No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

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LAWRENCE A. DIBBLE,
*Petitioner*,

v.

STATE OF OHIO,
*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF OHIO*

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**APPENDIX TO PETITION FOR WRIT OF CERTIORARI**

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APPENDIX A

2020 WL 826407
Supreme Court of Ohio.

The STATE of Ohio, Appellant,
v.
DIBBLE, Appellee.

No. 2018-0552
|
Submitted May 21, 2019
|
Decided February 20, 2020

**Synopsis**

**Background:** Defendant, who was charged with 20 counts of voyeurism and one count of sexual imposition, moved to suppress evidence obtained during a warrant search of his home, challenging the veracity of the affidavit in support of the warrant. The Court of Common Pleas, Franklin County, No. 10CR–03–1958, granted the motion. The State appealed. The Court of Appeals, 959 N.E.2d 540, affirmed. State sought review which was granted. The Supreme Court, 133 Ohio St.3d 451, 979 N.E.2d 247, reversed and remanded. On remand, defendant filed motion to suppress. The Court of Common Pleas denied motion, and defendant pled no contest to the charges. Defendant appealed. The Court of Appeals reversed and remanded. On remand, the Court of Common Pleas found that search warrant affidavit contained sufficient facts to support a finding of probable cause and that affidavit contained evidence sufficient to support a finding of probable cause was not so lacking in indicia of probable cause as to render official belief in its existence unreasonable. Defendant appealed. The Court of Appeals, 92 N.E.3d 893, reversed.

**Holdings:** The Supreme Court, DeWine, J., held that:

[1] a court may look to information outside the four corners of the affidavit, including information know to the officer and revealed to the magistrate, when evaluating an officer's good-faith reliance on a search warrant, and

[2] police officer's good faith reliance on search warrant for defendant's home was reasonable.

Reversed and remanded.

Donnelly, J., filed a dissenting opinion in which O'Connor, C.J., joined.

West Headnotes (6)

[1] **Criminal Law** Searches, seizures, and arrests

**Criminal Law** Searches and seizures in general

Because the exclusionary rule's purpose is to deter unlawful police conduct, evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. U.S. Const. Amend. 4.

1 Cases that cite this headnote

[2] **Searches and Seizures** Complaint, Application or Affidavit

It is ultimately the responsibility of the magistrate to determine whether there is a sufficient legal basis to issue a search warrant, and in most instances, police officers are not expected to second-guess the judge. U.S. Const. Amend. 4.

[3] **Criminal Law** Deliberately or recklessly false affidavit

In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression of evidence seized pursuant to a search warrant is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. U.S. Const. Amend. 4.

[4] **Criminal Law** Determinative process; matters or issues considered

A court may look to information outside the four corners of the affidavit, including information



 

known to the officer and revealed to the magistrate, when evaluating an officer's good-faith reliance on a search warrant. U.S. Const. Amend. 4.

[5] **Criminal Law** Determinative process; matters or issues considered

Rule of criminal procedure governing the issuance of search warrants, which provides, in part, that before issuing a warrant a judge may require the affiant to appear and be examined under oath, with the affiant's testimony being admissible on a motion to suppress if taken down by a court reporter and transcribed, did not bar consideration of unrecorded oral testimony officer provided to magistrate when analyzing whether officer relied in good-faith on the issuance of search warrant; the recording provision was nestled in paragraph focusing on a judge's finding of probable cause, thus it was not clear that it applied beyond a court's review of the judge's probable cause determination, and the rule was a rule of admission, not exclusion. U.S. Const. Amend. 4; Ohio Crim. R. 41(C)(2).

[6] **Criminal Law** Particular cases

Police officer's good faith reliance on search warrant for defendant's home was reasonable; detective testified that he told the judge about the allegations regarding photographs taken by defendant, who was a high school teacher, of underage students in "practically see-through" unitards, he expressed concern to the judge about where and how those photographs were being used, and the judge issued the search warrant after hearing the testimony. U.S. Const. Amend. 4.

APPEAL from the Court of Appeals for Franklin County, No. 16AP-629, 2017-Ohio-9321.

**Attorneys and Law Firms**

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellant.

Carpenter, Lipps & Leland, L.L.P., Kort Gatterdam, and Erik P. Henry, Columbus, for appellee.

**Opinion**

DeWine, J.

*1 **{¶ 1}** This case deals with the good-faith exception to the exclusionary rule. Specifically, we are asked whether a court may consider evidence beyond the four corners of a search-warrant affidavit in determining whether an officer reasonably and in good faith relied on that warrant. We conclude that a court may do so.

## I. Nine Years of Litigation on a Motion to Suppress

**{¶ 2}** Laurence Dibble was a high-school teacher at the Wellington School in Columbus. He is accused of groping one student and secretly videotaping numerous other students in a school locker room while they were undressing.

**{¶ 3}** The police began investigating Dibble after two former students complained about improper sexual behavior. One of the former students told police that Dibble had touched her inappropriately while at school. Subsequently, the police obtained a warrant authorizing the search of Dibble's home. During the search, police seized videotapes of female students undressing. The recordings appeared to have been filmed by a camera that Dibble had hidden in the school locker room.

**{¶ 4}** In 2010, a grand jury indicted Dibble for one count of sexual imposition and 20 counts of voyeurism. The sexual-imposition charge related to the school-groping incident, while the voyeurism counts were based on the filming of the students while undressing.

**{¶ 5}** Dibble filed a motion to suppress seeking to invalidate the search warrant on the basis that the warrant affidavit contained materially false statements. The affidavit described incidents involving "Victim #1" and "Victim #2." Victim #1—the subject of the sexual-imposition offense—was the 18-year-old student whom Dibble was alleged to have groped at school. Victim #2 was the other woman who contacted



 

the police. Dibble engaged in sexual contact with and took naked photographs of her. During the motion hearing, the detective acknowledged that the conduct involving Victim #2 did not allege a crime because she was an adult and no longer a student of Dibble's at the time, and because she said that she had consented to the interaction with Dibble. The detective further conceded that because the allegation of inappropriate physical contact with respect to Victim #1 occurred only at school, it did not by itself provide a basis for searching Dibble's home.

**{¶ 6}** But the detective also testified about other sworn statements that he had made before the judge at the time the warrant was issued. Specifically, he told the judge that the women had discussed occasions during which Dibble had taken photos of them and other underage students at school wearing nearly see-through unitards, purportedly for a theater project. The detective said he expressed his concern to the judge about the nature and location of those photographs. While that information was provided to the judge under oath, it was not recorded or transcribed. The affidavit itself contained no information about the photographs that Dibble took of the children at school.

**{¶ 7}** The trial court initially granted the motion to suppress. It held that by referring to the woman who engaged in sexual conduct with Dibble in his home as a "victim," despite her own statements that she was a consenting adult at the time, the detective had made false statements in the affidavit with the intent of misleading the judge. On appeal, this court reversed that judgment, concluding that the detective had simply used the identifier "victim" to protect the woman's identity and not in an attempt to intentionally mislead the judge who issued the warrant. *State v. Dibble*, 133 Ohio St.3d 451, 2012-Ohio-4630, 979 N.E.2d 247 ("*Dibble I*").

***2 {¶ 8}** On remand, the trial court determined that the affidavit filed in support of the warrant did not establish probable cause to search the home. But the court further found that the detective had acted in good faith in relying on the warrant, and the court therefore denied Dibble's motion to suppress. After pleading no contest to all the charges, Dibble appealed the denial of the motion to suppress to the Tenth District Court of Appeals.

**{¶ 9}** The arguments on appeal centered on the good-faith exception that was set forth by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). We adopted the *Leon* analysis in *State v. Wilmoth*, 22 Ohio St.3d 251, 490 N.E.2d 1236 (1986). Under the good-faith exception, evidence obtained during a search conducted pursuant to a warrant that is unsupported by probable cause will not be excluded if the officers who obtained the evidence acted reasonably in relying on the warrant. *Leon* at paragraph one of the syllabus; *Wilmoth* at paragraph one of the syllabus. The *Leon* court explained, however, that suppression would still be appropriate in circumstances when (1) the supporting affidavit contained information the affiant knew to be false or would have known to be false but for reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his judicial role, (3) the warrant was based on an affidavit " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,' " or (4) the warrant is so facially deficient in terms of particularity that the executing officers could not reasonably presume it to be valid. *Leon* at 923, 104 S.Ct. 3405, quoting *Brown v. Illinois*, 422 U.S. 590, 610-611, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring in part); *State v. George*, 45 Ohio St.3d 325, 331, 544 N.E.2d 640 (1989).

**{¶ 10}** The Tenth District determined that the trial court had failed to consider the third situation discussed in *Leon*—whether the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *State v. Dibble*, 10th Dist. Franklin No. 13AP-798, 2014-Ohio-5754, 2014 WL 7462904 ("*Dibble II*"), ¶ 24. The Tenth District therefore remanded the case to the trial court to consider the third *Leon* factor. *Id.*

**{¶ 11}** On the third go-around, the trial court considered the remaining *Leon* factor and concluded that the affidavit was not so lacking in probable cause as to render the detective's reliance on the warrant unreasonable. Thus, the court denied the motion to suppress and Dibble appealed again.

**{¶ 12}** This time, the Tenth District concluded that under Crim.R. 41(C)(2), the detective's testimony regarding his unrecorded conversation with the judge was not admissible at the suppression hearing. *State v. Dibble*, 2017-Ohio-9321, 92 N.E.3d 893, ¶ 26 (10th Dist.) ("*Dibble III*"). Then, considering only the information in the affidavit, the Tenth District decided that it was not reasonable for the detective to have relied on the warrant because it was " 'based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Id.* at ¶ 39, quoting *Leon*, 468 U.S. at 923, 104 S.Ct. 3405, 82 L.Ed.2d 677. Having determined that the good-faith exception did not

apply, the court of appeals reversed the trial court's judgment and ordered that judgment be entered in favor of Dibble. *Id.* at ¶ 40.

***3 {¶ 13}** The state appealed, and we accepted the cause on the following proposition of law:

> In deciding whether the good-faith exception to the exclusionary rule applies to a search conducted under a search warrant, a court can consider sworn but unrecorded oral information that the police gave to the judge at the time of the approval of the warrant.

*See* 153 Ohio St.3d 1432, 2018-Ohio-2639, 101 N.E.3d 464. We answer that question in the affirmative.

## II. The Good-Faith Exception to the Exclusionary Rule

### A. The objective of the exclusionary rule is to deter police misconduct

**{¶ 14}** The Fourth Amendment to the United States Constitution [1] provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

While the text of the Fourth Amendment says nothing about suppressing evidence obtained in violation of the rights enunciated therein, the United States Supreme Court has created an "exclusionary rule"—"a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. United States*, 564 U.S. 229, 231-232, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

**{¶ 15}** Exclusion is not meant to serve as a remedy for the injury caused by an unconstitutional search or seizure but rather as a deterrent against future violations. *Id.* at 236-237, 131 S.Ct. 2419. Thus, the question whether the exclusionary sanction should be imposed is " 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' " *Leon*, 468 U.S. at 906, 104 S.Ct. 3405, 82 L.Ed.2d 677, quoting *Illinois v. Gates*, 462 U.S. 213, 223, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

**{¶ 16}** "[T]he deterrence benefits of exclusion 'vary with the culpability of the law enforcement conduct' at issue." *Davis* at 239, 131 S.Ct. 2419, quoting *Herring v. United States*, 555 U.S. 135, 143, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (cleaned up). When a Fourth Amendment violation is occasioned by "deliberate," "reckless," or "grossly negligent" police conduct, the deterrent benefits of exclusion are said to outweigh its costs. *Id.* at 238, 131 S.Ct. 2419; *see also Herring* at 144, 129 S.Ct. 695 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system"). But, when police act in an objectively reasonable manner in executing a search believed in good faith to be legal, there is no bad conduct to deter. *Leon* at 918-920, 104 S.Ct. 3405.

**{¶ 17}** The United States Supreme Court has held that the exclusionary rule should not be applied in situations in which an officer has relied in good faith on a warrant issued by a neutral and detached magistrate or judicial officer, notwithstanding the fact that the warrant is later found to be invalid. *Id.* at 913, 104 S.Ct. 3405. But "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." *Id.* at 922, 104 S.Ct. 3405.

***4 [1] [2] {¶ 18}** Because the exclusionary rule's purpose is to deter unlawful police conduct, evidence should be suppressed " 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.' " *Leon*, 468 U.S. at 919, 104 S.Ct. 3405,

82 L.Ed.2d 677, quoting *United States v. Peltier*, 422 U.S. 531, 542, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975). When a detached and neutral magistrate has issued a search warrant and the police have acted within its scope, there is typically nothing more that the police can do to comply with the law. *Leon* at 920-921, 104 S.Ct. 3405. It is ultimately the responsibility of the magistrate to determine whether there is a sufficient legal basis to issue a warrant, and in most instances, police officers are not expected to second-guess the judge. *Id.* at 921, 104 S.Ct. 3405. Suppressing evidence because of an "error by a magistrate can never deter future police misconduct." *Wilmoth*, 22 Ohio St.3d at 266, 490 N.E.2d 1236; *see also Leon* at 921, 104 S.Ct. 3405.

**[3] {¶ 19}** The *Leon* court ultimately summarized the exclusion calculus this way:

> In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

*Leon* at 926, 104 S.Ct. 3405.

### B. All of the circumstances must be considered

**[4] {¶ 20}** The question we must address in this case is whether a court may look to information outside the four corners of the affidavit when evaluating an officer's good-faith reliance on a warrant. Viewed in light of the exclusionary rule's emphasis on deterrence, it becomes apparent that the answer is yes.

**{¶ 21}** The case of *United States v. Frazier*, 423 F.3d 526 (6th Cir.2005) is instructive. There, the Sixth Circuit considered whether information omitted from the affidavit but provided to the magistrate under oath could be considered in evaluating the officer's good-faith reliance on the warrant subsequently issued by the magistrate. In holding that the external information could be considered, the Sixth Circuit pointed out that in both *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, and *Massachusetts v. Sheppard,* 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), the Supreme Court considered information outside the four corners of the affidavit in deciding whether the officers had acted in good faith. The *Leon* court explained:

> [O]ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances—including whether the warrant application had previously been rejected by a different magistrate—may be considered.

*Leon* at 922, fn. 23, 104 S.Ct. 3405. By permitting consideration of whether the application had previously been rejected, the *Leon* court necessarily authorized courts to look beyond the four corners of the affidavit. *See Frazier* at 534. Likewise, in *Sheppard*, the court relied upon a conversation between the judge and the detective at the time the warrant was issued in determining that the detective had reasonably relied on the warrant. *Sheppard* at 989-991, 104 S.Ct. 3424.

**{¶ 22}** Because the goal of the exclusionary rule is deterrence, it makes sense to consider information known to the officer and revealed to the judge even when that information is not included in the affidavit. As the *Frazier* court explained:

> [W]e are unable to envision *any* scenario in which a rule excluding from the *Leon* analysis information known to the officer and revealed to the magistrate would deter police misconduct. *Leon* only comes into play when an officer has a warrant, albeit a defective one. Because a judge's initial probable cause determination is limited to the

> four corners of the affidavit, an officer has no incentive to exclude from the affidavit information that supports a finding of probable cause only to reveal this information to the magistrate by parol. If the affidavit is not sufficient to support a finding of probable cause, the officer is unlikely to get a search warrant, and if the officer does not get a search warrant, he may not rely on *Leon.* Any deterrent—even the exclusionary rule—is wholly unnecessary in the absence of an incentive to engage in undesirable behavior.

***5** (Emphasis sic and citation omitted.) *Frazier* at 535. Thus, the court held that "a court reviewing an officer's good faith under *Leon* may look beyond the four corners of the warrant affidavit to information that was known to the officer and revealed to the issuing magistrate." *Id.* at 535-536.

**{¶ 23}** The Fourth Circuit similarly found it "proper to consider any contemporaneous oral statements to the magistrate in conjunction with the supporting affidavit in assessing the reasonableness of an officer's reliance on a warrant." *United States v. Legg*, 18 F.3d 240, 243 (4th Cir.1994), citing *United States v. Edwards*, 798 F.2d 686, 691-692 (4th Cir.1986). This is because the good-faith analysis is based not on the sufficiency of the affidavit, but rather on the officer's reliance on the *warrant*, and the latter inquiry must take into account all the information both known to the officer and presented to the magistrate. *Legg* at 243, fn. 1.

**{¶ 24}** The dissent acknowledges that it is appropriate to consider the totality of the circumstances when conducting a general review of an officer's good-faith reliance on a warrant. It contends, however, that evidence outside the four corners of an affidavit cannot be probative of the third *Leon* factor—whether the affidavit is so lacking in indicia of probable cause that the officer could not have reasonably relied upon it, 468 U.S. at 923, 104 S.Ct. 3405, 82 L.Ed.2d 677.

**{¶ 25}** In concluding that a court may not consider an officer's sworn testimony to the issuing judge in determining whether the officer executed a warrant in good faith, the dissent loses sight of the purpose of the exclusionary rule—to prevent police misconduct. Not surprising in light of the rule's focus on the officer's state of mind, the federal circuit courts have reached the opposite conclusion from that reached by the dissent.

**{¶ 26}** In *Legg*, the Fourth Circuit rejected the notion that an affidavit lacking sufficient indicia of probable cause categorically precluded application of the good-faith exception. 18 F.3d at 243, fn. 1. As that court explained, "even assuming that the affidavit itself lacked sufficient indicia of probable cause to support reasonable reliance on the warrant, the affidavit did not contain all of the facts presented to the magistrate." *Id.* at 243. Thus, the Fourth Circuit concluded that statements made to the magistrate, considered "in conjunction with" the affidavit, established an officer's objectively reasonable reliance on the warrant. *Id.* at 244; *see also United States v. Perez*, 393 F.3d 457, 463 (4th Cir.2004) (concluding that the affidavit, when considered together with oral statements presented to the magistrate, was not so lacking in indicia of probable cause that the officer could not have reasonably relied on the warrant).

**{¶ 27}** The Sixth Circuit, in *Frazier*, also considered information that was provided to the magistrate but was omitted from the affidavit when evaluating an officer's good-faith reliance on a warrant. The *Frazier* court determined that in light of the additional extrinsic information given to the magistrate, the insufficient affidavit was not so lacking in indicia of probable cause that it could not be reasonably relied upon. 423 F.3d at 535-536. In so holding, the court explained that evaluating whether an officer's reliance on a warrant was objectively reasonable requires a " ' "less demanding showing than the 'substantial basis' threshold required to prove the existence of probable cause in the first place." ' " *Id.* at 536, quoting *United States v. Carpenter*, 360 F.3d 591, 595 (6th Cir.2004), quoting *United States v. Bynum*, 293 F.3d 192, 195 (4th Cir.2002).

***6 {¶ 28}** Thus, even though an affidavit presented in support of a warrant might be insufficient, an officer's reliance on the warrant might nevertheless be reasonable when he has provided information to the magistrate beyond the affidavit. *See Legg* at 243, fn. 1. Therefore, a court "should examine the totality of the information presented to the magistrate [or judge] in deciding whether an officer's reliance on the warrant could have been reasonable." *Id.*



 

### III. Crim.R. 41(C)(2) Does Not Bar Consideration of Extrinsic Evidence for Purposes of the Good-Faith Analysis

**[5]** **{¶ 29}** Before reaching the constitutional question, the Tenth District determined that the sworn but unrecorded discussion that took place between the detective and the judge was inadmissible under Crim.R. 41(C)(2). *Dibble III*, 2017-Ohio-9321, 92 N.E.3d 893, at ¶ 30. That rule provides:

> If the judge is satisfied that probable cause exists, the judge shall issue a warrant identifying the property to be seized and naming or describing the person or place to be searched or the person or property to be tracked. * * * 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.*

(Emphasis added.) The conversation between the judge and detective regarding the unitard photographs was not recorded, transcribed, or made a part of the affidavit. Nonetheless, that information may be considered in evaluating the detective's good-faith reliance on the warrant under the totality of the circumstances, subject to any credibility determinations by the trial court. A few points compel this conclusion.

**{¶ 30}** First, the explicit terms of the rule do not bar consideration of such evidence. The recording provision in Crim.R. 41(C)(2) is nestled into a paragraph focused entirely on a judge's finding of probable cause when issuing a search warrant. Thus, it is not clear that the provision applies beyond the court's review of the judge's probable-cause determination. Further, it is a rule of admission, not a rule of exclusion: if the requirements of the rule are met, such "testimony shall be admissible at a hearing on a motion to suppress." Nothing in the language of the rule directs that unrecorded and untranscribed evidence may not be considered in determining an officer's good faith.

**{¶ 31}** The dissent concludes, based on the history of Crim.R. 41, that the rule should be read as prohibiting a court from considering unrecorded testimony for any purpose —not just a probable-cause determination. The recording requirement was included in Crim.R. 41 from the time of the rule's adoption in 1973. *See* Katz, *Ohio Rules of Criminal Procedure: A Guide to Criminal Procedure in Ohio Under the New Criminal Rules* 154-155 (1973). Thus, that requirement predated the United States Supreme Court's announcement of the good-faith exception to the exclusionary rule in its 1984 decision in *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677. Given that the good-faith exception to the exclusionary rule had not been enunciated at the time that Crim.R. 41 was adopted, it is difficult to conclude that the rule was meant to prohibit the use of unrecorded sworn testimony for the purpose of evaluating good faith.

***7** **{¶ 32}** Rather, as the dissent notes, the recording requirement was made a part of the rule "to insure a later review of the finding of probable cause." Katz at 157; *see also* 1 Katz, Giannelli, Lipton, & Crocker, *Criminal Law*, Section 9:10, 209 (3d Ed.2009) (testimony in support of an affidavit), and at fn. 1, citing Crim.R. 41(C) and *Moya v. State*, 335 Ark. 193, 202, 981 S.W.2d 521 (1998) (holding pursuant to a state procedural rule that a court may not consider unrecorded oral testimony in determining probable cause, but that such testimony could be used to determine whether an officer relied in good faith on an otherwise invalid warrant). Indeed, when supplemental testimony is recorded, the reviewing court may consider that information in its review of the issuing judge's finding of probable cause; when the testimony is not recorded or transcribed, the court's review of probable cause is limited to the four corners of the affidavit. *See* Katz, Giannelli, Lipton, & Crocker at 209; *see also State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 39.

**{¶ 33}** But even if we were to read the rule as requiring that all such statements be recorded, it would not change the result. We have previously held that suppression is warranted for noncompliance with Crim.R. 41 only when the rule violation was of "constitutional magnitude," *Wilmoth*, 22 Ohio St.3d at 263, 490 N.E.2d 1236, or, in other words, " 'renders the search unconstitutional under traditional fourth amendment standards.' " (Emphasis deleted.) *Id.*, quoting

*United States v. Vasser*, 648 F.2d 507, 510 (9th Cir.1980). The *Vasser* court explained that evidence should be excluded for nonconstitutional rule violations only when " ' "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." ' " *Vasser* at 510, quoting *United States v. Radlick*, 581 F.2d 225, 228 (9th Cir.1978), quoting *United States v. Burke*, 517 F.2d 377, 386 (2d Cir.1975).

