for law enforcement." *Id.* at 90. "A drug trafficking residence often has more than one person on the premises * * * [m]ost occupants are armed and dangerous." *Id.* "A search for illegal drugs is more likely to support a search of all persons than a search for

evidence of many other crimes." *Id.* at 91. "Nevertheless, although drug sales from a residence are more likely to create probable cause for a search of all persons within, we reject a per se rule that would find probable cause in all such cases." *Id.* at 94.

{¶ 31} Finally, the court noted that "we do not intend to make the process of determining the sufficiency of an affidavit a hypertechnical one. When an 'all persons' warrant is requested, determination of probable cause will still require practical common-sense decision making by magistrates." *Id.* at 95.

{¶ 32} We find that the affidavit presented probable cause for the magistrate to issue the "all persons" warrant. First, the affidavit detailed Detective Sam Allen's experience in investigating drug complaints and his knowledge of drug trafficking. Second, the affidavit also described a small private single family residence to be searched, requested the search to be completed at night, and noted that often weapons are used for protection by drug traffickers. As mentioned previously, the affidavit stated that the Middletown Police Department had received complaints that the residence was being used to store drugs for other persons and that a trash pull completed within the past 72 hours revealed several drug-related items, including "saran" wrapped packages for both cocaine and marijuana which is a common way for large amounts of drugs to be packaged and distributed. We find this case similar to our decision in *State v. McClendon*, 12th Dist. No. CA2006-06-025, 2007-Ohio-1656, in which this court upheld an "all persons" warrant where a defendant was alleged to be making crack cocaine sales out of his house, the warrant requested a nighttime search, and police had completed two controlled buys from defendant. Similar to *McClendon*, drug trafficking was involved in this case which raises concerns that individuals are armed on the premises and that all individuals on the premises are involved in drug activity. Therefore, based on these facts and circumstances, the trial court did not err in denying the motion to suppress regarding the "all persons" provision in the search warrant.

{¶ 33} Because we have found that probable cause supported the magistrate's issuance of the search warrant and the "all persons" provision of the search warrant is valid, appellant's argument that the search warrant did not fall into the good faith exception is rendered moot. Moreover, appellant's second assignment of error is also rendered moot as we find the search warrant valid.

{¶ 34} Appellant's first and second assignments of error are overruled.

{¶ 35} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.