**{¶ 34}** None of those circumstances apply here. The Fourth Amendment has never been held to require suppression for a failure to record an oral conversation taken under oath as part of a warrant application. Indeed, the Amendment's explicit terms require only that the probable-cause determination be "supported by oath or affirmation." And as explained above, the court may consider all the circumstances in deciding whether the detective reasonably relied on the warrant. Nor is there any indication that the search would not have taken place or would have been more limited in scope had the oral conversation been transcribed. Indeed, the additional information provided to the judge about the inappropriate photographs of underage students further supported a finding of probable cause. Finally, there have been no allegations that either the judge or detective acted with deliberate intent to circumvent the rule's recording requirement.

**{¶ 35}** In addition, whether a court records an applicant officer's statements has no bearing on the officer's good-faith reliance on the warrant, because the officer has no control over the court's recording and transcription procedures. It would seem unduly onerous, once probable cause has been established, to require a court to delay issuing a search warrant until a court reporter is able to transcribe additional testimony and attach it to the warrant application. On the contrary, these are requirements that would likely be completed *after* the warrant has been issued, and the judge's subsequent failure to ensure fulfillment of those requirements would have no bearing on the officer's good-faith reliance that the warrant itself was based on probable cause. Indeed, the very fact that the issuing judge would take supplemental testimony from an officer during the application process would reasonably lead the officer to believe that the testimony has legal significance and is being properly considered in assessing probable cause.

***8 {¶ 36}** For those reasons, we conclude that Crim.R. 41(C)(2) does not bar consideration of unrecorded oral testimony for the purpose of evaluating a detective's good-faith reliance on the warrant.

## IV. Considering the Totality of the Information Presented to the Judge, the Detective's Reliance on the Warrant was Reasonable

**[6] {¶ 37}** Following our remand in *Dibble I*, the trial court twice determined that the detective relied on the warrant in good faith. The only question that remains is whether the detective's reliance on the warrant was objectively reasonable, notwithstanding the trial court's later determination that the affidavit was insufficient to establish probable cause. As explained above, we may consider "all of the circumstances," *Leon*, 468 U.S. at 922, 104 S.Ct. 3405, 82 L.Ed.2d 677, fn. 23, in evaluating the reasonableness of the detective's reliance on the warrant.

**{¶ 38}** The detective testified that he told the judge about the allegations regarding photographs taken by Dibble of underage students in "practically see-through" unitards. And he expressed concern to the judge about where and how those photographs were being used. The judge issued the search warrant after hearing this testimony. Based on all the information known to the detective and provided to the judge at the time the warrant was issued, it was entirely reasonable for the detective to rely on the judge's probable-cause determination.

**{¶ 39}** This is not a situation in which the applying officer has intentionally omitted facts that, if included, would tend to undermine a finding of probable cause. Rather, the information pertaining to the unitard photographs further supported a probable-cause determination. *See*, *e.g.*, *United States v. Martin*, 297 F.3d 1308, 1320 (11th Cir.2002).

**{¶ 40}** When viewing the affidavit in light of the totality of the information provided, the affidavit was not so lacking in indicia of probable cause that the detective's reliance on it was unreasonable. And the oral testimony given to the judge provides additional support for the allegations in the affidavit. Even if the statement that Dibble took naked photographs of a former student does not itself allege a crime, it was not unreasonable for the detective to connect that conduct with the inappropriate photographs that Dibble had taken at school. And since all that information was provided to the judge as well, it was reasonable for the detective to rely on the judge's verification that probable cause existed for the search.



 

**{¶ 41}** The error in this case belongs to the judge, not the detective. Because application of the exclusionary rule would not serve to deter any bad police conduct, suppression is unwarranted. We therefore reverse the judgment of the Tenth District and remand the matter to the trial court for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

Kennedy, Tucker, Fischer, and Stewart, JJ., concur.

Donnelly, J., dissents, with an opinion joined by O'Connor, C.J.

Michael Tucker, J., of the Second District Court of Appeals, sitting for French, J.

Donnelly, J., dissenting.

**{¶ 42}** After multiple appeals arising from appellee Laurence Dibble's 2010 motion to suppress, one very specific question remained before the trial court: was Detective Andrew Wuertz's search-warrant affidavit, alleging an act of gross sexual imposition at the school in which Dibble taught, so lacking in indicia of probable cause that it was unreasonable for any official to rely on it when deciding to search all of Dibble's media and data-storage devices in his home? Appellant, the state, could not prevail on that question within the four corners of Detective Wuertz's affidavit. Instead, it asserted that Detective Wuertz provided supplemental, unrecorded oral testimony to the issuing judge about an independent crime, which was not even mentioned in the warrant, that provided some indicia of probable cause to search Dibble's media and data-storage devices in his home.

*9 **{¶ 43}** An even more specific question is now before this court: did Crim.R. 41(C)(2) [2] prohibit Detective Wuertz's alleged unrecorded oral testimony from being considered at Dibble's suppression hearing? Decidedly, the answer is "yes." Crim.R. 41(C)(2) unequivocally requires a warrant applicant's supplemental testimony to be recorded in order for it to be "admissible at a hearing on a motion to suppress." Because the fundamental purpose of Crim.R. 41(C)(2) is to prevent the state from providing unrecorded oral testimony to create probable cause post hoc and because that is precisely what the state did here, Detective Wuertz's alleged unrecorded oral testimony should have been excluded from the evidence that the reviewing judge considered when ruling on Dibble's motion to suppress. By holding that the state is allowed to present unrecorded testimony to supplement a warrant affidavit at a suppression hearing to establish an officer's good-faith reliance on a warrant, the majority is providing the state with a complete end run around the very protections intended by the rule. The majority's holding paves the way for sloppy police work at best and perjury at worst. For these reasons, I dissent.

## I. BACKGROUND

**{¶ 44}** During the procedural history of this case, I believe some important facts, which only recently became relevant, were lost in the shuffle. I am therefore taking pains to detail additional background information from this case in order to provide adequate context for the many judicial decisions that have been entered over the past nine years, as well as the decision being entered today.

### A. The police report, search, charges, and added charges

**{¶ 45}** On February 2, 2010, E.S. reported to police that in April 2009, when she was a senior in high school, Dibble —her drama teacher—had groped her genitals and buttocks during an incident when they were in the theater area of the school. E.K., one of Dibble's former students, accompanied E.S. to the police station to help report what had happened to E.S. Police interviewed E.K. as well. E.K. stated that she had been involved in a relationship with Dibble when she was a young adult in college. She stated that they engaged in consensual sexual contact and that he had taken nude photographs of her.

**{¶ 46}** Detective Wuertz filed a police report identifying E.S. as a victim of gross sexual imposition. Detective Wuertz did not file a report regarding E.K.'s statements because he concluded that Dibble's actions with E.K. did not involve any criminal behavior. The next day, February 3, 2010, Detective Wuertz obtained a search warrant from Judge Andrea C. Peeples to search Dibble's home for the following:

> Evidence of the crime of Gross Sexual Imposition, to include Computers, printers, scanners, photographs, cameras, video cameras, videotapes, * * *



 

> memory devices and storage media, * * * and any and all types of related computer equipment and electronic storage media * * * as well as fruits and instrumentalities of other crimes as yet unknown.

**{¶ 47}** In Detective Wuertz's affidavit in support of the warrant, he described the sexual contact at the school reported by E.S., whom he identified as "Victim #1." Despite the fact that no crime was associated with the young adult, E.K., the affidavit also described Dibble's sexual interactions with E.K., identifying her as "Victim #2." The affidavit states that any of Dibble's media or media-storage devices might contain evidence "to substantiate Victim #1 and Victim #2's claims." That same day, February 3, 2010, police arrested Dibble and filed a complaint at the Franklin County Municipal Court, charging him with gross sexual imposition.

**{¶ 48}** The police confiscated 183 pieces of media or media storage from Dibble's home.

**{¶ 49}** According to the state:

> ***10** Detectives sought this evidence *based on E.K.'s statements* that he digitally photographed her on several occasions. While going through the vast number of video tapes, CD's and DVD's taken from defendant's home, police found a tape that appeared to have been made using a hidden camera in a locker room at the * * * School. The video tape showed 20 different girls trying on costumes. All of the girls would strip naked before trying on the leotard-type costumes. It was *later learned* by police that the defendant instructed these girls to be completely nude underneath the costume in order for it to fit properly.

(Emphasis added.) The video tape showing 20 female students trying on costumes was made sometime around 2003. When Detective Wuertz contacted the young women identified in the video tape, several of them informed Detective Wuertz about Dibble's instruction that they wear nothing under their costumes. Subsequent to the discovery and investigation into the circumstances of the video tape, Dibble was indicted on March 29, 2010, in the Franklin County Court of Common Pleas on one count of sexual imposition involving E.S. and 20 counts of voyeurism involving the other students identified in the video tape.

### B. The first suppression proceedings and appellate review

**{¶ 50}** At the first hearing on Dibble's motion to suppress —and the only hearing in which evidence was presented— Detective Wuertz was the only witness who testified. He acknowledged that both the police report and the criminal complaint were limited to a crime involving only E.S., and nothing about the crime of gross sexual imposition against E.S. provided probable cause to search Dibble's home. He acknowledged that although he used E.K.'s statements to justify searching Dibble's home, there was nothing illegal about Dibble's interactions with E.K. He provided new information, though, as to why he sought to search Dibble's home.

**{¶ 51}** Detective Wuertz testified that in addition to E.S. describing the groping incident at school, she also described occasions during which Dibble photographed theater students wearing leotard costumes that were "practically see-through, if not see-through," after instructing the students to wear nothing underneath the costumes. Detective Wuertz testified that he told Judge Peeples about the photographs when answering her questions about the search warrant. He stated that he told Judge Peeples that "due to the possible see-through of the unitards [he] was very concerned about where those photos were and what exactly those were being used for."

**{¶ 52}** In the trial court's decision on Dibble's motion to suppress, it primarily applied *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Pursuant



 

to *Franks*, if a statement is knowingly and intentionally false or made with reckless disregard for the truth, and if the remaining statements fail to establish probable cause, "the search warrant must be voided and the fruits of the search excluded." *Id.* at syllabus. The trial court held that by portraying E.K. as a "victim" in his affidavit, Detective Wuertz knowingly and intentionally made false statements about her in order to create probable cause to search Dibble's home. After striking the false statement from consideration, the court concluded that the warrant was not supported by probable cause. The court further held that the good-faith exception to suppression could not apply because Detective Wuertz could not objectively and in good faith rely on a warrant that was given based on statements that he knew to be false. It also held that the good-faith exception could not apply through consideration of Detective Wuertz's alleged off-the-record statements to Judge Peeples because he lacked credibility regarding that conversation. Accordingly, the trial court suppressed the evidence that was seized during the search of Dibble's residence.

***11** **{¶ 53}** After the Tenth District Court of Appeals affirmed the trial court's judgment, this court accepted jurisdiction over the state's appeal, 130 Ohio St.3d 1493, 2011-Ohio-6556, 958 N.E.2d 956, and addressed the narrow issue of whether Detective Wuertz's use of the word "victim" to describe E.K. rose to the level of a statement that is knowingly and intentionally false or made with reckless disregard for the truth as stated in *Franks*, 133 Ohio St.3d 451, 2012-Ohio-4630, 979 N.E.2d 247. This court held that a determination pursuant to *Franks* must consider the affiant's statements in light of their lay meaning rather than any technical legal meaning. This court concluded that the lower courts were overly technical in construing the word "victim" by relying on strictly legal terms and that those courts should not have concluded that Detective Wuertz's common, everyday use of the word "victim" was a purposeful attempt to create probable cause necessary for a search warrant for Dibble's home.

### C. The second round

**{¶ 54}** On remand to the trial court, no new evidence was offered. In its second decision, the trial court denied Dibble's motion to suppress. The court first held that Detective Wuertz's affidavit, by his own admission, clearly lacked any basis that evidence of a crime would be found in Dibble's home. Accordingly, the warrant was not supported by probable cause. The court went on to hold, without much explanation, that Detective Wuertz must have been acting in good-faith reliance on the warrant, preventing suppression of the evidence pursuant to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Finally, the court specified that it was not considering Detective Wuertz's extrinsic statements to Judge Peeples. The court noted that Crim.R. 41(C)(2) prohibited it from considering such unrecorded testimony. The court declined to rule on the state's argument that Crim.R. 41(C)(2) was unconstitutional, concluding that its finding of good faith mooted the matter.

**{¶ 55}** In its second appellate decision, 10th Dist. Franklin No. 13AP-798, 2014-Ohio-5754, the Tenth District noted that the trial court failed to address one circumstance in which the good-faith exception under *Leon* does not apply: when a warrant's supporting affidavit is so devoid of indicia of probable cause that an officer could not objectively believe that probable cause existed. *Leon* at 923, 104 S.Ct. 3405. Because an examination of that specific issue was crucial to the good-faith-exception analysis and judgment in Dibble's case, the Tenth District reversed and remanded the case to the trial court yet again.

### D. The third round

**{¶ 56}** By the third time Dibble's suppression motion was before the trial court, a new judge had been assigned to the case. Although the new judge indicated that the appellate court's evidence-specific mandate should require a new evidentiary hearing, the parties asked the court to simply review the evidence that had already been provided from the original hearing. After reviewing that evidence, the trial court denied Dibble's motion to suppress. The trial court did not discuss Crim.R. 41(C)(2), but it pointed specifically to Detective Wuertz's alleged unrecorded testimony regarding Dibble's "illicit photos of the minor victim [E.S.]" as helping to establish probable cause to search Dibble's home. The trial court stated that since it decided that Detective Wuertz's sworn oral and written statements provided probable cause for the warrant outright, the affidavit certainly was not so lacking in indicia of probable cause as to render belief in probable cause unreasonable.

**{¶ 57}** Dibble appealed and in its third decision, the Tenth District reversed, holding that the trial court had exceeded the scope of the remand by making a general probable-cause determination that was contrary to the settled law of the case.

2017-Ohio-9321, 92 N.E.3d 893. The appellate court further held that Crim.R. 41(C)(2) prohibited the trial court from considering Detective Wuertz's alleged unrecorded testimony regarding Dibble's illicit photographs of E.S. *Id.* at ¶ 27. Setting that evidence aside, the appellate court concluded that "the affidavit objectively produces no set of facts that a reasonable law enforcement officer could in good faith rely on to search a house." *Id.* at ¶ 40.

## II. ANALYSIS

***12 {¶ 58}** The state contends that Crim.R. 41(C)(2) does not bar the admission of a warrant applicant's unrecorded oral testimony at later suppression hearings or, at the very least, it does not bar such evidence for purposes of a good-faith-exception analysis pursuant to *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677. The state is wrong, particularly in the context of this case. The plain language of the rule prohibits such evidence in general, and its history demonstrates an express purpose to exclude exactly the kind of evidence presented by the state in this case. Crim.R. 41(C)(2)'s recorded-testimony requirement must be applied in this case in order to ensure that officers of the law protect the Fourth Amendment rights of our citizenry.

### A. The relationship between the Fourth Amendment and Crim.R. 41(C)(2)

**{¶ 59}** As the Tenth District noted, it is already the law of the case that Detective Wuertz's affidavit fell short of establishing probable cause to justify the search of Dibble's home. The general issue of probable cause is therefore not technically before the court, and the issue that remains is limited to whether the good-faith exception to the exclusionary rule provided in *Leon* applies here and to future cases with similar fact patterns. That being said, in applying *Leon*, this court must examine whether Detective Wuertz's affidavit does not merely just fall short of establishing probable cause but whether the affidavit failed to provide any arguable indication of probable cause. The existence of probable cause therefore remains at the very heart of this court's review. The procedure for establishing probable cause is also at the very heart of the purposes underlying Crim.R. 41(C)(2). In order to properly review the probable-cause argument contained within the state's good-faith-exception argument, as well as the role of Crim.R. 41(C)(2) in this case, it is essential for this court to examine the general issue of probable cause and its constitutional underpinnings.

**{¶ 60}** The Fourth Amendment to the United States Constitution [3] requires that a search warrant may issue only upon a showing of "probable cause, supported by Oath or affirmation." When a court reviews a probable-cause determination, it must review the facts that supported the issuing judge's probable-cause determination. In fact, a court must limit its review to *only* those facts that were presented to the issuing judge. *See Aguilar v. Texas*, 378 U.S. 108, 109, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), fn. 1, *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Giordenello v. United States*, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). Thus, any information known by the warrant applicant that is not presented to the issuing judge is irrelevant to a probable-cause determination. *United States v. Abernathy*, 843 F.3d 243, 249-250 (6th Cir.2016).

**{¶ 61}** In some jurisdictions, courts are limited in probable-cause determinations to a review of the "four corners" of the affidavit. *See*, *e.g.*, *Commonwealth v. O'Day*, 440 Mass. 296, 297, 798 N.E.2d 275 (2003); *Bonds v. State*, 403 S.W.3d 867, 873 (Tex.Crim.App.2013). In many jurisdictions, including Ohio, warrant applicants may supplement the information in their affidavits with sworn oral statements to the issuing judge. 1 John M. Burkoff, *Search Warrant Law Deskbook*, Section 6:7, at 224-225 (2019), fn. 3. Some jurisdictions have held that the Fourth Amendment's failure to specify any format for the requisite "Oath or affirmation" before obtaining a warrant means that there is no constitutional requirement to record, write, or otherwise memorialize any sworn statements made to an issuing judicial officer. *United States v. Clyburn*, 24 F.3d 613, 617 (4th Cir.1994); *United States v. Shields*, 978 F.2d 943, 946 (6th Cir.1992) ("The Fourth Amendment does not require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit"). But, although there is no specific format or recording requirement in the text of the Fourth Amendment, many have opined that the constitutional provision would be meaningless without the ability to objectively review the statements that informed the issuing judge's probable-cause determination:

> ***13** The substantive right created by the requirement of probable cause is hardly



 

> accorded full sweep without an effective procedural means of assuring meaningful review of a determination by the issuing magistrate of the existence of probable cause. Reliance on a record prepared after the fact involves a hazard of impairment of that right. It is for this reason that some States have imposed the requirement of a contemporaneous record.

*Christofferson v. Washington*, 393 U.S. 1090, 1090-1091, 89 S.Ct. 855, 21 L.Ed.2d 783 (1969) (Brennan, J., dissenting); *see also State v. Fariello*, 71 N.J. 552, 559, 366 A.2d 1313 (1976); *United States v. Hittle*, 575 F.2d 799, 802 (10th Cir.1978).

**{¶ 62}** The dangers in not requiring a record of a warrant applicant's statements to an issuing judge are manifold. It is well established that evidence discovered during a search cannot be used after the fact to establish the probable cause that was necessary to have lawfully conducted the search in the first place. *Whiteley v. Warden*, 401 U.S. 560, 567, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), fn. 11; *Johnson v. United States*, 333 U.S. 10, 16-17, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *Akron v. Williams*, 175 Ohio St. 186, 189, 192 N.E.2d 63 (1963). Yet, allowing an officer to establish probable cause on the record for the first time at a suppression hearing invites the officer to use evidence that has been discovered after a search has been conducted to bolster the issuing judge's probable-cause determination and to then bolster the officer's and the state's good-faith-exception argument. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under United States v. Leon*, 54 U.Kan.L.Rev. 155, 221 (2005) ("a police officer at a suppression hearing may be especially willing to lie to save the fruits of a search because the officer's suspicions (whatever their original basis) have turned out to be justified").

**{¶ 63}** Moreover, the human memory remains fallible. *Fariello* at 560-561, 366 A.2d 1313; *Christofferson* at 1091, 89 S.Ct. 855, quoting *Glodowski v. State*, 196 Wis. 265, 271, 220 N.W. 227 (1928) (Brennan, J., dissenting). By the time a suppression hearing takes place, a warrant applicant may not remember the exact succession of events that led up to an indictment, including when and where he gathered certain information and when and where he shared that information to others. "[T]he possible initial uncertainty of the affiant may vanish when the search proves to be fruitful. Inadvertent additions to the remembered conversation are not unlikely." *Boyer v. Arizona*, 455 F.2d 804, 807 (9th Cir.1972) (Ely, J., dissenting). And the issuing judicial officer may not be able to recall some or all of the information that had been provided when the warrant was issued. *Id.* at 808; *see also State v. Sims*, 127 Ohio App.3d 603, 613, 713 N.E.2d 513 (2d Dist.1998); *State v. White*, 707 P.2d 271, 276 (Alaska App.1985); *Daitch v. State*, 168 Ga.App. 830, 833, 310 S.E.2d 703 (1983).

**{¶ 64}** Problems in procedure are apparent as well. A defendant may not be afforded a reasonable opportunity to challenge the validity of a warrant if he is not apprised, prior to the suppression hearing, of the information that allegedly supported the warrant. *See State v. Liesche*, 228 N.W.2d 44, 48 (Iowa 1975) (the failure to record statements deprives a defendant of notice of relevant facts and therefore a meaningful opportunity to attack their veracity). Issuing judges and magistrates would be dragged into the evidentiary process as witnesses, which would waste judicial resources and blur an important line between the judicial process in issuing the warrant and the separate, independent judicial process of reviewing its sufficiency. *See In re Gault*, 387 U.S. 1, 58, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (failure to record proceedings forces the reviewer to reconstruct the record and imposes on the original judge "the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him"); *State v. Lindsey*, 473 N.W.2d 857, 862 (Minn.1991). In sum, allowing courts to consider such unrecorded statements would significantly hinder the courts' ability to reasonably and accurately determine whether the state actually complied with the Constitution before obtaining a search warrant for someone's home.

***14 {¶ 65}** The majority of jurisdictions in the United States that allow supplemental testimony for warrant applications have attempted to avoid the foregoing dangers by requiring that such testimony be recorded, transcribed, or officially memorialized in some way. 1 Burkoff at 226, fn. 5 and Appendix 2. Most of those jurisdictions place an affirmative duty on the *issuing* judge, the warrant applicant, or both, to create a record at the time of testimony. For example, the Federal Rules of Criminal Procedure provide that "[t]estimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit." Fed.R.Crim.P. 41(d)(2)(C). *See also*



 

Ariz.Rev.Stat.Ann. 13-3914 (sworn oral statements "shall be recorded"); N.Y.Crim.Pro. 690.35 (oral testimony must be sworn to and recorded). These rules fail to place any duty on the *reviewing* judge, though, which provides plenty of room for disagreement over the appropriate consequences at a suppression hearing if it turns out that the issuing judge failed to adhere to her duty. Our rule does not lack such explanation.

**{¶ 66}** Ohio's rule on sworn oral statements is relatively unique in that it goes one step further in the process. Crim.R. 41(C)(2) does not require that a warrant applicant's testimony be recorded in all instances. However, it does make the recording process a prerequisite to the admissibility of the testimony at a suppression hearing:

> 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.

Crim.R. 41(C)(2). Our rule therefore places affirmative duties on the suppression judge rather than on the warrant applicant or the issuing judge. In other words, Crim.R. 41(C)(2) put Judge Peeples and Detective Wuertz on notice that their failure to record Detective Wuertz's supplemental testimony would have a definitive outcome in the event that Dibble were to challenge the sufficiency of Detective Wuertz's warrant affidavit at a suppression hearing: the reviewing court would be forbidden from considering the supplemental testimony because it would be inadmissible.

**{¶ 67}** The unique and specific language of Crim.R. 41(C)(2)'s recording-admissibility requirement is not accidental. It is not merely "nestled," majority opinion at ¶ 30, into the rule like a superfluous piece of ribbon that just happened to be woven into a bird's nest. Its presence in the rule is intentional and it serves a specific and important purpose. When Ohio's Criminal Rules were first adopted in 1973, there was a "disputed issue which [was] clarified by Criminal Rule 41(C)." Katz, *Ohio Rules of Criminal Procedure: A Guide to Criminal Procedure in Ohio Under the New Criminal Rules* 157 (1973). The disputed issue was whether a warrant applicant's supplemental oral testimony to an issuing judge could be considered later at a motion to suppress in order to "validate an otherwise insufficient affidavit." *Id.*, citing *Cleveland Hts. v. Spellman*, 7 Ohio Misc. 149, 213 N.E.2d 206 (M.C.1965) (disallowing oral testimony); *State v. Misch*, 23 Ohio Misc. 47, 260 N.E.2d 841 (C.P.1970) (allowing oral testimony). Requiring that supplemental oral testimony be recorded was "the only way to insure a later review of the finding of probable cause." Katz at 157. Thus, Crim.R. 41(C)(2) resolved the dispute by allowing consideration of supplemental oral testimony at a suppression hearing if, and only if, that testimony was recorded.

**{¶ 68}** Given the foregoing, the plain language of Crim.R. 41(C)(2) dictates that unrecorded oral testimony that was given to an issuing judge when a warrant was signed cannot be admitted at a subsequent suppression hearing for any reason. *State v. Shingles*, 46 Ohio App.2d 1, 2, 345 N.E.2d 614 (9th Dist.1974) (in a motion-to-suppress hearing, an unrecorded statement is inadmissible); *see also State v. Graddy*, 55 Ohio St.2d 132, 136, 378 N.E.2d 723 (1978), fn. 2, citing *Shingles*. And given the history and purpose behind Crim.R. 41(C)(2), such testimony absolutely cannot be considered to bolster probable cause at a suppression hearing to remedy a warrant affidavit's failure to establish probable cause.

### B. The good-faith exception to the exclusionary rule

***15 {¶ 69}** Despite the clear purpose and scope of Crim.R. 41(C)(2), the state urges that the rule is inapplicable in this case because our focus is not on probable cause but instead is on the narrower issue of the good-faith exception to the exclusionary rule outlined in *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677.

**{¶ 70}** In *Leon*, the United States Supreme Court provided a nonexhaustive list of four exceptions to an officer's alleged good-faith reliance on an invalid warrant. It is unreasonable for an officer to rely on a warrant (1) when the warrant affidavit contains knowing or reckless falsehoods, (2) when the issuing judge abandons her neutral role, (3) when the affidavit is so devoid of indicia probable cause that it is unreasonable for any official to believe in its existence, and (4) when the warrant itself is facially deficient regarding the location to be searched or the items to be seized.

*Id.* at 922-923, 104 S.Ct. 3405. In any of the foregoing circumstances, any reasonably well-trained officer would know that the warrant would not have been constitutionally compliant and therefore the officer could not have reasonably relied on that warrant.

**{¶ 71}** It is true that "all of the circumstances" may be considered when determining if a competent police officer would reasonably rely on a search warrant. *Id.* at 922, 104 S.Ct. 3405, fn. 23. But our inquiry in this case does not involve a general exploration of good faith. It is limited to the third exception stated in *Leon*, which contains a probable-cause review and prohibits the application of the good-faith exception when the warrant affidavit is " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Id.* at 923, 104 S.Ct. 3405, quoting *Brown v. Illinois*, 422 U.S. 590, 611, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring in part). Unlike the first two exceptions described in *Leon*, which would require a reviewing court to consider evidence outside the four corners of a warrant's affidavit, the third exception evaluates the facial validity of the affidavit.

**{¶ 72}** The quintessential example of the third exception described in *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, is found within *Leon* itself. Although the warrant affidavit in question in *Leon* fell just short of probable cause, it still had "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." *Id.* at 926, 104 S.Ct. 3405. Consequently, the officer's reliance on the warrant was found to have been objectively reasonable. *Id.* Conversely, the good-faith exception does not apply when a warrant is supported by a "bare bones" affidavit that leaves no room for debate that the affidavit completely failed to provide a single indicia of probable cause. *Id.*

**{¶ 73}** The state's argument does not align with *Leon*'s analysis of the third exception. Pursuant to *Leon*, the state would need to establish that Detective Wuertz's affidavit, despite its failure to fully establish probable cause, provided at least some information—on its face—that could lead reasonable judges to disagree over the existence of probable cause. The state failed to do so, as it was clear from the testimony of Detective Wuertz that neither he nor any reasonable officer or judge could objectively conclude from the face of the affidavit that there was probable cause to search Dibble's home. Instead, the state sought to amend the face of the affidavit itself by supplementing it with alleged testimony to the issuing judge.

***16 {¶ 74}** The state essentially asked the suppression court to consider an allegation of a completely separate crime for purposes of establishing probable cause, approximately akin to illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323. Thus, the state used the good-faith exception as a back door to insert a new, alternative theory of probable cause after the affidavit's utter lack of probable cause was already a foregone conclusion.

**{¶ 75}** Because the specific good-faith inquiry in this case arises from an affidavit that lacks any indicia of probable cause, it would subvert the purpose of the analysis to allow the state to establish good faith by shoehorning probable cause back into the affidavit. *See United States v. Luong*, 470 F.3d 898, 905 (9th Cir.2006); *State v. Klosterman*, 114 Ohio App.3d 327, 332-333, 683 N.E.2d 100 (2d Dist.1996); *State v. Lee*, 1st Dist. Hamilton No. C-070056, 2008-Ohio-3157, 2008 WL 2553025, ¶ 26. Accordingly, I do not believe that the evidence promoted by the state is even appropriate for purposes of establishing good-faith reliance on the warrant pursuant to the third exception in *Leon*. Even if the state's evidence were appropriate in this specific good-faith analysis, it remains true that the state is attempting to establish some indicia of probable cause on which a reasonable official could rely, to which the recording-admissibility requirement of Crim.R. 41(C)(2) would apply. Although the level and intensity of a reviewing court's probable-cause inquiry might differ within the good-faith analysis compared to a reviewing court's initial determination that the warrant affidavit lacked probable cause, it is still a probable-cause inquiry. Accordingly, Crim.R. 41(C)(2)'s recording-admissibility rule applied to Dibble's suppression proceedings irrespective of the fact that the trial court was tasked with reviewing the good-faith exception to suppression rather than the initial review of probable cause.

### C. Barring unrecorded testimony serves a deterrent purpose

**{¶ 76}** The potential inadmissibility of a warrant applicant's unrecorded testimony at a suppression hearing, pursuant to Crim.R. 41(C)(2), is a completely separate inquiry from the ultimate determination that the evidence from an unlawful search should be suppressed. The state and the majority opinion combine the two matters by examining whether

the exclusionary rule's emphasis on deterrence prohibits the application of Crim.R. 41(C)(2) at a suppression hearing. Even if the combination of the two inquiries is legitimate, it is clear that the recording-admissibility requirement in Crim.R. 41(C)(2) deters police from improperly enhancing the issuing judge's finding of probable cause after the search has occurred.

**{¶ 77}** The majority cites to *State v. Wilmoth*, 22 Ohio St.3d 251, 490 N.E.2d 1236 (1986), to emphasize that any noncompliance with Crim.R. 41(C)(2) should lead to suppression only if the violation of the rule rose to the level of "constitutional magnitude," *Id.* at 263, 490 N.E.2d 1236. But *Wilmoth* stands for the proposition that a "magistrate's technical failure to use the proper words in administering the oath," *Id.* at 266, 490 N.E.2d 1236, would not render the otherwise properly recorded and transcribed testimony inadmissible pursuant to Crim.R. 41(C)(2). *Wilmoth* explains that negligible technical or ministerial irregularities related to sworn testimony should be disregarded when they do not impair the suppression court's review of the issuing court's probable-cause determination. *Id.* at 266-267, 490 N.E.2d 1236.

***17 {¶ 78}** The complete failure to preserve a record of the alleged showing of probable cause is not a mere technical failing. The lack of any record of probable cause is wholly substantive, and the trial court's decision to admit Detective Wuertz's unrecorded testimony constitutes a violation of Crim.R. 41(C)(2) of constitutional magnitude because it fails to safeguard the "interests sought to be protected by the Fourth Amendment and Crim.R. 41." *Wilmoth* at 264, 490 N.E.2d 1236. Excluding evidence that has been collected in contravention of Crim.R. 41(C)(2) serves an important deterrent purpose; it deters officials from violating the Fourth Amendment by denying them the opportunity to cover up such violations at suppression hearings with backdated information in support of probable cause. Accordingly, I believe the Tenth District Court of Appeals correctly determined that Detective Wuertz's alleged supplemental testimony to Judge Peeples was not admissible at the hearing on Dibble's motion to suppress.

**{¶ 79}** The only information regarding probable cause that was properly before the trial court in the suppression hearing was the affidavit itself. As already stated, Detective Wuertz agreed that the information in his affidavit regarding the crime against E.S. failed to establish probable cause to search Dibble's residence for media materials. Although obscene media involving minors and sexual contact with minors are both criminalized, an allegation of one of those crimes does not automatically provide probable cause to search for evidence of the other. *United States v. Doyle*, 650 F.3d 460, 472 (4th Cir.2011); *United States v. Hodson,* 543 F.3d 286, 292 (6th Cir.2008); *United States v. Falso,* 544 F.3d 110, 124 (2d Cir.2008). Detective Wuertz's affidavit lacked any indicia of probable cause that would allow an official to reasonably believe in its existence, and the state failed to meet its burden of proving that the good-faith exception should apply. The Tenth District properly held that the fruits of the search of Dibble's residence should have been suppressed.

## III. CONCLUSION

**{¶ 80}** Common sense tells us that a person who has committed crimes of an obscene and depraved nature deserves punishment. But common sense also tells us that the police cannot search for anything they want for any reason they want just because they have a piece of paper in hand that states, "Warrant." In order to ensure that the latter remains true, enforcement of the admissibility rules of Crim.R. 41(C)(2) is appropriate in this case. I would affirm the decision of the Tenth District Court of Appeals.

O'Connor, C.J., concurs in the foregoing opinion.

**All Citations**

--- N.E.3d ----, 2020 WL 826407, 2020 -Ohio- 546

Footnotes

1 Curiously, the parties have not presented any arguments under the Ohio Constitution in this court or in the proceedings below. Thus, we have no occasion to consider here the protections afforded under Article I, Section 14 of that document.

2 Crim.R. 41(C)(2) provides:

> 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.



 

3 As noted in the majority opinion, the parties' failure to present arguments regarding the Ohio Constitution limits this court's discussion to the Fourth Amendment of the United States Constitution. This leaves open the question whether the Ohio Constitution might offer greater rights and protections to our citizenry under these circumstances. *See* *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 20; *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496, ¶ 23; *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 46-48.

APPENDIX B

92 N.E.3d 893
Court of Appeals of Ohio, Tenth District, Franklin County.

STATE of Ohio, Plaintiff–Appellee,
v.
Lawrence A. DIBBLE, Defendant–Appellant.

No. 16AP–629
|
Rendered on December 29, 2017

**Synopsis**

**Background:** Defendant who was charged with 20 counts of voyeurism and one count of sexual imposition moved to suppress evidence obtained during a warrant search of his home, challenging the veracity of the affidavit in support of the warrant. The Court of Common Pleas, Franklin County, No. 10CR–03–1958, granted the motion. The State appealed. The Court of Appeals, Peggy L. Bryant, P.J., 195 Ohio App.3d 189, 959 N.E.2d 540, affirmed. State sought review which was granted. The Supreme Court, Lundberg Stratton, J., 133 Ohio St.3d 451, 979 N.E.2d 247, reversed and remanded. On remand, defendant filed motion to suppress. The Court of Common Pleas, Franklin County, denied motion, and defendant pled no contest to the charges. Defendant appealed. The Court of Appeals reversed and remanded. On remand, the Court of Common Pleas, Franklin County, found that search warrant affidavit contained sufficient facts to support a finding of probable cause and that affidavit that contained evidence sufficient to support a finding of probable cause was not so lacking in indicia of probable cause as to render official belief in its existence unreasonable. Defendant appealed.

**Holdings:** The Court of Appeals, Brunner, J., held that:

[1] because detective's comments were not recorded or transcribed, they were not admissible in the common pleas court at the hearing on defendant's motion to suppress evidence;

[2] search warrant affidavit, stating that victim reported that defendant had touched her and taken photographs, did not establish probable cause to search defendant's house;

[3] affidavit, stating that defendant ran his hands over student's clothed buttocks and vaginal area at school, was not sufficient to establish probable cause to search defendant's house; and

[4] good-faith exception to execution of an invalid search warrant was not applicable.

Reversed.

Sadler, J., filed dissenting opinion.

West Headnotes (20)

[1] **Courts** Previous Decisions in Same Case as Law of the Case

"Law of the case" doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.

[2] **Criminal Law** Mandate and proceedings in lower court

Pursuant to law of the case doctrine, absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.

[3] **Criminal Law** Parties Entitled to Allege Error

When trial court found no probable cause for search warrant to be issued, but found the warrant authorized search to be based on a good-faith exception, the State should have cross-appealed the finding of no probable cause during defendant's appeal, and since the 30–day deadline to cross-appeal had expired, the State could not argue that trial court, on remand, was free to reverse itself and find probable cause after appellate court had settled other matters concerning case and no appeal had been made of



 

the lack of probable cause finding. U.S. Const. Amend. 4; Ohio App. R. 3(C)(1), 4.

1 Cases that cite this headnote

**[4]** **Criminal Law** Lack of indicia of probable cause; "bare bones" affidavits

For purposes of good faith exception to execution of an invalid search warrant, grounds for the issuance of the search warrant must be considered in determining whether the affidavit upon which the warrant was issued was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. U.S. Const. Amend. 4.

**[5]** **Criminal Law** Evidence on Motions

Supplemental testimony taken orally by the judge from an affiant will not be admissible at a hearing to suppress unless that testimony has been recorded by a court reporter or recording equipment, transcribed and made a part of the affidavit; if it is not so recorded and transcribed, it will not be admissible at a hearing on a motion to suppress. U.S. Const. Amend. 4; Ohio Crim. R. 41(C)(2).

**[6]** **Criminal Law** Evidence on Motions

Because warrant affiant's purported comments to municipal court judge were not recorded or transcribed, even though they were reportedly offered under oath, they were not admissible in the common pleas court at the hearing on defendant's motion to suppress evidence to be offered in support of the felony charges against him. U.S. Const. Amend. 4; Ohio Crim. R. 41(C)(2).

**[7]** **Criminal Law** Good Faith or Objectively Reasonable Conduct Doctrine

**Criminal Law** Evidence on Motions

Good-faith exception to execution of an invalid search warrant occurs after an analysis is performed under criminal rule governing issuance and contents of search warrant, which, by its terms, defines what quality of evidence is admissible to prove the exception. U.S. Const. Amend. 4; Ohio Crim. R. 41.

**[8]** **Criminal Law** Degree of proof

There is no basis in the law for applying an evidentiary standard to support a good-faith exception to execution of an invalid search warrant that is different from or less restrictive or reliable than what evidence is required to determine the validity of a search warrant. U.S. Const. Amend. 4.

**[9]** **Criminal Law** Evidence on Motions

Testamentary evidence, that is beyond the four corners of the search warrant affidavit and that is not transcribed and made part of the affidavit, is not admissible in a hearing to determine whether such an affidavit supports a good-faith belief by the officer executing the associated search warrant that the warrant complies with the law and constitutional principles or for any other purpose for purposes of good-faith exception to execution of an invalid search warrant. U.S. Const. Amend. 4; Ohio Crim. R. 41(C).

1 Cases that cite this headnote

**[10]** **Criminal Law** Evidence on Motions

Purpose of rule governing issuance and contents of search warrant is to protect a defendant's rights against the introduction of oral evidence at a post-seizure hearing on a motion to suppress intended to bolster the affidavits that probable cause existed for the issuance of a warrant, and the requirement that supplemental testimony be recorded and made a part of the affidavit serves additional purpose of removing any concern that a reviewing court will have to guess about the actual statements made to the magistrate issuing the warrant. U.S. Const. Amend. 4; Ohio Crim. R. 41(C).



 

[11] **Searches and Seizures** Searches and Seizures

Fourth Amendment sets forth the right of the people, not the rights of the State, and thus, the State has no constitutional rights under the Fourth Amendment that can be violated. U.S. Const. Amend. 4.

[12] **Searches and Seizures** Constitutional and statutory provisions

Fourth Amendment establishes a floor, not a ceiling, that is, state governments may freely pass laws and promulgate rules without offending the Constitution that make it more onerous for the State to search and seize persons and property; state governments are only forbidden from passing laws or promulgating rules that would diminish the constitutionally protected right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. Amend. 4.

[13] **Criminal Law** Evidence on Motions

Criminal rule governing evidence admissible at a hearing on a motion to suppress does not purport to alter the Fourth Amendment, nor does it not change the definition of probable cause, nor does it alter the requirements for obtaining a warrant, nor does it abridge, enlarge, or modify any other part of the right of citizens to be free from unlawful search and seizure. U.S. Const. Amend. 4; Ohio Const. art. 4, § 5(B); Ohio Crim. R. 41(C)(2).

[14] **Criminal Law** Evidence on Motions

Criminal rule governing evidence admissible at a hearing on a motion to suppress is procedural, and rule finds to be inherently unreliable evidence introduced in a suppression hearing that was not preserved in the record when the warrant was sought. U.S. Const. Amend. 4; Ohio Const. art. 4, § 5(B); Ohio Crim. R. 41(C)(2).

[15] **Criminal Law** Evidence on Motions

In reviewing whether the fruits of the search of defendant's home could be used as evidence against him in a criminal proceeding, there was no basis in the law or under the Constitution to consider statements made by the detective to the municipal judge issuing the search warrant that were not preserved in the record. U.S. Const. Amend. 4; Ohio Const. art. 4, § 5(B); Ohio Crim. R. 41(C)(2).

[16] **Searches and Seizures** Probable Cause

Probable cause to conduct a search exists when the facts available to the searcher would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present. U.S. Const. Amend. 4.

[17] **Searches and Seizures** Factual showing, in general

Search warrant affidavit stating that victim, who was over the age of consent, reported that defendant had touched her and taken photographs of her nude vaginal area did not tend toward a finding of probable cause to search defendant's house since nothing in the affidavit stated that, in taking these actions, defendant violated criminal statutes. U.S. Const. Amend. 4.

[18] **Arrest** Other officers or official information

Search warrant affidavit stating that defendant ran his hands over student's clothed buttocks and vaginal area at school was sufficient to establish probable cause to arrest defendant, because it provided information that would warrant a prudent person's belief that defendant had committed the crime of sexual imposition; although the affidavit did not explicitly say so, a fair reading of the affidavit was that this sexual contact was offensive to student, and thus, the affidavit fairly described the crime of sexual imposition. U.S. Const. Amend. 4; Ohio Rev. Code Ann. § 2907.06(A)(1).



 

**[19]** **Searches and Seizures** Particular concrete applications

Search warrant affidavit, stating that defendant ran his hands over student's clothed buttocks and vaginal area at school, was not sufficient to establish probable cause to search defendant's house. U.S. Const. Amend. 4.

**[20]** **Criminal Law** Particular cases

Good-faith exception to execution of an invalid search warrant was not applicable because affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; no events, legal or illegal, described in the detective's affidavit occurred at defendant's home, and defendant's alleged illegal touching of student did not result in any physical evidence that reasonably could be believed to be stored at his home. U.S. Const. Amend. 4.

***897** APPEAL from the Franklin County Court of Common Pleas, (C.P.C. No. 10CR–1958).

**Attorneys and Law Firms**

On brief: Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellee. Argued: Steven L. Taylor.

On brief: Carpenter Lipps & Leland LLP, Kort W. Gatterdam, and Erik P. Henry, Columbus, for appellant. Argued: Kort W. Gatterdam.

DECISION

BRUNNER, J.

{¶ 1} Defendant-appellant, Lawrence A. Dibble, appeals an entry of the Franklin County Court of Common Pleas filed on August 16, 2016 which denied his motion to suppress evidence obtained in a search of his house. Because we find that the affidavit submitted for the search warrant did not supply probable cause to search Dibble's house and was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," we reverse. (Citations and internal quotation marks omitted.) *See United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

## I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On March 29, 2010, a Franklin County Grand Jury indicted Dibble for 20 counts of voyeurism and one count of sexual imposition. (Mar. 29, 2010 Indictment.) The voyeurism counts were based on videotape recovered from Dibble's home which apparently showed girls in their early and mid-teens disrobing in the locker room of the school where Dibble was then a teacher. *Id.* Dibble pled not guilty on March 31. (Mar. 31, 2010 Plea Form.) Shortly thereafter, on May 12, Dibble filed a motion to suppress. (May 12, 2010 Mot. to Suppress.)

{¶ 3} The trial court held a hearing on the motion on June 29, 2010. (June 29, 2010 Hearing Tr., filed Aug. 17, 2010.) At the hearing, the defense introduced four exhibits: the warrant documents, the complaint against Dibble, the arrest information form, and the uniform incident report. (Hearing Exs. 1–4, filed Aug. 17, 2010.) The affidavit in support of the warrant provided the following statement in support of probable cause:

> On February 2, 2010 Victim # 1 reported to the Upper Arlington Police Department that while a student at The Wellington School one of her teacher's [sic], Lawrence A Dibble touched her inappropriately. Victim # 1 stated that she was rehearsing line [sic] for a play with Dibble in the school when he asked for a reward for getting his lines correct. He asked to touch Victim # 1's stocking on her leg. Upon touching the stocking Dibble then proceeded to run his hand up Victim # 1's skirt brushing his fingers across her vaginal area. Victim # 1 stated she was shocked and froze as Dibble then ran his hands over her buttocks, and lower abdomen area. Victim # 2 was with Victim # 1 while she made the report. Victim # 2 stated she also had inappropriate contact with Dibble. Victim # 2 stated it was after she had graduated high school where Dibble had also been her teacher. Victim # 2 stated that Dibble had taken photo's [sic] of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim # 2 told investigators that Dibble used a digital camera to take the photo's [sic], and ***898** made her wear a pillow case over her head while he took them.



 

> On February 2, 2010 Victim # 1 went to The Wellington School at the direction of the Upper Arlington Police wearing a recording device. She had a conversation with Dibble about the inappropriate touching where he stated "I just wasn't thinking". [sic]
>
> Investigators from Upper Arlington believe Dibble's computers, camera's [sic], media storage devices, etc. may contain correspondence, and photos to substantiate Victim # 1 and Victim # 2's claims.

(Hearing Ex. 1 at 5.)

{¶ 4} Only one witness testified at the hearing, the detective who had sworn out the affidavit for the search warrant, obtained the search warrant, and conducted the search. (Hearing Ex. 1 at 5–6; June 29, 2010 Hearing Tr. at 3–4.) The detective admitted that "Victim # 2," also known as E.K., was legally an adult when the nude photographs were taken and the touching occurred. *Id.* at 18–20. He also admitted that E.K. had told him the contact and photographs were consensual. *Id.* at 35. He admitted that he did not refer to E.K. as a "victim" in any other report he filed in connection with the case and that his uniform incident report stated there was only one victim. *Id.* at 5–9. However, he testified that he felt that E.K. had seemed uncomfortable about her activities with Dibble and still considered her a victim. *Id.* at 15, 35.

{¶ 5} The detective admitted that the information given to him by "Victim # 1," also known as E.S., did not, on its own, provide probable cause to search Dibble's house. *Id.* at 13. That is, E.S.'s report of unwanted physical contact was contact that occurred only at school. (Hearing Ex. 1 at 5.) Allegations regarding photographs taken with a digital camera came only from E.K., who reported that she had consented to the photographs and was an adult when they were taken. *Id.*

{¶ 6} The detective testified at the trial court's hearing on Dibble's motion to suppress that, in addition to providing the affidavit, he was sworn in before the municipal court judge issuing the search warrant and then had a discussion with that judge. (June 29, 2010 Hearing Tr. at 33.) No recording or transcript or other form of preservation of the record was made of the hearing before the municipal judge who issued the search warrant concerning Dibble. So the evidence before the trial judge of the common pleas court was primarily that of the sworn testimony of the detective involved in all stages of obtaining and executing the search warrant and an affidavit from the detective sworn in support of the warrant. This detective testified before the common pleas court on the motion to suppress that he told the issuing judge more background about how Dibble had known E.K. and E.S. since seventh grade, and how Dibble took photographs of students in unitards which were somewhat see-through. *Id.* at 33–34.

{¶ 7} On July 1, 2010, the trial court concluded that the evidence must be suppressed. (July 1, 2010 Decision & Entry Granting Suppression.) It found that the detective knowingly and intentionally made false statements in referring to E.K. as a victim in order to obtain a search warrant for Dibble's house. *Id.* at 4–10. The trial court did not perceive that the photographs of E.K. were unlawful and it found that the evidence regarding E.S. did not give probable cause to search Dibble's house. *Id.* at 8. That is, nothing about the fact that Dibble touched E.S. inappropriately at school supported an inference of illegal activity occurring in Dibble's home such that a judicial warrant should have issued to search it. *Id.*

***899** {¶ 8} This Court affirmed the trial court's decision on August 4, 2011. *State v. Dibble*, 195 Ohio App.3d 189, 2011-Ohio-3817, 959 N.E.2d 540 (10th Dist.).

{¶ 9} The Supreme Court of Ohio reversed our decision on October 10, 2012. *State v. Dibble*, 133 Ohio St.3d 451, 2012-Ohio-4630, 979 N.E.2d 247. The high court found that the trial court's construction of the definition of "victim" was too hypertechnical and narrow. *Id.* at ¶ 20–22. The Supreme Court opined that the detective had merely selected "victim" as a generic term to describe E.K. and E.S. so as to avoid identifying them by name and that the trial court had abused its discretion in finding that the detective had intentionally misled the municipal judge who reviewed the search warrant affidavit. *Id.* at ¶ 22–26.

{¶ 10} On remand, Dibble filed with the trial court a new motion to suppress. (Feb. 4, 2013 Mot. to Suppress.) His counsel argued in the new motion that, although the detective may have had a subjective basis to refer to E.K. as a "victim," Dibble's conduct toward her did not constitute a crime as it was described in the affidavit in support of the warrant. *Id.* at 6. There is no dispute that no probable cause existed to search Dibble's house based on statements concerning E.K. Additionally, the detective had admitted no probable cause existed to search Dibble's house based on Dibble's alleged inappropriate touching of E.S. at school. *Id.* at 6–8.



 

{¶ 11} The parties thoroughly briefed the matter and the trial court heard oral argument at a new hearing. (Mar. 12, 2013 Hearing Tr., filed Oct. 24, 2013.) The State indicated at the outset that it wanted to call the municipal judge as a witness. *Id.* at 5. But the trial court declined to allow it based on Ohio Rule of Criminal Procedure 41(C)(2), which allows testimony in support of a warrant to be admitted into evidence only "if taken down by a court reporter or recording equipment, transcribed, and made part of the affidavit." *Id.* at 5–7. The State did not otherwise seek to present any new evidence and neither did Dibble's counsel in his defense. *Id.* at 3–6. Instead, the parties relied on materials and testimony developed during the original June 2010 suppression hearing. *Id.*

{¶ 12} On April 30, 2013, the trial court denied the new motion to suppress. (Apr. 30, 2013 Decision & Entry Denying Suppression.) The trial court found that, based on the affidavit supporting the warrant, there was no probable cause to search Dibble's house. *Id.* at 4–8. However, it found that because the Supreme Court had determined that the trial court had erred in finding that the detective had intentionally misled the municipal judge, it could no longer conclude that the detective had not exercised good-faith reliance on the warrant. *Id.* at 8–9. It also found that the municipal judge who issued the search warrant of Dibble's home did not "wholly abandon[ ] her role." *Id.* at 9. The trial court found that the case did not present a warrant "so inadequate in terms of its particularity of the place to be search[ed] or items to be seized as to" otherwise circumvent the good-faith reliance exception. *Id.* at 9. But, despite quoting the four circumstances in which good-faith reliance on a warrant does *not* excuse a violation of the Fourth Amendment, the trial court did not discuss or consider the third circumstance, where "an officer purports to rely upon a warrant based on an affidavit 'so lacking' in indicia of probable cause as to render official belief in its existence entirely unreasonable." (Apr. 30, 2013 Decision & Entry at 8–9, quoting *State v. George*, 45 Ohio St.3d 325, 332–33, 544 N.E.2d 640 (1989), citing *Leon* at 923, 104 S.Ct. 3405).

{¶ 13} After the trial court denied Dibble's motion to suppress, on June 11, 2013 Dibble pled "no contest" to each of the ***900** multiple counts of the indictment. (June 11, 2013 Plea Form; June 11, 2013 Hearing Tr. at 14, filed Oct. 24, 2013.) On August 15, 2013, the trial court held a sentencing hearing and sentenced Dibble to serve 6 months on each of the 17 fifth-degree felony counts of voyeurism, 90 days on each of the three second-degree misdemeanor counts of voyeurism, and 60 days on the single count of sexual imposition. (Aug. 16, 2013 Entry at 2.) The trial court ordered Dibble to serve 8 of the fifth-degree felony 6–month voyeurism terms (Counts 1–5, 7, 9, and 10) consecutively to each other. *Id.* It permitted Dibble to serve all other sentences on all other counts concurrently with each other and the 8 consecutively sentenced fifth-degree felony counts for a total term of imprisonment of 4 years. *Id.*

{¶ 14} On December 30, 2014, this Court reversed and remanded. *State v. Dibble*, 10th Dist. No. 13AP-798, 2014-Ohio-5754, 2014 WL 7462904. We determined that the State could have sought leave to appeal the trial court's initial determination post-Supreme Court remand that the affidavit did not supply probable cause, but it did not do so. *Id.* at ¶ 13–14. We concluded that because the State did not elect to appeal the trial court's finding that the affidavit did not supply probable cause, we could not consider that question. *Id.* at ¶ 11–14. We also determined that the trial court should have engaged, but did not, in a further examination of the affidavit to determine whether the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at ¶ 23. We thus remanded for the trial court to consider that issue. *Id.* at ¶ 23, 29.

{¶ 15} On March 3, 2015, we denied reconsideration and certification of a conflict and, on September 16, 2015, the Supreme Court declined to exercise any further jurisdiction concerning the affidavit and search warrant at issue in Dibble's second motion to suppress. *State v. Dibble*, 10th Dist. No. 13AP–798 (Mar. 3, 2015) (memorandum decision); *State v. Dibble*, 2014-Ohio-5754, 2014 WL 7462904, *discretionary appeal not allowed*, 143 Ohio St.3d 1464, 2015-Ohio-3733, 37 N.E.3d 1249.

{¶ 16} On remand, and before a new trial judge, the parties engaged in further briefing and the trial court held two hearings. At the first hearing, on March 10, 2016, each party presented arguments but no new evidence. (Mar. 10, 2016 Hearing Tr., filed Oct. 12, 2016.) At the second hearing, on August 16, 2016, the trial court raised the issue of whether it had been established in prior proceedings that probable cause to search Dibble's house had been lacking. (Aug. 16, 2016 Hearing Tr. at 5, filed Oct. 12, 2016.) The State requested that the trial court limit its decision to the issue of whether the detective had a good-faith basis to rely on the warrant issued by the municipal court judge. *Id.* at 15. At this point, the trial court opined that this Court had "missed the point" of the Supreme Court's 2012 decision. *Id.* at 5; *see also id.* at 15. The trial court therefore issued a decision and entry later

the same day finding that the affidavit did "contain sufficient facts to support a finding of probable cause" because a camera was "used to take illicit photos of the minor victim" and the affidavit disclosed two instances of "deviant behavior" which were "connect[ed]" to the "location specified in the warrant." (Aug. 16, 2016 Decision & Entry at 1–2.) It then concluded, "an affidavit that contains evidence sufficient to support a finding of probable cause is certainly not so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 2.

{¶ 17} Dibble now appeals.

## *901 II. ASSIGNMENT OF ERROR

{¶ 18} Dibble raises a single assignment of error for review:

> THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHTS UNDER THE OHIO AND U.S. CONSTITUTIONS AND RIGHTS PROTECTED UNDER THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE AFFIDAVIT AT ISSUE WAS SO LACKING IN INDICIA OF PROBABLE CAUSE AS TO RENDER OFFICIAL BELIEF IN ITS EXISTENCE ENTIRELY UNREASONABLE.

## III. DISCUSSION

### A. Whether Probable Cause is Law of the Case

{¶ 19} In its April 30, 2013 decision and entry, the trial court denied Dibble's motion to suppress but found that, based on the affidavit supporting the warrant, there was no probable cause to search Dibble's house. (Apr. 30, 2013 Decision & Entry Denying Suppression at 4–8.) We reversed and remanded so that the trial court could fulfill its "obligat[ion] to conduct further examination of the affidavit to determine whether it is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Dibble*, 2014-Ohio-5754, ¶ 23, 29. However, we also noticed from the record that the State did not seek leave to appeal the trial court's determination that the search warrant was not supported by probable cause. *Id.* at ¶ 11–14.

{¶ 20} In the instant appeal, the State argues that, even though it did not cross-appeal the trial court's April 2013 decision, the absence of probable cause has not been established as law of the case. (State's Brief at 18–23.) The State also argues that, because the trial court declined to address the State's claim that Crim.R. 41(C) is unconstitutional, the trial court did not consider unrecorded oral statements allegedly made by the detective to the issuing municipal judge, and thus, the April 2013 finding on probable cause was solely based on the content of the warrant affidavit. *Id.* at 21–22. In short, even though the State focused its arguments before the trial court on the good-faith exception and not probable cause, the State argues that the trial court was still free to find that probable cause existed based on the full record, including statements allegedly made by the detective to the municipal judge. *Id.* at 21–23. The State argues that we should affirm the trial court in denying Dibble's motion to suppress, based on the affidavit and the statements allegedly made by the detective to the municipal judge and also find that reliance on the warrant was reasonable. *Id.* at 18–24.

**[1]** **[2]** {¶ 21} The law of the case doctrine "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). This Court has also recognized that, "[t]he doctrine of the law of the case is not limited to the explicit determinations of a reviewing court, but also extends to determinations by a trial court that could have been appealed but were abandoned by a failure to do so." *Beagle v. Beagle*, 10th Dist. No. 09AP-353, 2009-Ohio-6570, ¶ 22, 2009 WL 4809837, citing *Clymer v. Clymer*, 10th Dist. No. 95APF02-239, 1995 WL 571445, *3 (Sept. 26, 1995); *see accord Klaus v. Klosterman*, 10th Dist. No. 16AP-273, 2016-Ohio-8349, ¶ 15, 2016 WL 7427432. "Absent extraordinary ***902** circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan* at syllabus.

{¶ 22} While a review of the record does not support that the State voluntarily abandoned its arguments on probable cause, when it did not cross-appeal the trial court's finding that probable cause was lacking, it forfeited the

argument for subsequent proceedings in this same matter. *See Dibble*, 2014-Ohio-5754, ¶ 12–14. The State argues that an unappealed ruling of law in a pending case should not create law of the case if the ruling can still be argued to be incorrect. (State's Brief at 21.) We disagree in this case. And in doing so, we consider that we could have noticed plain error in the trial court's finding of no probable cause but we did not. *Dibble*, 2014-Ohio-5754, ¶ 11–14, in passim.

{¶ 23} We recognize that the Staff Notes to the 2013 amendments of App.R. 3 provide:

> App.R. 3(C)(2) is amended to clarify that a party seeking to defend a judgment on a ground other than that relied on by the trial court need not file a cross-assignment of error to do so; instead, that party may simply raise the arguments in the appellate brief.

App.R. 3, staff notes (July 1, 2013 Amend.) We also recognize that we have considered arguments by a defendant-appellee that were raised in a brief but not raised by cross-appeal. *State v. Pinckney*, 10th Dist. No. 14AP-709, 2015-Ohio-3899, ¶ 21, 2015 WL 5638096. But whether we can consider arguments not relied on by the trial court in a criminal motion to suppress in order to affirm the trial court's decision is a different question from whether a party seeking to modify a trial court's order must cross-appeal.

**[3]** {¶ 24} "A person who intends to defend a judgment or order against an appeal taken by an appellant *and who also seeks to change the judgment or order* * * * shall file a notice of cross appeal within the time allowed by App.R. 4." (Emphasis added.) App.R. 3(C)(1). And we have previously stated in matters of criminal sentencing that when there is a failure to raise a claimed error in a prior appeal, whether by direct or cross-appeal, the claimed error is not subject to review. *State v. Burks*, 10th Dist. No. 07AP-553, 2008-Ohio-2463, ¶ 44, 2008 WL 2152670. When the trial court in April 2013 found no probable cause for the search warrant to be issued but found the warrant authorized search to be based on a good-faith exception, the State should have cross-appealed the finding of no probable cause during Dibble's appeal. Since the 30–day deadline to cross-appeal has long expired, the State cannot now effectively argue that the trial court was free to reverse itself and find probable cause after this Court settled other matters concerning the case and no appeal had been made of the lack of probable cause finding. Were we to otherwise permit this, especially in criminal cases, resolution of matters sought to be adjudicated on behalf of the people of Franklin County would lack finality. That the detective and municipal court lacked probable cause to issue the warrant to search Dibble's home is therefore the law of the case.

### B. Whether the Detective Acted in Good–Faith Reliance Upon the Warrant

**[4]** {¶ 25} Despite there being a lack of probable cause in Dibble's case, the State essentially argues that the grounds for the issuance of the search warrant must be considered in determining whether the affidavit upon which the warrant ***903** was issued was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. (State's Brief at 23–24.) We agree. This goes to the question of a good-faith exception when there is a lack of probable cause. Whether there were "indicia of probable cause" is endemic to the question of whether there was probable cause. It is helpful to consider what evidence was appropriately before the trial court and whether that evidence objectively supported a belief by a person of reasonable caution that contraband or evidence of a crime would be found in Dibble's home. *See Florida v. Harris*, 568 U.S. 237, 243, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013).

#### 1. What Evidence Should Have Been Considered under Crim.R. 41

**[5]** **[6]** **[7]** **[8]** {¶ 26} The State argues that the trial court should have considered not only the face of the affidavit but also the content of what the detective stated he said to the judge who issued the warrant. (State's Brief at 42–58.) However, Crim.R. 41 provides:

> 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*.

(Emphasis added.) Crim.R. 41(C)(2). Further, "supplemental testimony taken orally by the judge from an affiant will not be admissible at a hearing to suppress unless that testimony has been recorded by a court reporter or recording equipment, transcribed and made a part of the affidavit. If it is not so recorded and transcribed, it will not be admissible at a hearing on a motion to suppress." *State v. Shepcaro*, 45 Ohio App.2d 293, 298, 344 N.E.2d 352 (10th Dist.1975). [1] Because the detective's comments were not recorded or transcribed, even though they were reportedly offered under oath to the municipal court judge, they were not admissible in the common pleas court at the hearing on Dibble's motion to suppress evidence to be offered in support of the felony charges against him.

**[9]** {¶ 27} The State argues that although Crim.R. 41(C) may purport to bar the use of such statements to prove probable cause, such statements should nonetheless be considered on the question of whether or not the detective acted in good-faith reliance on the warrant. (State's Brief at 44–46.) However, Crim.R. 41(C) sets forth what evidence is admissible "at a hearing on a motion to suppress," and both probable cause and good faith are issues ***904** central to the adjudication of motions to suppress. Crim.R. 41(C)(2); *Shepcaro*, at 298, 344 N.E.2d 352. Thus, testamentary evidence that is beyond the four corners of the affidavit and that is not transcribed and made part of the affidavit, is not admissible in a hearing to determine whether such an affidavit supports a good-faith belief by the officer executing the associated search warrant that the warrant complies with the law and constitutional principles or for any other purpose. We find no basis under Crim.R. 41 or the facts and history of this case to carve out any exception.

{¶ 28} And the seminal case defining the good-faith exception to a bad search warrant, *Leon* makes clear that as a matter of law an officer does not "manifest objective good faith in relying on a warrant based on an *affidavit* 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (Emphasis added.) *Leon* at 923, 104 S.Ct. 3405, quoting *Brown v. Illinois*, 422 U.S. 590, 610–11, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring in part), citing *Illinois v. Gates*, 462 U.S. 213, 263–64, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (White, J., concurring in judgment). Most simply, *Leon* itself suggests that for the good-faith exception to apply, the important inquiry is what is in the affidavit that was offered in support of the warrant—not what an officer (long after the search has been executed and evidence obtained) may attempt to recall having said to the issuing judge or magistrate in an off-the-record conversation to achieve the warrant.

**[10]** {¶ 29} We recognize that other districts have viewed the questions posed here using different analyses: *Compare State v. Lee*, 1st Dist. No. C-070056, 2008-Ohio-3157, ¶ 22–28, 2008 WL 2553025; *State v. Gales*, 143 Ohio App.3d 55, 62–63, 757 N.E.2d 390 (8th Dist.2001); *State v. Klosterman*, 114 Ohio App.3d 327, 333, 683 N.E.2d 100 (2d Dist.1996) (evidence is limited by Crim.R. 41) *with State v. Mays*, 2d Dist. No. 23986, 2011-Ohio-2684, ¶ 31, 2011 WL 2176172; *State v. Landis*, 12th Dist. No. CA2005-10-428, 2006-Ohio-3538, ¶ 21, 2006 WL 1880495 (evidence is not limited by Crim.R. 41). Yet there is generally agreement that,

> "[t]he purpose of Crim.R. 41(C) is to protect a defendant's rights against the introduction of oral evidence at a post-seizure hearing on a motion to suppress intended 'to bolster the affidavits that probable cause existed for the issuance of a warrant.' And the requirement that supplemental testimony be 'recorded [and] made a part of the affidavit' serves the additional purpose of removing any concern that a reviewing court will have to guess about the actual statements made to the magistrate [or judge] issuing the warrant."

(Footnotes omitted.) *Lee* at ¶ 26, quoting *State v. Shingles*, 46 Ohio App.2d 1, 3, 345 N.E.2d 614 (9th Dist.1974); Crim.R. 41(C), citing *State v. Jaschik*, 85 Ohio App.3d 589, 594, 620 N.E.2d 883 (11th Dist.1993). We hold that these concerns also apply to the question of whether an affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

{¶ 30} Thus Crim.R. 41(C)(2) prohibits admitting statements made on all issues that may be addressed in "hearing[s] on [ ] motion[s] to suppress," even when made under oath to the issuing judge or magistrate if they are not also "taken down by a court reporter or recording equipment, transcribed, and made part of the affidavit." Crim.R. 41(C)(2). This limitation applies to the use of such evidence including on the question of whether an affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *Id.*



 

***905 2. Constitutionality of Crim.R. 41**

**[11]** {¶ 31} The State argues that, even if it would apply, Ohio Rule of Criminal Procedure 41(C) is unconstitutional because, although the Fourth Amendment only requires an "oath or affirmation" to support a warrant, Crim.R. 41(C) purports to also require that the oath or affirmation be "transcribed, and made part of the affidavit." (State's Brief at 46–57.) However the Fourth Amendment sets forth "[t]he right of the people," not the rights of the State. Fourth Amendment to the U.S. Constitution. The State can neither assert nor defend its position under the rubric of the Fourth Amendment, since it has no Constitutional rights under the Fourth Amendment that can be violated.

**[12]** {¶ 32} It should be emphasized that the Fourth Amendment establishes a floor, not a ceiling. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. That is, state governments may freely pass laws and promulgate rules without offending the Constitution that make it *more* onerous for the State to search and seize persons and property. State governments are only forbidden from passing laws or promulgating rules that would diminish the constitutionally protected "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Fourth Amendment to the U.S. Constitution.

{¶ 33} The State further argues that, even if Crim.R. 41(C) does not offend the United States Constitution, the Supreme Court of Ohio has exceeded its power in promulgating the rule because it is substantive, rather than procedural. (State's Brief at 50–53.) The State points out the Ohio Constitution requires that, "[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right." Ohio Constitution, Article IV, Section 5(B). The Supreme Court of Ohio has applied this state constitutional provision, holding that "[r]ules promulgated pursuant to this constitutional provision must be procedural in nature." *State v. Slatter*, 66 Ohio St.2d 452, 454, 423 N.E.2d 100 (1981).

**[13]** **[14]** {¶ 34} Yet there is nothing to draw from in criminal or Constitutional law for a finding that the provision of Crim.R. 41 at issue in this case abridges, enlarges, or modifies any substantive right. The provision of Crim.R. 41(C)(2) at issue in this case regards what evidence "shall be admissible at a hearing on a motion to suppress." Crim.R. 41(C)(2). This procedural provision does not purport to alter the Fourth Amendment, nor does it not change the definition of probable cause, nor does it alter the requirements for obtaining a warrant, nor does it "abridge, enlarge, or modify" any other part of the right of citizens to be free from unlawful search and seizure. Ohio Constitution, Article IV, Section 5(B). Rather, this provision of the rule finds to be inherently unreliable, evidence introduced in a suppression hearing that was not preserved in the record when the warrant was sought. This provision of the rules is procedural. It is analogous to a rule of evidence, and rules of evidence are generally considered procedural within the limits of Article IV, Section 5(B) of the Ohio Constitution. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 491, 715 N.E.2d 1062 (1999); *State v. French*, 72 Ohio St.3d 446, 450, 650 N.E.2d 887 (1995).

**[15]** {¶ 35} In reviewing whether the fruits of the search of Dibble's home can be used as evidence against him in a criminal proceeding, there is no basis in the law or under the Constitution to consider ***906** statements made by the detective to the municipal judge issuing the search warrant that were not preserved in the record.

**3. Whether the Warrant Affidavit was So Lacking in Indicia of Probable Cause as to Render Official Belief in its Existence Unreasonable**

**[16]** {¶ 36} "[P]robable cause to conduct a search [exists] when 'the facts available to [the searcher] would "warrant a [person] of reasonable caution in the belief" ' that contraband or evidence of a crime is present." *Harris* at 243, 133 S.Ct. 1050, quoting *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion); *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925), citing *Safford Unified School Dist. # 1 v. Redding*, 557 U.S. 364, 370–71, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009).

**[17]** {¶ 37} In this case, the search warrant affidavit provided information about Dibble's activities with two women. (Hearing Ex. 1 at 5.) One woman, E.K., was known to the detective to have been over the age of consent. *Dibble*, 2012-Ohio-4630, ¶ 19, 133 Ohio St.3d 451, 979 N.E.2d 247 (noting that the affidavit "stated clearly that Victim # 2 (E.K.) had graduated before the 'inappropriate' touching began"). E.K. reported that Dibble had touched her and taken photographs of her nude vaginal area, but nothing in the affidavit states that in taking these actions Dibble violated criminal statutes. (Hearing Ex. 1 at 5.) This does not tend toward a finding of probable cause to search Dibble's house.



 

**[18]** **[19]** {¶ 38} With respect to the student, E.S.[2], the detective's affidavit reports that Dibble ran his hands over her clothed buttocks and vaginal area at school. *Id.* Though the affidavit does not explicitly say so, a fair reading of the affidavit is that this sexual contact was offensive to E.S. Thus, the affidavit does fairly describe the crime of sexual imposition against E.S., an alleged violation of R.C. 2907.06(A)(1). As such, the detective's affidavit was sufficient to establish probable cause to arrest Dibble, because it provided information that would warrant a prudent person's belief that he had committed the crime of sexual imposition. *See Miller v. Sanilac Cty.*, 606 F.3d 240, 248 (6th Cir.2010), quoting *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959) ("An officer has probable cause when 'the facts and circumstances known to the officer warrant a prudent [person] in believing that an offense has been committed.' "). However, the affidavit did not establish probable cause to believe that evidence of any crime was likely to be found at Dibble's home. As the United States Supreme Court stated, "[j]ust as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Applying this maxim, probable cause to believe that Dibble offensively touched E.S. at school will not support a warrant to search Dibble's home.

**[20]** {¶ 39} The detective's affidavit in support of the search warrant that was issued to search Dibble's home described ***907** two things: first, a sexual course of conduct with one adult woman (E.K.) involving photographs taken with a digital camera that did not indicate a crime, and second, offensive sexual contact while clothed with a student (E.S.) at a school (who later proved to be of legal age). No reasonable law enforcement officer could think that these two pieces of information, separately or together, would suggest a warranted belief that there was probable cause to search Dibble's home. While Dibble used a digital camera with E.K., which could support the inference that downloading photos from the camera would have to occur on a computer, likely located at his home, his photographic conduct was not a crime. And while Dibble allegedly committed a crime while at school when he offensively touched E.S., there is no evidence in the warrant that he took photographs of her. In short, no events, legal or illegal, described in the detective's affidavit occurred at Dibble's home, and his alleged, illegal touching of E.S. did not result in any physical evidence that reasonably could be believed to be stored at his home. We do not find any manifestation of "objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (Internal quotation marks omitted.) *Leon* at 923, 104 S.Ct. 3405.

## IV. CONCLUSION

{¶ 40} The affidavit the police relied on to search Dibble's house provided information about consensual nude photographs Dibble took of one young adult woman who graduated from the school where he was employed as a teacher. It also provided information that Dibble offensively touched another young woman at school without her consent. Photographs consensually taken by Dibble of an adult female whom he met through teaching at the school she graduated from, though likely to be found at Dibble's house, were not evidence of a crime. An affidavit that describes criminal offensive touching of another woman, a student at the school where Dibble taught, but describes no further activity involving Dibble's home does not support the search of his house. As such, the affidavit objectively produces no set of facts that a reasonable law enforcement officer could in good faith rely on to search a house. There being no probable cause for the issuance of the warrant, we hold that the good-faith exception of *Leon* does not apply. Objectively, the warrant was "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (Internal quotation marks omitted.) *Leon* at 923, 104 S.Ct. 3405. Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and order judgment entered on the motion to suppress in favor of Dibble.

*Judgment reversed.*

TYACK, P.J., concurs.

SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 41} Because I believe the trial court did not err when it determined that the good-faith exception to the exclusionary rule applied and denied appellant's motion to suppress, I respectfully dissent.



 

{¶ 42} In this appeal, appellee argues that Detective Wuertz's affidavit, as supplemented by his testimony at the suppression hearing, establishes the required nexus between appellant's home and a crime against E.S. [3] I agree.

***908** {¶ 43} At the suppression hearing in this case, Detective Wuertz gave the following testimony:

> [Prosecutor:] Did she [E.S.] indicate any other activity, either photographs or touching or otherwise?
>
> A. She did. She relayed that she felt kind of strange. There were times that [appellant] took pictures of them in kind of —she described them as unitard suits in order for costumes for plays and that in describing those she said he would have them specific instructions to wear nothing underneath these unitard suits, and he would then take pictures of them wearing these unitard suits in some way to aid in the creation of costumes for them.
>
> [Prosecutor:] And these unitards, they were somewhat see-through, you indicated?
>
> A. Correct. She described them as practically see-through, if not see-through.
>
> * * *
>
> [Prosecutor:] Okay. Do you recall what else you told her [Judge Peeples], whether it be in answer to a question or other testimony?
>
> A. I believe I went back to a little more detail about how the relationship with these girls was started in 7th grade, how they were cultivated to the point to where they were.
>
> I told her about the photographs of the unitards and the see-through unitards that they felt uncomfortable about, some just different things to give her a little bit more background than what was actually typed in the search warrant.
>
> I believe in that I said due to the possible see-through of the unitards I was very concerned about where those photos were and what exactly those were being used for.

(June 29, 2010 Tr. at 27, 34.)

{¶ 44} In the decision on appellant's motion to suppress, the trial court found that Detective Wuertz's affidavit "discusses two similar situations of deviant behavior and connects aspects of that behavior to the location specified in the warrant." (Aug. 16, 2016 Decision at 2.) The trial court also noted that "[t]he officer discussed events involving a camera used to take illicit photos of the minor victim and a similar course of conduct with the victim E.K." [4] (Aug. 16, 2016 Decision at 2.) There is no question that the affidavit states that appellant had sexual contact with both E.K. and E.S. The affidavit connects appellant's sexual contact with E.K. to appellant's home because the affidavit states that appellant took digital photographs of E.K. However, the affidavit does not state appellant took digital photographs of victim E.S. Thus, the trial court's findings evidence consideration of Detective Wuertz's sworn, but unrecorded, testimony before the issuing judge.

{¶ 45} After the remand order issued by this court in *Dibble III*, the state filed a motion for reconsideration wherein the state argued that our decision erroneously limited the trial court's review, on remand, ***909** to the four corners of the affidavit. In overruling the motion, this court stated: "This court did not provide any instruction to the trial court regarding the evidence that it should or should not consider in making its determination whether Detective Wuertz conducted the search in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate." *Dibble IV* at ¶ 11. [5]

{¶ 46} The majority notes that Civ.R. 41(C)(2) confines trial court review to the four corners of the affidavit and any recorded testimony made part of the affidavit when determining probable cause and thus finds that the trial court could only review the sworn affidavit in determining whether the good-faith exception applied to these facts. I disagree. However, in determining whether the good-faith exception to the exclusionary rule applies, several Ohio appellate courts have held that a reviewing court may look beyond the four corners of the affidavit and consider unrecorded oral testimony to determine whether the officer executing the search warrant did so in good-faith reliance on the magistrate's issuance of the search warrant. *State v. O'Connor*, 12th Dist. No. CA2001-08-195, 2002-Ohio-4122, ¶ 21, 2002 WL 1832865. *See also State v. Oprandi*, 5th Dist. No. 07 CA 5, 2008-Ohio-168, ¶ 45, 2008 WL 170683, *appeal denied*, 118 Ohio St.3d 1462, 2008-Ohio-2823, 888 N.E.2d 1114; *State v. Mays*, 2d Dist. No. 23986, 2011-Ohio-2684, ¶ 31, 2011 WL 2176172; *State v. Landis*, 12th Dist. No. CA2005-10-428, 2006-Ohio-3538, 2006 WL 1880495.

{¶ 47} The principle underlying these cases is the pronouncement in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), that " 'all of the



 

circumstances' " may be considered in determining whether a reasonably well-trained police officer would have known that the search was illegal despite the magistrate's authorization. *O'Connor* at ¶ 22, quoting *Leon* at 922, fn. 23, 104 S.Ct. 3405; *Oprandi* at ¶ 45, quoting *Leon* at 922, fn. 23, 104 S.Ct. 3405. Additional support for this position resides in the language of Crim.R. 41(C)(2), which expressly limits the scope of the recorded testimony requirement to the question whether "probable cause exists" and to "[t]he finding of probable cause." The Supreme Court of the United States released the *Leon* decision in 1984 and the Supreme Court of Ohio issued its decision in *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), in 1989. Crim.R. 41 has been amended several times since the establishment of the good-faith exception to the exclusionary rule, but the recorded testimony requirement in the rule has never been extended beyond the determination of probable cause.[6] Nor has the Supreme ***910** Court of Ohio issued a decision prohibiting a trial court from considering unrecorded oral testimony in determining the applicability of the good-faith exception to the exclusionary rule.

{¶ 48} The good-faith exception applies where the search warrant affidavit " 'contain[s] a minimally sufficient nexus between the illegal activity and the place to be searched' but [does] not contain sufficient information to establish probable cause." *Dibble III* at ¶ 20, quoting *United States v. Carpenter*, 360 F.3d 591, 596 (6th Cir.2004). The question for the court in such cases is " 'whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.' " *United States v. Frazier*, 423 F.3d 526, 536 (6th Cir.2005), quoting *United States v. Weaver*, 99 F.3d 1372, 1380 (6th Cir.1996). In the context of the good-faith exception, reasonably well-trained officers may infer a nexus between a place to be searched and items sought, even when the affidavit fails to establish probable cause. *Carpenter* at 596,.

{¶ 49} In *O'Connor*, an individual repairing O'Connor's computer alerted authorities that the computer contained downloaded images of child pornography. Police then obtained a search warrant and seized the computer from the home of the repair person. Police subsequently obtained a second warrant to search O'Connor's residence for additional evidence relating to child pornography. As a result of the search, police discovered compact discs and floppy discs containing photographs depicting child pornography.

{¶ 50} At the hearing on O'Connor's motion to suppress, the state presented the testimony of several witnesses, including the detective/affiant and the municipal court judge who issued the warrant. The testimony established that detectives informed the issuing judge that the computer came from O'Connor's residence and that O'Connor had, at one point in time, retrieved his hard drive from the repairmen's residence to copy files so as not to lose them during the reformatting process.

{¶ 51} The trial court denied O'Connor's motion to suppress and O'Connor appealed. The Twelfth District Court of Appeals found the warrant was not supported by probable cause because the computer had been seized from the repairmen's home, and there was nothing in the affidavit to establish a nexus between appellant's home and further evidence of child pornography. However, when the Twelfth District reviewed the transcript of the suppression hearing, the court found that oral statements provided to the issuing judge supplied the necessary nexus between O'Connor's residence and the items to be seized. *Id.* at ¶ 19. The Twelfth District held that the good-faith exception to the exclusionary rule applied, and the trial court had not erred by denying the motion to suppress. *Id.* at ¶ 23.

{¶ 52} In my view, the facts in this case are similar to those in *O'Connor* and require the same conclusion. Detective Wuertz is a 13–year veteran of the Upper Arlington Police Department. At the time of this investigation, his assignment included "juvenile crime, juvenile sex crimes, and narcotics investigations." (June 29, 2010 Tr. at 4.) Detective Wuertz testified at the suppression hearing that he told the municipal court judge, under oath, appellant had taken inappropriate photographs of both E.K. and E.S. in see-through unitards without undergarments. Though this information is not contained in Detective Wuertz's affidavit, such information was properly presented to and considered by the trial court and is sufficient to create a nexus between appellant's home and evidence of a crime against E.S. It is also sufficient to support a finding by the trial court that the officers who served the warrant, ***911** including Detective Wuertz, relied on a warrant based on an affidavit that contained a sufficient nexus between the illegal activity and the place to be searched. When the affidavit is supplemented by the unrecorded oral testimony of Detective Wuertz, there is no question that the affidavit contains the indicia of probable cause.

{¶ 53} In *Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), the Supreme Court of the



 

United States discussed the development of the good-faith exception to the exclusionary rule as follows:

> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. *Herring* [*v. United States*, 555 U.S. 135, 143 [129 S.Ct. 695, 172 L.Ed.2d 496] (2009) ]. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.* at 144 [129 S.Ct. 695] * * *. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, *Leon, supra*, at 909 [104 S.Ct. 3405] * * * (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, *Herring, supra*, at 137 [129 S.Ct. 695] * * *, the " 'deterrence rationale loses much of its force,' " and exclusion cannot "pay its way." *Leon, supra*, at 919 [104 S.Ct. 3405] * * * (quoting *United States v. Peltier*, 422 U.S. 531, 539, 95 S.Ct. 2313, 45 L.Ed. 2d 374 (1975)).

*Id.* at 238, 131 S.Ct. 2419.

{¶ 54} The Supreme Court in reversing this court in *Dibble II* expressly determined that Detective Wuertz did not "knowingly and intentionally includ[e] false information in his search-warrant affidavit." *Id.* at ¶ 25. In light of that decision, the only misconduct that can be attributed to Detective Wuertz in this case is a simple, isolated mistake in failing to include an averment in his affidavit that appellant had also taken photographs of E.S. in a see-through unitard without undergarments. The trial court stated, "based upon the evidence, any deficiencies within the affidavit are not so egregious that the executing officers could not reasonably presume the warrant was valid." (Aug. 16, 2016 Decision at 2.) I agree with the trial court. In my view, the relatively minor omission from the search warrant affidavit in this case does not justify the application of the exclusionary rule.

{¶ 55} For the foregoing reasons, I agree with those appellate districts holding that a trial court, in ruling on a motion to suppress, may rely on oral unrecorded testimony provided to the issuing judge when making the determination whether the good-faith exception applies. The record supports the trial court's conclusion that the officers who conducted the search of appellant's residence, including Detective Wuertz, did not rely on a warrant based on an affidavit that was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon* at 923, 104 S.Ct. 3405. Therefore, the trial court properly determined that the good-faith exception to the exclusionary rule applied and denied appellant's motion to suppress. [7]

{¶ 56} Accordingly, I would overrule appellant's sole assignment of error and ***912** affirm the judgment of the trial court. Because the majority holds otherwise, I respectfully dissent.

**All Citations**

92 N.E.3d 893, 2017 -Ohio- 9321

Footnotes

1 The dissent in this appeal questions the majority decision's reliance on *Shepcaro*, noting that the case was decided before the United States Supreme Court created the good-faith exception in *Leon*. Determinations of whether a search warrant is valid as executed and whether a good-faith exception applies are separate steps in a comprehensive analysis of whether evidence obtained via a law enforcement search should be suppressed. Our prior holding in *Shepcaro* serves as a longstanding guide for determining what evidence is admissible in a Crim.R. 41 suppression hearing, which as applied to the facts of this case, first requires a determination of whether or not a search warrant is valid or valid as executed. Under the later decided *Leon* and its progeny, the good-faith exception to execution of an invalid search warrant occurs *after* an analysis is performed under Crim.R. 41, which by its terms defines what quality of evidence is admissible. We find no basis in the law for applying an evidentiary standard to support a good-faith exception that is different from or less restrictive or reliable than what evidence is required to determine the validity of a search warrant.

2 Although the affidavit did not address it, E.S. later disclosed that she was over 18 when Dibble touched her at school, and she was legally an adult at the time it occurred. (Aug. 15, 2013 Sentencing Tr. at 16, filed Oct. 24, 2013.)

3 For purposes of this dissent, I shall refer to the decision of the Supreme Court of Ohio in this case as "*Dibble II*" (*State v. Dibble*, 133 Ohio St.3d 451, 2012-Ohio-4630, 979 N.E.2d 247), this court's decision in the subsequent appeal as "*Dibble III*" (*State v. Dibble*, 10th Dist. No. 13AP-798, 2014-Ohio-5754, 2014 WL 7462904), and this court's decision on reconsideration as "*Dibble IV*" (*State v. Dibble*, 10th Dist. No. 13AP–798 (Mar. 3, 2016) (memorandum decision)).



 

4 The majority cites evidence produced at a sentencing hearing in concluding that E.S. was 18 years of age when the sexual contact occurred. The affidavit identifies victim E.S. as a high school senior at the time the sexual contact occurred but does not state her age.

5 I disagree with appellant's contention that the Supreme Court in *Dibble II* prohibited the trial court from considering information outside the four corners of the affidavit in determining whether the good-faith exception applied. Neither the Supreme Court in *Dibble II* nor this court in *Dibble III* provided any instruction to the trial court regarding the evidence that it should or should not consider in determining whether to apply the good-faith exception. *Dibble IV* at ¶ 11.

6 The majority cites this court's decision in *State v. Shepcaro*, 45 Ohio App.2d 293, 344 N.E.2d 352 (10th Dist.1975), for the proposition that Crim.R. 41(C)(2) prohibits a trial court from considering oral unrecorded testimony in ruling on the issue of probable cause and the applicability of the good-faith exception. However, this court decided *Shepcaro* in 1975, nine years before the Supreme Court of the United States created the good-faith exception and thirteen years before the Supreme Court of Ohio adopted the good-faith exception in *George*. Consequently, *Shepcaro* does not stand for the proposition that oral unrecorded testimony is inadmissible at a suppression hearing where the question is whether the good-faith exception applies.

7 My ruling on this issue would render moot the state's argument regarding the constitutionality of Crim.R. 41(C)(2).

APPENDIX C

2014 WL 7462904

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.

STATE of Ohio, Plaintiff–Appellee,
v.
Lawrence A. DIBBLE, Defendant–Appellant.

No. 13AP–798.
|
Decided Dec. 30, 2014.

Appeal from the Franklin County Court of Common Pleas.

**Attorneys and Law Firms**

Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellee.

Meeks and Thomas Co., LPA, and David H. Thomas, for appellant.

**Opinion**

BROWN, J.

***1** {¶ 1} Defendant-appellant, Lawrence A. Dibble, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of multiple counts of voyeurism and one count of sexual imposition and denying his motion to suppress.

{¶ 2} On February 2, 2010, two young women, E.K. and E.S., a minor, informed Upper Arlington Police Detective Andrew Wuertz that a teacher at The Wellington School had sexually assaulted E.S. on school grounds. On February 3, 2010, Detective Wuertz appeared before a judge and requested a warrant to search appellant's residence. The search warrant affidavit states:

> On February 2, 2010 Victim # 1 [E.S.] reported to the Upper Arlington Police Department that while a student at The Wellington School, one of her teacher's, Lawrence A. Dibble touched her inappropriately. Victim # 1 stated that she was rehearsing line for a play with Dibble in the school when he asked for a reward for getting his lines correct. He asked to touch Victim # 1's stocking on her leg. Upon touching the stocking Dibble then proceeded to run his hand up under Victim # 1's skirt brushing his fingers across her vaginal area. Victim # 1 stated she was shocked and froze as Dibble then ran his hands over her buttocks, and lower abdomen area. Victim # 2 [E.K.] was with Victim # 1 while she made the report. Victim # 2 stated she also had inappropriate contact with Dibble. Victim # 2 stated it was after she had graduated high school where Dibble had also been her teacher. Victim # 2 stated that Dibble had taken photo's of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim # 2 told investigators that Dibble used a digital camera to take the photo's, and made her wear a pillow case over her head while he took them.
>
> On February 2, 2010 Victim # 1 went to The Wellington School at the direction of the Upper Arlington Police wearing a recording device. She had a conversation with Dibble about the inappropriate touching where he stated "I just wasn't thinking."
>
> Investigators from Upper Arlington believe Dibble's computers, cameras, media storage devices, etc. may contain correspondence, and photos to substantiate Victim # 1 and Victim # 2's claims.

(Sic passim.)

{¶ 3} On February 3, 2010, the judge issued a warrant authorizing the seizure of computers, cameras, and data storage media. That same day, several police officers, including Detective Wuertz, executed the warrant at 6595 Brock Street, Dublin, Ohio. The search resulted in the seizure of several items, including a laptop computer, a camera, and several videotapes and DVDs. On March 29, 2010, a Franklin County Grand Jury indicted appellant on 21 counts of voyeurism, in violation of R.C. 2907.08, and one count of sexual imposition, in violation of R.C. 2907.06. None of the charges related to E.K.

{¶ 4} On May 12, 2010, appellant filed a motion to suppress evidence obtained pursuant to a search warrant. On June 29, 2010, the trial court conducted an evidentiary hearing on the motion to suppress. As a result of the hearing, the trial court granted appellant's motion to suppress upon finding that Detective Wuertz deliberately included false and misleading information in his search warrant affidavit. Specifically, the trial court found that Detective Wuertz falsely represented E.K. as a "victim" inasmuch as he knew that E.K. was an



 

adult when appellant committed the sexual acts described in the affidavit and that she had given consent.

***2** {¶ 5} The state appealed the trial court's judgment to this court in *State v. Dibble,* 195 Ohio App.3d 189, 2011–Ohio–3817 (10th Dist.) We overruled the state's assignments of error and affirmed the judgment of the trial court. *Id.* The state appealed our decision to the Supreme Court of Ohio. In *State v. Dibble,* 133 Ohio St.3d 451, 2012–Ohio–4630, the Supreme Court reversed the judgment of this court and remanded the case to the trial court for another hearing on the motion to suppress. The opinion of the Supreme Court provides, in relevant part, as follows:

> [Appellant's] alleged behavior with each, including back rubs behind closed doors, other inappropriate touching, and photographing both women in see-through unitards without any undergarments, if true, clearly made victims of these young women. Therefore, the detective's use of the term "victim" to refer to E.K., even though the sexual activity regarding E.K. that was described in the search-warrant affidavit occurred after she was 18 and had graduated, did not amount to his knowingly and intentionally including false information in his search-warrant affidavit.
>
> Since the trial judge's analysis of whether to suppress the evidence began with his conclusion that the detective's testimony was false and we have called into question his basis for that conclusion, we find that consideration of the other assignments of error, which relate to later determinations in the judge's analysis, would be premature. Consequently, we reverse the judgment of the court of appeals and remand this cause to the trial court to hold a new suppression hearing consistent with this opinion.

*Id.* at ¶ 25–26.

{¶ 6} On remand, the trial court conducted a new suppression hearing. In a decision dated April 30, 2014, the trial court denied appellant's motion to suppress the evidence uncovered in the search of his home. The trial court concluded that, even though Detective Wuertz's affidavit did not provide a substantial basis for concluding that probable cause existed, the officers obtained the evidence from appellant's home while acting in objectively reasonable reliance on a search warrant issued by a detached and neutral judge. In reaching its conclusion, the trial court relied on the "good faith" exception to the exclusionary rule first articulated by the United States Supreme Court in *United States v. Leon,* 468 U.S. 897 (1984), and later adopted by the Supreme Court of Ohio in *State v. George,* 45 Ohio St.3d 325 (1989).

{¶ 7} As a result of the trial court's decision, appellant entered a plea of no contest to each of the counts in the indictment. On August 15, 2013, the trial court convicted appellant of all charges and sentenced him to a prison term of four years, followed by five years of mandatory post-release control. In addition, the trial court classified appellant as a Tier I sexual offender with a 15–year registration requirement.

{¶ 8} Appellant timely appealed to this court from his conviction and sentence and assigns the following as error:

> ***3** The trial court erred in overruling Appellant's motion to suppress evidence and finding that police acted in good faith reliance on a search warrant that was not supported by probable cause, where the officers' reliance on the warrant was not objectively reasonable. This error by the trial court deprived Appellant of his right to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution.

{¶ 9} Appellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact. *State v. Helmbright,* 10th Dist. No. 11AP–1080, 2013–Ohio–1143. Accordingly, an appellate court's standard of review of a motion to suppress is two-fold. *State v. Holland,* 10th Dist. No. 13AP–790, 2014–Ohio–1964, ¶ 8, citing *State v. Reedy,* 10th Dist. No. 05AP–501, 2006–Ohio–1212, ¶ 5. First, we must determine whether competent, credible evidence supports the trial court's findings. *State v. Burnside,* 100 Ohio St.3d 152, 2003–Ohio–5372, ¶ 8. Second, we must independently determine whether the facts satisfy the applicable legal standard, without giving any deference to the conclusion of the trial court. *Id.* We also note that federal appellate court's apply the same standard of review to the district court's determination of probable cause and the application of the good-faith exception. *United States v. Buffer,* 6th Cir. No. 12–5052 (June 24, 2013), citing *States v. Leake,* 998 F.2d 1359, 1362, 1366 (6th Cir.1993).



 

{¶ 10} However, "[i]n 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." *George* at paragraph two of the syllabus, citing *Illinois v. Gates,* 462 U.S. 213 (1983).

{¶ 11} We must first address the state's right to challenge the trial court's initial determination that the search warrant was not issued upon probable cause. For the following reasons, we find that the state may not challenge the trial court's probable cause determination in this appeal.

{¶ 12} R.C. 2945.67(A) provides that "[a] prosecuting attorney * * * may appeal as a matter of right any decision of a trial court in a criminal case * * * which * * * *grants a motion * * * to suppress evidence.*" (Emphasis added.) This statute grants the state a substantive, but limited, right of appeal. *In re T.A.,* 10th Dist. No. 07AP–327, 2007–Ohio–4417, ¶ 6, citing *State v. Thompson,* 10th Dist. No. 03AP–841, 2004–Ohio–3229, ¶ 12. Because the trial court denied appellant's motion to suppress the evidence obtained in the search of his home, the statute does not permit an appeal by the state.

***4** {¶ 13} " '[W]hen the prosecution wishes to appeal a judgment of the trial court not expressly provided for in R.C. 2945.67(A), it must ask for leave to appeal under App.R. 5(C).' " *In re A.E.,* 10th Dist. No. 08AP–59, 2008–Ohio–4552, ¶ 10, quoting *State v. Mitchell,* 6th Dist. No. L–03–1270, 2004–Ohio–2460, ¶ 9. Under App.R. 5(C), "[w]hen leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal *shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed* and shall set forth the errors that the movant claims occurred in the proceedings of the trial court." (Emphasis added.)

{¶ 14} The state has not sought leave from this court to appeal the trial court judgment. Consequently, this court is without jurisdiction to consider the state's challenge to the trial court's probable cause ruling in this appeal. *Thompson* at ¶ 21.

{¶ 15} The Fourth Amendment 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." (Emphasis added.) However, in *Leon,* the United States Supreme Court recognized that "the Fourth Amendment 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 unsupported by probable cause." *George* at paragraph three of the syllabus. In other words, if an affidavit lacks probable cause, an exception to the exclusionary rule exists where " 'the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate.' " *United States v. Watson,* 498 F.3d 429, 431 (6th Cir.2007), quoting *Massachusetts v. Sheppard,* 468 U.S. 981, 987–88 (1984). "This is known as the good-faith exception." *United States v. Rose,* 714 F.3d 362, 367 (6th Cir.2013).

The good-faith exception to the exclusionary rule is limited in its application. *George* at 331; *Leon* at 923. The *Leon* court cautioned that "[s]uppression remains an appropriate remedy" when the court finds that any one of the following four circumstances exist:

> (1) " * * * the magistrate or judge * * * was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth * * * "; (2) " * * * the issuing magistrate wholly abandoned his judicial role * * * "; (3) *an officer purports to rely upon " * * * a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable* ' "; or (4) " * * * depending on the circumstances of the particular case, a warrant may be so facially deficient —*i.e.,* in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. * * * "

***5** (Emphasis added.) *George* at 331; *Leon* at 923.

{¶ 17} An affidavit lacks the requisite *indicia of probable cause* if it is a "bare bones" affidavit. *United States v.*



 

*Laughton,* 409 F.3d 744, 748 (6th Cir.2005), citing *Leon* at 914–23. The inquiry into whether an affidavit is so bare bones as to preclude application of the good-faith exception is a less demanding inquiry than that involved in determining whether an affidavit provides a substantial basis for the magistrate's conclusion of probable cause. *Id.* at 748, citing *Leon* at 914–23. The Sixth Circuit has defined a "bare bones" affidavit as one that states "suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *Id.* at 748–49, citing *United States v. Weaver,* 99 F.3d 1372, 1378 (6th Cir.1996).

{¶ 18} Appellant argues that in conducting the "good faith" analysis, the trial court failed to consider whether Detective Wuertz's affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. We agree.

{¶ 19} In making its "good faith" determination, the trial court engaged in the following analysis:

> [T]his Court cannot conclude that the statements made by Detective Wuertz within the affidavit qualify as statements that the "affiant knew was false or would have known was false except for his reckless disregard of the truth" as required under the first category listed above. *State v. George, supra.*
>
> In addition, there is no argument, nor does this Court suggest, that the issuing Judge wholly abandoned her role. *And, this is not an extraordinary circumstance where the warrant or affidavit were so inadequate in terms of its particularity of place to be searche[d] or items to be seized as to qualify under the other remaining Leon categories.*
>
> As such, this Court finds that Detective Wuertz acted in objectively reasonable reliance on a search warrant issued by a detached and neutral judge under the good faith exception to the exclusionary rule.

(Emphasis added.) (Decision, 9.)

{¶ 20} Similarly, the Sixth Circuit Court of Appeals has applied the good-faith exception where the affidavit "contained a minimally sufficient nexus between the illegal activity and the place to be searched" but did not contain sufficient information to establish probable cause. *United States v. Carpenter,* 360 F.3d 591, 596 (6th Cir.2004). *See also United States v. Van Shutters,* 163 F.3d 331, 336 (6th Cir.1998) (good-faith exception applied where the affidavit described the residence to be searched and the items sought, but connected the residence to defendant's counterfeiting scheme only by stating that the residence "was available" to the defendant); *United States v. Schultz,* 14 F.3d 1093, 1098 (6th Cir.1994) (good-faith exception applied where officer averred that, based on his training and experience, he believed that evidence of defendant's illegal drug trafficking could be found in certain safe deposit boxes). *But see Laughton* (suggesting that court erred in considering the officer's expertise inasmuch as the good-faith standard is an objective one); *United States v. Hove,* 848 F.2d 137 (9th Cir.1988) (No reasonable officer could have believed that the warrant to search the home of defendant's father was valid given the failure of the affidavit to articulate any nexus between the home and defendant's menacing conduct toward her ex-husband.).

***6** {¶ 21} Although the trial court concluded that the good-faith exception applied in this case, the trial court's decision contains no meaningful consideration of whether Detective Wuertz's affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. We cannot infer any such consideration from the trial court's statement that "this is not an extraordinary circumstance where *the warrant or affidavit* were so inadequate in terms of its particularity of place to be searche[d] or items to be seized as to qualify under the *other remaining Leon categories.*" (Emphasis added.) (Decision, 9.) In our opinion, this statement may only be interpreted as a determination of the facial validity of the warrant itself. It is not a proper determination whether Detective Wuertz's affidavit is so bare bones as to preclude application of the good-faith exception.

{¶ 22} As noted above, the trial court found that the affidavit did not provide a substantial basis to conclude that probable cause existed. Indeed, the trial court expressly stated that "[t]he *affidavit* does not contain any information that establishes there is a *substantial* basis to conclude that evidence of gross sexual imposition or evidence of correspondence or photographs that substantiate E.S.'s claims would be found in Defendant's home." (Emphasis sic.) (Decision, 5.) The trial court also noted that "[t]he information contained in the affidavit is insufficient to create a nexus between Defendant's home * * * and illegal conduct that took place at the school." (Decision, 7.)

{¶ 23} Having determined that the information in the affidavit fails to supply probable cause to search appellant's home

for evidence of gross sexual imposition, the trial court was obligated to conduct further examination of the affidavit to determine whether it is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." However, the trial court's decision contains no discussion or analysis whether the information in the affidavit satisfies the less demanding standard set forth in *Leon* and *George.* Such an examination is critical to a proper determination whether to apply the good-faith exception to the exclusionary rule.

{¶ 24} In short, we find that the trial court erred when it failed to fully consider whether the circumstances of this case precluded the application of the good-faith exception. Accordingly, we sustain appellant's sole assignment of error. Consistent with the reasoning of the Supreme Court in *Dibble,* we shall remand the case for the trial court to re-examine Detective Wuertz's *affidavit* and to consider whether it is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. We will not make that determination in the first instance in this appeal. *Dibble* at ¶ 26.

***7** {¶25} Appellant also contends that the deficiencies in the warrant foreclose application of the good-faith exception. We disagree. The warrant issued by the judge provides that Upper Arlington police may enter appellant's residence to diligently search for the following:

> Evidence of the crime of Gross Sexual Imposition, to include Computers, printers, scanners, photographs, cameras, video cameras, videotapes including memory devices and storage media, associated peripheral equipment and any and all types of related computer equipment and electronic storage media (See Attachment A) as well as fruits and instrumentalities of other crimes as yet unknown. [1]

{¶ 26} As a general rule, when determining whether a search warrant satisfies the Fourth Amendment's particularity requirement, reviewing courts employ a standard of practical accuracy rather than technical precision. *United States v. Otero,* 563 F.3d 1127 (10th Cir.2009). The good-faith exception under *Leon* and *George* requires that the deficiencies in the warrant as to particularity must not be so egregious that the executing officers cannot reasonably presume it to be valid.

{¶ 27} The warrant in this case is not so deficient in particularizing the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid. First, the place to be searched is clearly identified as appellant's home address, which was known to the officers. Second, though the warrant contemplates the seizure of virtually all electronic and photographic evidence relevant to the crime of gross sexual imposition, given the nature of the factual allegations in Detective Wuertz's affidavit, a more specific description of the items to be seized would prove difficult to fashion.

{¶ 28} Moreover, in our opinion, the applicability of the good-faith exception in this case depends much more on the trial court's examination of Detective Wuertz's affidavit for the requisite indicia of reliability than its examination of the warrant for the lack of particularity. As this case is currently postured, we cannot say that there are defects on the face of the warrant that would preclude the application of the good-faith exception to the exclusionary rule.

{¶ 29} For the foregoing reason, we hold that the trial court erred by denying appellant's motion to suppress without first determining whether Detective Wuertz's affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *Leon; George.* Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and remand the case to that court for further proceedings in accordance with law, consistent with this decision.

*Judgment reversed and cause remanded.*

SADLER, P.J., and CONNOR J., concur.

**All Citations**

Not Reported in N.E.3d, 2014 WL 7462904, 2014 -Ohio- 5754



 

Footnotes

1 “Attachment A” describes, in more detail, the types of devices in which electronic information may be stored; it lists associated computer documentation subject to seizure, and it identifies documents that may provide “indicia of occupancy.”#

APPENDIX D

133 Ohio St.3d 451
Supreme Court of Ohio.

The STATE of Ohio, Appellant,
v.
DIBBLE, Appellee.

No. 2011–1569.
|
Submitted June 20, 2012.
|
Decided Oct. 10, 2012.

**Synopsis**

**Background:** Defendant who was charged with 20 counts of voyeurism and one count of sexual imposition moved to suppress evidence obtained during a warrant search of his home, challenging the veracity of the affidavit in support of the warrant. The Court of Common Pleas, Franklin County, No. 10CR–03–1958, granted the motion. The state appealed. The Court of Appeals, Peggy L. Bryant, P.J., 195 Ohio App.3d 189, 959 N.E.2d 540, affirmed. State sought review which was granted.

**[Holding:]** The Supreme Court, Lundberg Stratton, J., held that officer's use of the term "victim" to describe defendant's former student aide in search warrant affidavit did not amount to his knowingly and intentionally including false information.

Reversed and remanded.

Pfeifer, J., dissented and filed opinion.

West Headnotes (3)

**[1] Searches and Seizures** False, inaccurate or perjured information; disclosure

Officer's use of the term "victim" to describe defendant's former student aide in search warrant affidavit did not amount to his knowingly and intentionally including false information, although the sexual activity that was described in the affidavit occurred after she was 18 years of age and graduated from school at which defendant taught, where defendant allegedly sexually exploited two young women while employed as a teacher at their school, and his alleged behavior with each, including back rubs behind closed doors, other inappropriate touching, and photographing both women in see-through unitards without any undergarments, if true, clearly made victims of these young women. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

**[2] Courts** Abuse of discretion in general

A court abuses its discretion when its ruling lacks a sound reasoning process.

1 Cases that cite this headnote

**[3] Searches and Seizures** False, inaccurate or perjured information; disclosure

A determination whether information in a search-warrant affidavit is false must take into account the non-technical language used by non-lawyers. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

****248 *451 SYLLABUS OF THE COURT**

A determination whether information in a search-warrant affidavit is false must take into account the nontechnical language used by nonlawyers.

**Attorneys and Law Firms**

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellant.

R. William Meeks Co., L.P.A., Columbus, and David H. Thomas, for appellee.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Scott M. Heenan, Assistant Prosecuting Attorney, urging



 

reversal on behalf of amicus curiae Ohio Prosecuting Attorney's Association.

Hunter, Carnahan, Shoub, Byard & Harshman, Russell E. Carnahan, and Robert M. Cody, urging reversal on behalf of amicus curiae Fraternal Order of Police, Capital City Lodge No. 9.

Jeanine Hummer, Upper Arlington City Attorney, and Tom Lindsey, Assistant City Attorney, urging reversal on behalf of amicus curiae city of Upper Arlington.

Timothy Young, Ohio Public Defender, and Stephen Goldmeier and Sarah G. LoPresti, Assistant Public Defenders, urging affirmance on behalf of amicus curiae Ohio Public Defender.

**Opinion**

LUNDBERG STRATTON, J.

{¶ 1} This is an appeal from a judgment of the court of appeals affirming a trial court's judgment granting a motion to suppress. Today we must decide whether the trial court abused its discretion in granting the motion to suppress after it determined that an officer knowingly and intentionally made false statements in his search-warrant affidavit. Because we determine that the trial court did abuse its discretion, we reverse the judgment of the court of appeals, which upheld the ***452** trial ****249** court's ruling, and remand the cause to the trial court to conduct a new suppression hearing consistent with our holding.

**Facts and Procedural History**

{¶ 2} On February 3, 2010, Upper Arlington Police Detective Andrew Wuertz asked a Franklin County municipal court judge to issue a warrant to search defendant-appellee Lawrence A. Dibble's home. Detective Wuertz sought the warrant after speaking with two young women, E.S. and E.K., who reported their experiences with Dibble, who was then a theater instructor at a private school for kindergarten through 12th grade.

{¶ 3} The search-warrant affidavit states:

> On February 2, 2010 Victim # 1 [E.S.] reported to the Upper Arlington Police Department that while a student at The Wellington School, one of her teacher's [sic], Lawrence A. Dibble[,] touched her inappropriately. Victim # 1 stated that she was rehearsing line[s] for a play with Dibble in the school when he asked for a reward for getting his lines correct. He asked to touch Victim # 1's stocking on her leg. Upon touching the stocking Dibble then proceeded to run his hand up under Victim # 1's skirt brushing his fingers across her vaginal area. Victim # 1 stated she was shocked and froze as Dibble then ran his hands over her buttocks, and lower abdomen area. Victim # 2 [E.K.] was with Victim # 1 while she made the report. Victim # 2 stated she also had inappropriate contact with Dibble. Victim # 2 stated it was after she had graduated high school where Dibble had also been her teacher. Victim # 2 stated that Dibble had taken photo's [sic] of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim # 2 told investigators that Dibble used a digital camera to take the photo's [sic], and made her wear a pillow case over her head while he took them.
>
> On February 2, 2010 Victim # 1 went to The Wellington School at the direction of the Upper Arlington Police wearing a recording device. She had a conversation with Dibble about the inappropriate touching where he stated "I just wasn't thinking."
>
> Investigators from Upper Arlington believe Dibble's computers, cameras, media storage devices, etc. may contain correspondence, and photos to substantiate Victim # 1 and Victim # 2's claims.

{¶ 4} The warrant was issued on February 3, 2010, and it authorized the seizure of computers, cameras, and data-storage media. The warrant was ***453** executed the same day, and the search resulted in the seizure of several items, including a laptop computer, a camera, and several videotapes and DVDs.

{¶ 5} Based in part on the evidence seized, Dibble was arrested and charged with 17 felony counts of voyeurism, four misdemeanor counts of voyeurism, and one misdemeanor count of sexual imposition. None of the charges related to E.K.

{¶ 6} Dibble filed a motion to suppress the evidence obtained from the search of his home, arguing that Detective Wuertz had deliberately included false and misleading information in



 

his search-warrant affidavit in that his references to E.K. as a "victim" were false because, as Wuertz knew, E.K. was an adult when the sexual ****250** acts described in the affidavit occurred and the acts had been consensual. The trial court held a hearing on the motion on June 29, 2010.

{¶ 7} Detective Wuertz testified that E.S. came to the police station with her mother and E.K. on February 2 to report what had happened to E.S. E.S. told Wuertz that during her senior year, she was Dibble's aide, which she described as a person who would do whatever Dibble needed done. Wuertz testified that E.S. had told him that she had known Dibble since she was in the seventh grade. Through the years, she had become close to Dibble, and she looked at him as a father figure.

{¶ 8} Detective Wuertz testified that E.S. had relayed to him that one of her duties in being an aide to Dibble was giving him back massages. They would go into his office, he would close the door and remove his shirt, and she would rub his back. In addition, E.S. reported that Dibble had taken pictures of her in see-through or nearly see-through unitards and that Dibble had told her to wear nothing underneath.

{¶ 9} Detective Wuertz testified that the groping incident described in the search-warrant affidavit had taken place nearly a year before E.S. reported it, but he added that in talking to E.S., he felt that Dibble had manipulated her so that he could "get her to do whatever he asked her to do," and he had asked her not to tell anyone. E.S. told Wuertz that after the groping incident, she went to her next class but was upset, so she left that class and wrote Dibble a letter about the incident and took it to him. Before he finished reading it, he tore it up and threw it away and told E.S. that she could not tell anyone about the incident or it would ruin his life. Wuertz reported that E.S. had felt conflicted but had not told anyone. The incident continued to weigh on her to the point that she had trouble sleeping and she knew she had to report it.

{¶ 10} Detective Wuertz also testified that E.K., too, had been Dibble's theater aide when she was a senior and that Dibble had taken pictures of her in a unitard. She had taught E.S. how to give Dibble massages. E.K. also had ***454** looked at Dibble as a father figure, and in fact, Dibble had referred to himself as her stepdad.

{¶ 11} Detective Wuertz conceded that the information in the affidavit regarding E.S. would not have led him to believe that there was any evidence of the alleged inappropriate relationship in Dibble's home. He thus acknowledged that the information in the affidavit related to E.S. did not provide probable cause to search Dibble's home. When pressed about his using the term "victim" with regard to E.K., who was 18 years of age and no longer a student of Dibble's when the sexual contact described in the affidavit began, Wuertz refused to agree that she was not a victim. Wuertz acknowledged that he had never filed a report, beyond the search-warrant affidavit, indicating that she was a victim.

{¶ 12} Detective Wuertz testified that when he appeared before the judge and presented her with the application for the search warrant and the supporting affidavit, she asked him some questions and he gave her some additional information verbally, under oath, that was not contained in the affidavit or application. Wuertz stated that he gave her more background information about Dibble's relationships with the young women, explaining that they had known him as a teacher since they were in seventh grade and that they had been manipulated over time by Dibble. In addition, Wuertz told the judge about the photographs in the unitards that Dibble had taken of E.S. and E.K. when they were students and that he was concerned ****251** about where those photographs were and how they were being used.

{¶ 13} Detective Wuertz again explained that he had referred to E.K. as a victim even though she was an adult when the incident described in the affidavit occurred because he believed that she had been manipulated by Dibble. To demonstrate how easily Dibble manipulated E.K., Wuertz relayed E.K.'s explanation for allowing Dibble to take naked pictures of her. Dibble had told E.K. that he wanted to teach her about internal power and that the only way to see the ultimate energy was to look at her vaginal area. But he said that because the power was so strong, he could not look at it directly for very long and that he needed photos so he could look at the photos longer and study them to see her internal energy. Wuertz explained that E.K. had trusted Dibble and did not believe that he would do anything to hurt her and that she did not think the photos were sexual in nature.

{¶ 14} Detective Wuertz testified that he had not intended to mislead the judge who issued the search warrant. He explained that at the time he typed the search-warrant affidavit, he thought there was a chance that he could charge Dibble with something related to his conduct with E.K., and he said that he still considers E.K. to be a victim.

***455** {¶ 15} The trial court granted Dibble's motion to suppress evidence, finding that Wuertz had "knowingly and



 

intentionally made false statements in his affidavit" and that without those statements, the affidavit did not support a finding of probable cause to search Dibble's home. The trial court declined to consider sworn oral statements made by Wuertz to the judge issuing the warrant when he submitted his search-warrant affidavit, since no record of any such statements had been made. The trial court then held that evidence outside the "false" affidavit standing alone was insufficient to support probable cause. The state appealed, and the Franklin County Court of Appeals affirmed the judgment of the trial court. The case is now before this court upon our acceptance of the state's discretionary appeal. *State v. Dibble,* 130 Ohio St.3d 1493, 2011-Ohio-6556, 958 N.E.2d 956.

**Law and Analysis**

{¶ 16} As a preliminary matter, both courts below concluded that the search-warrant affidavit in question failed to meet Crim.R. 41(C), which excludes consideration of unrecorded sworn oral information. The state contends that this finding compels us to hold that Crim.R. 41(C) is unconstitutional because the Fourth Amendment requires only that the information be given under oath or affirmation. However, we find that we need not reach the issue whether Crim.R. 41(C) is unconstitutional, because we find that the statements made by the detective were not false statements made intentionally or with reckless disregard for the truth. We are remanding this matter for a new hearing, which will now require the trial court to consider the affidavit on its face.

{¶ 17} Turning now to the issue of falsity in a search-warrant affidavit, in 1978, the United States Supreme Court held that

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation ****252** of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

***456** *Franks v. Delaware,* 438 U.S. 154, 155–156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

{¶ 18} This court set forth the analysis for determining whether a law-enforcement affiant intentionally or with a reckless disregard for the truth made a false statement in a search-warrant affidavit in *State v. Waddy,* 63 Ohio St.3d 424, 588 N.E.2d 819 (1992), where we noted that

> "[r]eckless disregard" means that the affiant had serious doubts of an allegation's truth. *United States v. Williams* (C.A.7, 1984), 737 F.2d 594, 602. Omissions count as false statements if "designed to mislead, or *** made in reckless disregard of whether they would mislead, the magistrate." *United States v. Colkley* (C.A.4, 1990), 899 F.2d 297, 301.

*Id.* at 441, 588 N.E.2d 819.

{¶ 19} The focus of the trial and appellate courts in this case was on the detective's use of the word "victim" to describe E.K., the woman who was over 18 at the time of the sexual conduct alleged in the affidavit. According to Wuertz's testimony, however, he considered her to be a victim because Dibble's relationship with E.K. involved a pattern of grooming and manipulation that began when E.K. was a minor and a student of Dibble's. Although the affidavit indicated that the "inappropriate" touching of E.K. occurred after she graduated from high school, Wuertz testified that he had told the judge about the teacher-student relationship. It is therefore difficult to understand how the courts could have deemed the affidavit misleading, since it stated clearly that Victim # 2 (E.K.) had graduated before the "inappropriate" touching began.

{¶ 20} However, the trial court found that the detective's use of the term "victim" to refer to E.K. amounted to knowingly and intentionally including false information in his search-warrant affidavit in order to establish probable cause to search Dibble's house. The court of appeals held that competent and credible evidence supported that finding. We disagree and conclude that the trial court used too narrow a definition of "victim" by viewing the term to encompass only victims of crime. We find this hypertechnical analysis inappropriate.



 

{¶ 21} The United States Supreme Court has explained that search-warrant affidavits are usually drafted by nonlawyers and should be reviewed with that in mind. *United States v. Ventresca,* 380 U.S. 102, 108–109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). Citing *Ventresca,* the dissenting judge in this case reasoned as follows:

> ***457** Here, the trial court interpreted the term "victim" to mean, and only to mean, "a person who is the object of a crime." I conclude, however, that it was improper for the trial court to apply such a limited definition. Specifically, it is improper for a court to invalidate warrants by interpreting the accompanying affidavits in a "hypertechnical" manner because the affidavits are drafted by nonlawyers in ****253** the midst and haste of a criminal investigation. *United States v. Ventresca* (1965), 380 U.S. 102, 108–109, 85 S.Ct. 741, 13 L.Ed.2d 684.
>
> Used more broadly, "victim" can mean (1) "a person who suffers from a destructive or injurious action," or (2) "a person who is deceived or cheated, as by his own emotions or ignorance, by the dishonesty of others, or by some impersonal agency." Webster's Encyclopedic Unabridged Dictionary (Random House 1997).
>
> The trial court noted that few people "would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization." I agree. And, applying this characterization to what may have occurred between E.K. and appellee, an affiant could have reasonably concluded that E.K. was a "victim" under a definition broader than the one the court imposed. Therefore, the characterization of E.K. as a victim was not false, and the trial court erred by suppressing the evidence on that basis.

*State v. Dibble,* 195 Ohio App.3d 189, 2011-Ohio-3817, 959 N.E.2d 540, ¶ 57–59 (French, J., dissenting).

**[1]** {¶ 22} We agree with the reasoning in Judge French's dissent. The validity of a search-warrant affidavit should not turn on the identifier that an officer selects when trying to protect a person's identity. The detective selected "victim" as a generic term to describe the two women in the affidavit so as to not identify them by name. The trial court conceded that Dibble had created "some measure of victimization" with regard to E.K., but then went on to find that Wuertz had used the term "victim" in reference to E.K. to intentionally mislead the trial judge who reviewed the search-warrant affidavit.

**[2]** {¶ 23} A court abuses its discretion when its ruling lacks a sound reasoning process. *State v. Morris,* 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.,* 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

## Conclusion

**[3]** {¶ 24} A determination whether information in a search-warrant affidavit is false must take into account the nontechnical language used by nonlawyers. As ***458** noted by the United States Supreme Court in *Ventresca,* 380 U.S. at 108, 85 S.Ct. 741, 13 L.Ed.2d 684:

> If the teachings of the [United States Supreme] Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

{¶ 25} In this case, Dibble allegedly sexually exploited two young women while ****254** employed as a teacher at their school. His alleged behavior with each, including back rubs behind closed doors, other inappropriate touching, and photographing both women in see-through unitards without any undergarments, if true, clearly made victims of these young women. Therefore, the detective's use of the term "victim" to refer to E.K., even though the sexual activity regarding E.K. that was described in the search-warrant affidavit occurred after she was 18 and had graduated, did not amount to his knowingly and intentionally including false information in his search-warrant affidavit.

{¶ 26} Since the trial judge's analysis of whether to suppress the evidence began with his conclusion that the detective's testimony was false and we have called into question his basis for that conclusion, we find that consideration of the other assignments of error, which relate to later determinations in the judge's analysis, would be premature. Consequently, we reverse the judgment of the court of appeals and remand this cause to the trial court to hold a new suppression hearing consistent with this opinion.

Judgment reversed and cause remanded.

O'CONNOR, C.J., and O'DONNELL, LANZINGER, CUPP, and McGEE BROWN, JJ., concur.

PFEIFER, J., dissents.

PFEIFER, J., dissenting.

***459** {¶ 27} I would affirm the judgment of the court of appeals but would not adopt its reasoning.

{¶ 28} Whether Detective Wuertz knowingly made false statements in his affidavit is ultimately irrelevant. That is because any information about Dibble's relationship with E.K., a consenting adult, describes no crime, and thus provides no basis for a search. There is no allegation in the affidavit that any illegal activity regarding Victim # 1, E.S., took place in defendant's home. Detective Wuertz was asked at the suppression hearing about the importance of information about E.K. to the probable-cause determination:

{¶ 29} "Q. * * * And only the information from [E.K.] would be the probable cause basis to be able to search the home of Mr. Dibble, correct? At that point in time, detective, that's correct, is it not?

{¶ 30} "A. At that point in time."

{¶ 31} The detective, the trial court, and the court of appeals agreed that without the information regarding E.K., there was no probable cause to search Dibble's residence. Since there was no basis for including information about E.K. in the supporting affidavit, we need not expend further judicial resources to determine that there was no basis for the search in this case.

**All Citations**

133 Ohio St.3d 451, 979 N.E.2d 247, 2012 -Ohio- 4630

APPENDIX E

195 Ohio App.3d 189
Court of Appeals of Ohio,
Tenth District, Franklin County.

The STATE of Ohio, Appellant,
v.
DIBBLE, Appellee.

No. 10AP–648.
|
Decided Aug. 4, 2011.

**Synopsis**

**Background:** Defendant who was charged with 20 counts of voyeurism and one count of sexual imposition filed a motion to suppress evidence obtained during a warrant search of his home, challenging the veracity of the affidavit in support of the warrant. The Court of Common Pleas, Franklin County, No. 10CR–03–1958, granted the motion. The state appealed.

**Holdings:** The Court of Appeals, Peggy L. Bryant, P.J., held that:

[1] appellate court would deny defendant's motion to strike sections of the state's brief that relied on an affidavit of the judge who approved the warrant;

[2] trial court complied with the two-step *Franks* procedure for resolving the suppression motion;

[3] the state did not show that it was prejudiced by any failure of trial court to comply precisely with the *Franks* procedure;

[4] record supported a determination that the affiant officer knowingly and intentionally included a false characterization of one of defendant's former students as a "victim";

[5] good-faith exception to the exclusionary rule did not apply to allow admission of the evidence obtained during the warrant search; and

[6] allegations that remained in the affidavit after the false information was removed were insufficient to constitute probable cause.

Affirmed; motion denied.

French, J., dissented and filed opinion.

West Headnotes (16)

[1] **Criminal Law** Affidavits accompanying or supplementing transcript

Appellate court would deny defendant's motion to strike sections of the state's brief that relied on an affidavit of a judge who approved a warrant to search defendant's home for sex-offense evidence, despite defendant's claim that the affidavit was not part of the appellate record because trial court did not have it when ruling on the suppression motion; the state had submitted the affidavit to trial court as part of a motion in response to the suppression ruling, and the affidavit was transmitted to the appellate court as part of the record. Rules App.Proc., Rule 9(A).

2 Cases that cite this headnote

[2] **Searches and Seizures** Hearing; in camera inspection

Trial court complied with the two-step *Franks* procedure for resolving defendant's motion to suppress based on a challenge to the veracity of an affidavit in support of a search warrant, even though there was no formal preliminary determination of merit prior to hearing on the motion; the state opposed the suppression motion with a memorandum addressing the merits of defendant's arguments without referring to a preliminary showing, trial court, through the act of granting a hearing on the matter, apparently concluded that defendant had satisfied his initial burden and was entitled to a second-step hearing, and there was no showing that state was prejudiced by lack of second hearing. U.S.C.A. Const.Amend. 4.

[3] **Searches and Seizures** Hearing; in camera inspection

When a defendant challenges the veracity of an affidavit in support of a search warrant,



 

the defendant initially must make a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the affidavit and that the allegedly false statement is necessary to the finding of probable cause. U.S.C.A. Const.Amend. 4.

[4] **Searches and Seizures** Hearing; in camera inspection

At the preliminary stage of a *Franks* proceeding on a defendant's challenge to the veracity of an affidavit in support of a search warrant, the defendant must provide an offer of proof that specifically outlines the portions of the affidavit alleged to be false, as well as the supporting reasons for the defendant's claim; the offer of proof should include the submission of affidavits or otherwise reliable statements, or their absence should be satisfactorily explained. U.S.C.A. Const.Amend. 4.

[5] **Searches and Seizures** Hearing; in camera inspection

If a defendant satisfies his or her preliminary burden at a *Franks* proceeding on a challenge to the veracity of an affidavit in support of a search warrant, the defendant is entitled to a hearing on his or her motion to suppress. U.S.C.A. Const.Amend. 4.

[6] **Searches and Seizures** Hearing; in camera inspection

At a *Franks* hearing on a motion to suppress based on a challenge to the veracity of an affidavit in support of a search warrant, a defendant must not only establish by a preponderance of the evidence that the affidavit contained intentionally or recklessly false information but also show that without that false information, the affidavit contained insufficient content to establish probable cause, meaning the fruits of the search must be suppressed. U.S.C.A. Const.Amend. 4.

[7] **Searches and Seizures** Hearing; in camera inspection

The state did not show that it was prejudiced by any failure of trial court to comply precisely with the two-step *Franks* procedure for resolving defendant's motion to suppress based on a challenge to the veracity of an affidavit in support of a search warrant, even though the state argued that it had intended to call the issuing judge to testify about affiant's sworn statements at the time he granted the warrant; affiant's statements were not recorded or transcribed by a court reporter, and thus could not have been relied upon by trial court, and to the extent that the judge would testify that she believed affiant, such testimony would only duplicate the known fact that the judge had determined that probable cause existed at the time she issued the warrant. U.S.C.A. Const.Amend. 4; Rules Crim.Proc., Rule 41(C).

[8] **Criminal Law** Evidence on Motions

In considering a motion to suppress evidence obtained through a search warrant, a court cannot rely on sworn testimony that was not properly recorded and transcribed. U.S.C.A. Const.Amend. 4; Rules Crim.Proc., Rule 41(C).

[9] **Searches and Seizures** False, inaccurate or perjured information; disclosure

Record supported a determination that a law enforcement officer, in an affidavit in support of a warrant to search defendant's home for sex-offense evidence, knowingly and intentionally included a false characterization of one of defendant's former students as a "victim," so as to support trial court's grant of defendant's motion to suppress based on a challenge to the veracity of the affidavit; officer acknowledged that he had no basis to search defendant's home apart from activities related to the student, officer never characterized the student as a victim on three different forms used by officer in his investigation, and trial court found that officer's



 

reasoning for using the student in the affidavit was not credible. U.S.C.A. Const.Amend. 4.

[10] **Searches and Seizures** False, inaccurate or perjured information; disclosure

**Searches and Seizures** Warrants, issuance and execution

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; "reckless disregard" means the affiant had serious doubts about the truth of an allegation. U.S.C.A. Const.Amend. 4.

[11] **Searches and Seizures** False, inaccurate or perjured information; disclosure

For purposes of a challenge to the veracity of a facially sufficient search-warrant affidavit, omissions count as a false statement if they were designed to mislead the issuing magistrate or if they were made in reckless disregard of whether they would mislead the magistrate. U.S.C.A. Const.Amend. 4.

[12] **Searches and Seizures** Questions of law or fact

In a proceeding on a challenge to the veracity of a facially sufficient search-warrant affidavit, a person's intent or culpable mental state is a question of fact for the trial court. U.S.C.A. Const.Amend. 4.

[13] **Criminal Law** Particular cases

Good-faith exception to the exclusionary rule did not apply to allow admission of evidence that was obtained through a search warrant that was issued on an affidavit of a law enforcement officer that contained deliberately false information and thus lacked probable cause; one primary goal of the exclusionary rule was to deter deliberate police misconduct. U.S.C.A. Const.Amend. 4.

[14] **Criminal Law** Good Faith or Objectively Reasonable Conduct Doctrine

Under the good-faith exception, the Fourth Amendment exclusionary rule should not operate to suppress evidence that officers obtained when acting in objectively reasonable reliance on a search warrant that a detached and neutral magistrate or judge issued but ultimately is determined to be lacking in probable cause. U.S.C.A. Const.Amend. 4.

[15] **Searches and Seizures** False, inaccurate or perjured information; disclosure

**Searches and Seizures** Particular concrete applications

Allegations that remained in a search-warrant affidavit after intentionally false information was removed were insufficient to constitute probable cause to issue a warrant to search defendant's home for sex-offense evidence; remaining allegations comprised a young woman's statements that defendant, who was a theater instructor at a private school, inappropriately touched her while she was a student, and nothing in the affidavit tied those statements to any criminal conduct or evidence at defendant's home. U.S.C.A. Const.Amend. 4.

[16] **Searches and Seizures** False, inaccurate or perjured information; disclosure

If a defendant who challenges the veracity of an affidavit in support of a search warrant satisfies his or her burden that the affidavit contains intentionally false information, the warrant remains valid only if the remaining allegations in the affidavit are sufficient to constitute probable cause. U.S.C.A. Const.Amend. 4.



 

**Attorneys and Law Firms**

****543** Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellant.

R. William Meeks Co., L.P.A., Columbus, and David H. Thomas, for appellee.

**Opinion**

PEGGY L. BRYANT, Presiding Judge.

***193** {¶ 1} Plaintiff-appellant, state of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to suppress of defendant-appellee, Lawrence A. Dibble. Because the trial court's findings of fact support its decision to suppress the evidence the state obtained through the warrant at issue, we affirm.

**I. Facts and Procedural History**

{¶ 2} On February 3, 2010, Upper Arlington Police Detective Andrew Wuertz asked a Franklin County municipal court judge to approve a search warrant for ***194** defendant's home. Detective Wuertz sought the warrant after speaking with two young women, E.S. and E.K., who reported their past experiences with defendant, a theater instructor at a private school for students enrolled in kindergarten through 12th grade. In the affidavit supporting the warrant, Wuertz referred to E.S. as victim No. 1 and E.K. as victim No. 2.

{¶ 3} According to the warrant affidavit, defendant "inappropriately" touched the vaginal area and buttocks of his student, victim No. 1, while they were at school. Victim No. 1 later confronted defendant about the incident, and defendant said, "I just wasn't thinking." Victim No. 2 "stated she also had inappropriate contact with" defendant. The incident regarding victim No. 2 occurred after victim No. 2 graduated from the school where defendant ****544** was her teacher, and it involved defendant's taking photographs "of her nude vaginal area during one of their meetings where inappropriate touching was involved." Wuertz claimed that he needed to search defendant's home because defendant's "computers, camera[s], media storage devices, etc. may contain correspondence, and photos to substantiate victim No. 1 and victim No. 2's claims."

{¶ 4} The municipal court judge approved the warrant, and when it was executed, police seized a laptop computer, camera, and several tapes and DVDs from defendant's home. Based on the evidence obtained from that search, defendant was indicted on 20 counts of voyeurism; he also was charged with one count of sexual imposition for sexually touching E.S. None of the charges pertained to E.K.

{¶ 5} Defendant filed a motion to suppress evidence obtained from the search of his home, arguing that Wuertz had improperly referred to E.K. as a victim in the search-warrant affidavit, given that E.K. was an adult and their sexual activity was consensual. The trial court held a hearing on the motion on June 29, 2010. At the commencement of the hearing, defense counsel noted, "I think initially, Judge, I do need to make a preliminary showing for the specific issue I've raised here." The defense then called Wuertz to testify.

{¶ 6} Wuertz began by conceding that the information he possessed regarding E.S. gave him no probable cause to search defendant's home. The subsequent questioning thus focused on E.K., or victim No. 2. Defense counsel inquired of Wuertz about using the term "victim No. 2" to refer to E.K., which the detective admitted was used six times in the affidavit "in order to get a search warrant." In response to the questions, Wuertz agreed that although E.K. had told him that defendant took pictures of her and sexually touched her, she also had said that those incidents occurred after she turned 18 and was no longer a student at the school where defendant taught. Wuertz, however, stated that whether E.K. had consented to the activity was debatable. Wuertz testified that defendant and E.K. were consenting adults only in a strict definition of that phrase. In ***195** response to counsel's asking whether E.K. was merely a jilted lover whose concern about her relationship with defendant arose only after she learned of defendant's incident with E.S., Wuertz replied, "I think it's inaccurate to call her a lover." The detective nonetheless acknowledged that E.K. had said that defendant visited her at her home in Maine, went to New York City with her to see a Broadway show, and shared a carriage ride in Central Park. Wuertz had not filed any charges pertaining to E.K.

{¶ 7} Despite these activities, the detective stated that he thought E.K. was a victim. Defense counsel explored that statement, inquiring of other paperwork the detective completed in the case. The detective's testimony revealed that he did not include E.K. as a victim in any other form he completed on the case, including the complaint and the U–10.100, both of which were completed either the same day or the day before the affidavit supporting the search-warrant



 

request was presented to the court. The detective conceded that he had no basis to charge defendant with a crime as to E.K.

{¶ 8} When defense counsel finished his direct examination of Wuertz, he said he thought he had "gotten through * * * the window I need to get through." The trial court asked the prosecutor whether he was "admitting" that the defense had met its burden and "moving on to the State's part of their case," or if he was "simply cross-examining this witness to rebut [the defense's] ****545** burden." The prosecutor said, "I'm simply cross-examining the witness."

{¶ 9} Wuertz first testified on cross-examination about defendant's sexual activity with E.S. According to the detective, E.S. had been defendant's student since seventh grade, and E.S. considered defendant a father figure. In April of her senior year, E.S. was working as defendant's aide and rehearsing lines with him. Defendant told E.S., " 'As a reward every time I get my lines correct, I get to touch your stockings.' And she allowed him to do that." Another time, after defendant correctly recited his lines, he said, "I believe I deserve a reward for that." E.S. was standing in front of him, and he brushed his fingers against her vaginal area and felt her buttocks. E.S. told Wuertz that the sexual contact was unwanted and that she had written defendant a letter about it. Defendant tore the letter and threw it away, saying, "You can't tell anyone about this, or it will ruin my life."

{¶ 10} Defendant also required E.S. to give him back massages, lifting his shirt for her to "touch her hands against his skin." Although not included in the affidavit supporting the warrant, Wuertz's testimony included information that defendant also took pictures of her and other students in unitards, instructing the students not to wear anything underneath the suits, which were "practically see-through, if not see-through." Wuertz concluded that defendant had "brainwashed" or manipulated E.S. so she would do whatever he asked of her.

***196** {¶ 11} Wuertz thought E.K. was also a victim of defendant because "[s]he described a very similar situation to what [E.S.] had described." Wuertz stated that E.K.'s relationship with defendant started when she became involved in theater in the seventh grade. She, too, considered defendant a father figure, and defendant would even refer to himself as her stepfather. She also was a former aide to defendant who taught E.S. how to give him massages. Wuertz said that he thought E.K. was a victim because defendant deceived her into allowing him to photograph her vaginal area under the guise of wanting to study her "internal energy."

{¶ 12} Wuertz testified that when he was writing the warrant affidavit, he thought defendant might be charged with a crime for his conduct with E.K., and he stated that "as of today I still consider her a victim." According to Wuertz, he had described, in the warrant affidavit, defendant's touching E.K. as "inappropriate" because "it was very evident she was very conflicted about what had happened, that although she would reluctantly say it was consensual, she also would say she wasn't comfortable with it, and that the way that he touched her in order to take some of the pictures, she wasn't completely comfortable with."

{¶ 13} Wuertz went to the municipal court judge to obtain a search warrant, and she swore him as a witness and asked him about his investigation. Wuertz testified at the suppression hearing that he had told the judge about defendant's relationships with E.K. and E.S. Wuertz mentioned not only that defendant took pictures of them while they were in unitards but that they were uncomfortable with that activity.

{¶ 14} On redirect examination, defense counsel presented the detective with yet another document he had completed, the Ohio Uniform Incident Report, completed on February 2, 2010, and reviewed by his sergeant on February 3, 2010, the day the detective sought the search warrant. Not only did the form not include E.K. as a victim, but Wuertz specifically noted on the form only one victim. Although Wuertz stated that he later could have ****546** added a victim to the report, he did not add E.K. as a victim to the form because he lacked probable cause that defendant had committed a crime against E.K. Defense counsel asked the detective why, given that admission, he referred to E.K. as a victim in the search-warrant affidavit, and Wuertz replied, "At the time that I typed the search warrant, we were still continuing the investigation. I believed that [E.K.] could potentially still be a victim."

{¶ 15} The trial court inquired whether the parties had any further evidence to present. When both declined, the state requested the opportunity to present a closing argument that addressed the merits of defendant's motion to suppress evidence; defendant responded. After ascertaining that neither party had ***197** anything further, the court stated it would take the matter under advisement, explaining it would not rule from the bench but would issue a brief decision later.



 

{¶ 16} On July 1, 2010, the trial court issued a written decision and entry granting defendant's motion to suppress. Although it acknowledged that defendant's behavior was reprehensible, the court concluded that Wuertz "lacks credibility in regards to his reasoning" for referring to E.K. as a victim in the search-warrant affidavit. The court decided that Wuertz had knowingly and intentionally made a false statement when he characterized E.K. as a victim in the search-warrant affidavit and that he had used the false characterization to create probable cause to search defendant's home. The court declined to consider Wuertz's testimony about the oral statements made to the municipal court judge, noting not only that no "record" of the statements existed, but that Wuertz's testimony about the statements also lacked credibility. Lastly, the court concluded that Wuertz's references to E.S. as a victim in the search-warrant affidavit did not create probable cause for the search of defendant's home.

{¶ 17} The state filed a motion for reconsideration, arguing that although the June 29, 2010 hearing "was represented to be limited to the threshold question of whether the defense made a sufficient preliminary showing of the need for a full hearing," the court's "decision and entry prematurely reached the full merits of the issues, rather than merely determining whether a full hearing should occur." The state claimed that had the court proceeded with a full hearing, the municipal court judge who issued the search warrant for defendant's home would have testified to the additional information set forth in an affidavit attached to the motion for reconsideration.

{¶ 18} According to the affidavit, the judge confirmed that she had had a conversation with Wuertz about defendant when the search warrant was requested but that a court reporter had not recorded the conversation or transcribed it. In addition, the judge surmised that Wuertz did not lie to her when he referred to E.K. as a victim in the search-warrant affidavit. Relying on her experience as a former assistant city prosecutor who not only was familiar with how police conduct their investigations but had worked with victims and witnesses herself, the judge said, "I believe that the word 'victim' and the reference to 'victim # 2' is broader than a reference to someone who is the victim of a criminal act for whom a criminal complaint may be filed at that point against a named defendant."

{¶ 19} The judge also noted that from her experience, "a victim may or may not evolve into a prosecuting witness," and she "understood from the affidavit that 'victim No. 2' had graduated and there was a touching believed to be inappropriate that was under continuing investigation by the **547 Detective." The *198 trial court declined to rule on the motion for reconsideration, because the state had already filed an appeal.

## II. Assignments of Error

{¶ 20} The state assigns the following errors on appeal:

**FIRST ASSIGNMENT OF ERROR**

The trial court prejudicially erred in going beyond the threshold question of whether the defense had made a sufficient preliminary showing to justify a full hearing on the motion to suppress.

**SECOND ASSIGNMENT OF ERROR**

The trial court erred in concluding that the defense had shown intentional or reckless falsity, especially in light of the sworn oral statements made by the officer contemporaneous to the judge's approval of the warrant.

**THIRD ASSIGNMENT OF ERROR**

The trial court erred in refusing to find that the good-faith exception to the exclusionary rule applied.

**FOURTH ASSIGNMENT OF ERROR**

The trial court erred in concluding that the search warrant for defendant's home could not have issued without the "Victim # 2" characterization.

## III. Motion to Strike

[1] {¶ 21} Defendant filed a motion to strike sections of the state's brief that rely on the municipal court judge's affidavit, asserting that the affidavit is not part of the appellate record, since the trial court did not have it when it ruled on defendant's motion to suppress. Pursuant to App.R. 9(A), "[t]he original papers and exhibits thereto filed in the trial court * * * shall constitute the record on appeal in all cases." Here, the state submitted the affidavit to the trial court as part of its motion in response to the court's decision granting defendant's motion to suppress, and the affidavit was transmitted to this court as part of the record. Because the affidavit is part of the appellate record, we deny defendant's motion to strike. We address later whether the evidence may be considered in determining the appeal.

**IV. First Assignment of Error—Scope of Hearing**

**[2]** {¶ 22} The state's first assignment of error asserts that the trial court erred when it granted defendant's motion to suppress following the June 29, 2010 hearing. The state contends that the hearing was meant to address only whether defendant made a preliminary showing to justify a full evidentiary hearing.

***199** **[3]** **[4]** **[5]** {¶ 23} Defendant's motion to suppress asserted that the warrant authorizing the search of his home was invalid because the accompanying affidavit contained false statements. In *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667, the United States Supreme Court established the procedure for challenges to the veracity of a search-warrant affidavit. The defendant initially must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and * * * the allegedly false statement is necessary to the finding of probable cause." Id. at 155–156, 98 S.Ct. at 2676, 57 L.Ed.2d 667. At this preliminary stage, the defendant must provide "an offer of proof which specifically outlines the portions of the affidavit alleged to be false, and the supporting reasons for the defendant's claim." *State v. Roberts* (1980), 62 Ohio St.2d 170, 178, 16 O.O.3d 201, 405 N.E.2d 247. "This offer of proof should include the submission of affidavits or otherwise reliable statements, or their absence should be satisfactorily explained." Id. If the defendant ****548** satisfies his or her preliminary burden, the defendant is entitled to a hearing on his motion to suppress. *Franks* at 156, 98 S.Ct. 2674, 57 L.Ed.2d 667.

{¶ 24} The state urges us to construe the two-step procedure in *Franks* as requiring two separate evidentiary hearings. Although the state points to no case law indicating that the *Franks* analysis requires such a bifurcated process, the state asserts that it was prejudiced when the trial court combined the two prongs of the *Franks* analysis into a single hearing and resolved them in a subsequent decision and entry.

{¶ 25} To support its argument, the state notes that defendant conceded at the beginning of the hearing that he did "need to make a preliminary showing for the specific issue I've raised here, so we would call Detective Andrew Wuertz from Upper Arlington Police Department." After defendant presented Wuertz's testimony, the trial court specifically asked the state whether it was "admitting" that defendant had satisfied his initial burden or whether the state intended to "simply cross-examinin[e] this witness to rebut his burden that [defendant] needs to make." The state stated it was "simply cross-examining [the] witness."

{¶ 26} Defendant responds to the state's argument by asserting that the state waived its *Franks* argument. Defendant initially notes that the state did not object in the trial court when the court combined the two *Franks* steps into one hearing. Secondly, defendant argues that the state waived any objection when it argued the merits of defendant's motion to suppress both in its memorandum opposing defendant's motion and in its closing arguments during the hearing. The state argues that it could not have waived its *Franks* argument in the trial court, because the court was not clear that it intended to deviate from the *Franks* ***200** procedure until it issued its decision and entry granting defendant's motion to suppress.

{¶ 27} The procedure *Franks* outlined contemplates two distinct processes concerning an attack on a search-warrant affidavit, one procedural and one more substantive. The first step in the *Franks* analysis requires a defendant to make a preliminary showing, presumably through a motion, that the search-warrant affidavit contains intentionally false information. If the court determines that the defendant made that preliminary showing, then defendant is entitled to a hearing on his motion. *Franks,* 438 U.S. at 155–156, 98 S.Ct. 2674, 57 L.Ed.2d 667.

**[6]** {¶ 28} The second step in the *Franks* analysis, the hearing, requires a defendant, in attacking the validity of a search-warrant affidavit, not only to establish by a preponderance of the evidence that the affidavit contained intentionally or recklessly false information, but also to show that without that false information, the affidavit contained insufficient content to establish probable cause, meaning the fruits of the search must be suppressed. Id. The issue here is what the trial court intended when at the hearing it referred to defendant's initial burden.

{¶ 29} Defendant filed his motion to suppress on May 12, 2010, arguing that the search-warrant affidavit contained intentionally false information; the state opposed defendant's motion with a memorandum addressing the merits of defendant's arguments, but not referring to an initial showing under the procedural aspects of the first step of *Franks.* The trial court, through the act of granting a hearing on the matter, apparently concluded that defendant had satisfied his burden under the first step of *Franks* and was entitled to a hearing under the second step of *Franks.*



 

**549 {¶ 30} Accordingly, when not only the trial court but also defendant, consistent with his written motion that referred to a "preliminary showing" under the second step of *Franks,* mentioned defendant's "preliminary showing" and initial "burden" during the hearing, they referred to the second step of the *Franks* analysis requiring defendant to establish by a preponderance of the evidence that the affidavit contained intentionally false information. The trial court's decision and entry bolster such a conclusion by including the citation to and explanation of the second step of the *Franks* analysis in determining that defendant, at the hearing, had satisfied his initial burden of demonstrating that the affidavit contained intentionally false information.

{¶ 31} Further supporting the conclusion that the initial "burden" the trial court referred to was in the second step of the *Franks* analysis, the trial court's decision and entry specifically concluded that "the first prong of the *Franks* test has been satisfied," and then proceeded to determine whether "the remaining *201 allegations in the warrant, without the false language, constitute probable cause." That language represents a straight-forward application of the two parts of the second step of the *Franks* analysis. The trial court properly complied with both steps of the two-step *Franks* analyses in granting defendant a hearing and then, based on the hearing, determining defendant's motion to suppress.

[7] [8] {¶ 32} Even if the trial court failed to comply precisely with the procedure in *Franks,* the state does not demonstrate prejudice. The state asserts only that it intended to call the municipal court judge who had issued the warrant to testify about Wuertz's sworn statements at the time he requested the warrant. A court, however, cannot rely on sworn testimony that was not properly recorded and transcribed. *State v. Shepcaro* (1975), 45 Ohio App.2d 293, 298, 74 O.O.2d 437, 344 N.E.2d 352 (concluding that pursuant to Crim.R. 41(C), "supplemental testimony taken orally by the judge from an affiant" applying for a search warrant "will not be admissible at a hearing to suppress unless that testimony has been recorded by a court reporter or recording equipment, transcribed and made a part of the affidavit"). Moreover, to the extent that the municipal court judge would testify that she believed Wuertz was being truthful and that his using the term "victim" was appropriate, such testimony would serve only to duplicate what is already known: the municipal court judge determined probable cause existed at the time she issued the search warrant. Had she not believed Wuertz, she presumably would not have issued the warrant.

{¶ 33} For the stated reasons, the state's first assignment of error is overruled.

**V. Second Assignment of Error—Intentional or Reckless Falsity**

[9] {¶ 34} The state's second assignment of error asserts that the trial court erred in concluding that defendant carried his burden to prove that the affidavit supporting the search warrant contained intentional or reckless falsity.

{¶ 35} "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest* (May 29, 2001), 4th Dist. No. 00CA2576, 2001 WL 605217. Thus, an appellate court's standard of review of the trial court's decision granting the motion to suppress is twofold. *State v. Reedy,* 10th Dist. No. 05AP–501, 2006-Ohio-1212, 2006 WL 648861, ¶ 5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100–101, 709 N.E.2d 913. Because the **550 trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. Id., citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488, 597 N.E.2d 1141. We nonetheless must independently determine whether, as a matter of law, the facts meet the applicable legal standard. Id., citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906.

*202 [10] [11] [12] {¶ 36} In his motion to suppress, defendant argued that Wuertz intentionally or recklessly included false information in his affidavit to create probable cause for the search warrant. " '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." ' " *State v. McKnight,* 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 31, quoting *State v. Waddy* (1992), 63 Ohio St.3d 424, 441, 588 N.E.2d 819, quoting *Franks,* 438 U.S. at 155–156, 98 S.Ct. 2674, 57 L.Ed.2d 667. " 'Reckless disregard' means that the affiant had serious doubts about the truth of an allegation." Id., citing *United States v. Williams* (C.A.7, 1984), 737 F.2d 594, 602. "Omissions count as a false statement if 'designed to mislead, or * * * made in reckless disregard of whether they would mislead, the magistrate.' " Id., quoting *United States v. Colkley* (C.A.4, 1990), 899 F.2d 297, 301. A person's intent or culpable mental state is a question of fact for the trial court. See, e.g., *Wissler v. Ohio Dept. of Job & Family Servs.,* 10th Dist. No. 09AP–569, 2010-Ohio-3432, 2010 WL


 

2891641, ¶ 33, quoting *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 2006-Ohio-2957, 855 N.E.2d 909, ¶ 57, quoting *B & J Jacobs Co. v. Ohio Air, Inc.*, 1st Dist. No. C–020264, 2003-Ohio-4835, 2003 WL 22103385, ¶ 10; *State v. Mason*, 6th Dist. No. L–06–1404, 2008-Ohio-5034, 2008 WL 4409432, ¶ 69, citing *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 106.

{¶ 37} The trial court factually concluded "Detective Wuertz's reasons for listing E.K. as a 'victim' only on the search warrant," but on no other documents introduced at the hearing, "are intentionally misleading and false." As the court explained, "Detective Wuertz fully understood at the time he petitioned the court for a search warrant that he did not have probable cause for any criminal charge against Defendant as it relates to [E.K.] and lacked a good faith belief that the information he possessed would lead to any future charges." With that premise, the trial court specifically concluded that "Detective Wuertz knowingly and intentionally included the false characterization of [E.K.] in order to create probable cause to search Defendant's home." The record contains competent, credible evidence supporting the trial court's factual determination.

{¶ 38} The trial court relied on Wuertz's own testimony that the detective had no probable cause either to search defendant's home regarding his conduct with E.S. or for a charge against defendant regarding his conduct with E.K. Indeed, the detective acknowledged that he had no basis to search defendant's home apart from the activities related to E.K.

{¶ 39} Moreover, the trial court considered the three different forms that Wuertz used in his investigation, on which, though given the opportunity, Wuertz never noted that E.K. was a victim. Initially, the court pointed to the complaint ***203** filed regarding E.S. that failed to reference E.K. "as a victim or otherwise." The court further observed that Wuertz did not mention ****551** E.K. in the Arrest Information Form. Finally, Wuertz did "not mention [E.K.] in his Ohio Uniform Incident U–10 Report and specifically notes that only '1' victim is involved." Although Wuertz testified that he personally considered E.K. to be a victim, the court pointed out that he never filed "a complaint, u–10 report, or arrest report specifically as it pertains to [E.K.]." Rather, the trial court found that "Detective Wuertz knows the definition of victim and deliberately chose not to include [E.K.] in any of his other police documents."

{¶ 40} The trial court, as the finder of fact, must determine issues of credibility and weight of the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. Here, competent, credible evidence supported the trial court's factual determination that "Detective Wuertz knowingly and intentionally included the false characterization of [E.K.]" in the search warrant affidavit "in order to create probable cause to search Defendant's home."

{¶ 41} The state nonetheless focuses on the meaning of the word "victim," arguing that the detective personally believed E.K. to be a victim. See *United States v. Garcia–Zambrano* (C.A.10, 2008), 530 F.3d 1249, 1256 (noting an appellate court need not defer to a district court's interpretation of an affidavit "where the district court's interpretation of the affidavit is based solely on the court's reading of the written words in the affidavit"). *Garcia–Zambrano*, however, goes on to conclude that "[w]here the district court uses extrinsic evidence to determine what the affidavit means, [an appellate court] will reject the [lower] court's interpretation only if clearly erroneous." Id.

{¶ 42} Here, the trial court did not rely solely on the written affidavit. Rather, the trial court considered Wuertz's testimony that sought to explain why the detective used the term "victim" to refer to E.K. in the affidavit but did not use that term to describe E.K. in any other documentation. The trial court specifically concluded that Wuertz "lacks credibility in regards to his reasoning of using [E.K.] in the affidavit."

{¶ 43} The trial court noted that most people would agree that "even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization," but such circumstances do not satisfy the constitutional standards for a search for criminal activity. Read in that context, the trial court's including the Black's Law Dictionary definition of "victim" in its decision was not an attempt to apply an overly rigid standard for language used in a search-warrant affidavit, but to contrast the meaning that the word "victim" ordinarily has in a criminal investigation, ***204** such as in the various forms that Wuertz completed, with the detective's application of his personal belief as to the word's meaning. The trial court determined that Wuertz understood that E.K. was not a "victim" in the criminal sense, so his using that term six times in the search-warrant affidavit, as compared to a single reference to E.S., amounted to Wuertz's

knowingly and intentionally including false information in the affidavit in order to establish probable cause.

{¶ 44} Because competent, credible evidence supports the trial court's specific factual determination that Wuertz knowingly and intentionally included false information in his search-warrant affidavit in order to establish probable cause to search defendant's house, the trial court's decision to suppress the evidence obtained as a result of the search complies with applicable ****552** law. *Franks.* The state's second assignment of error is overruled.

**VI. Third Assignment of Error—Good–Faith Exception**

**[13]** {¶ 45} The state's third assignment of error argues that the trial court erred in refusing to apply the good-faith exception to the exclusionary rule.

**[14]** {¶ 46} Under the good-faith exception, the Fourth Amendment exclusionary rule should not operate to suppress evidence that officers obtained when acting in objectively reasonable reliance on a search warrant that a detached and neutral magistrate or judge issued but ultimately is determined to be lacking in probable cause. *United States v. Leon* (1984), 468 U.S. 897, 922–923, 104 S.Ct. 3405, 82 L.Ed.2d 677. "Leon teaches that * * * the police officer may rely upon the legal judgment and decision of the judge as to the propriety for [the] issuance of the warrant." *Columbus v. Wright* (1988), 48 Ohio App.3d 107, 112, 548 N.E.2d 320. More recently, the United States Supreme Court phrased the issue in terms of an officer's "objectively reasonable reliance" on a warrant. *State v. Geiter,* 190 Ohio App.3d 541, 2010-Ohio-6017, 942 N.E.2d 1161, ¶ 39, appeal not allowed, 128 Ohio St.3d 1445, 2011-Ohio-1618, 944 N.E.2d 695, citing *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496.

{¶ 47} As the trial court noted in its decision, *Herring* involved a computer error that generated an invalid warrant, and the Supreme Court determined that the police had acted in good faith in relying on the defective warrant. Here, by contrast, no electronic or other mechanical error occurred. Instead, the trial court determined that Wuertz had deliberately included false information in his affidavit in order to obtain the search warrant. Given that one of the primary ***205** goals of the exclusionary rule is to deter deliberate police misconduct, this is not a situation where the good-faith exception applies. *Herring* at 144, 129 S.Ct. 695, 172 L.Ed.2d 496.

{¶ 48} Accordingly, the state's third assignment of error is overruled.

**VII. Fourth Assignment of Error—Issuance of Search Warrant Absent "Victim No. 2"**

**[15]** {¶ 49} The state's fourth assignment of error asserts that the trial court erred in concluding that the search warrant for defendant's home could not have issued without the "victim No. 2" characterization used to describe E.K.

**[16]** {¶ 50} Under *Franks,* if a defendant satisfies its burden that a search warrant affidavit contains intentionally false information, the search warrant remains valid only if the remaining allegations in the affidavit are sufficient to constitute probable cause. *Franks,* 438 U.S. at 156, 98 S.Ct. 2674, 57 L.Ed.2d 667. Having determined that Wuertz's use of the phrase "victim No. 2" in the affidavit was intentionally false and misleading, the trial court looked to the remaining allegations in the affidavit. All that remained were E.S.'s statements that defendant inappropriately touched her while she was a student at school. Nothing in the affidavit ties E.S.'s allegations to any criminal conduct or evidence at defendant's home. Indeed, the detective admitted that the affidavit, as it relates to E.S. only, presented no basis to search defendant's house.

{¶ 51} The state nonetheless asserts that a warrant can issue for "mere evidence" having a nexus to criminal behavior. *Warden v. Hayden* (1967), 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782. Even if E.K. were not a victim in her own right, the state argues, E.K. was still a ****553** witness with valuable information regarding potential evidence at defendant's home that might aid in defendant's conviction for the crime committed against E.S.

{¶ 52} Although E.S. asserted that defendant photographed her, she did not allege that any conduct took place at defendant's home. She alleged that defendant had touched her inappropriately on school grounds and photographed her at an undisclosed location. We note, however, that E.K. mentioned the photographs and added that no inappropriate touching occurred with her at school, thus suggesting the photographs were taken at school. Further, E.K.'s statements about defendant's photographing her pertained solely to E.K.'s consensual conduct with defendant. E.K. did not allege that defendant had photographed anyone other than her, and she did not assert that she had knowledge that defendant possessed explicit photographs of anyone other than her. Lastly, the affidavit supporting the warrant did not mention



 

the photographs. Under *Hayden,* the state lacked probable cause to search defendant's home. Accordingly, the state's fourth assignment of error is overruled.

***206 VIII. Disposition**

{¶ 53} Having overruled the state's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Motion to strike denied; judgment affirmed.

TYACK, J., concurs.

FRENCH, J., dissents.

FRENCH, Judge, dissenting.

{¶ 54} In the second assignment of error, appellant contends that the trial court erred by concluding that Wuertz intentionally included false information within the warrant affidavit in order to create probable cause for the warrant. I agree.

{¶ 55} Appellee argued in his motion to suppress that Wuertz lied when referring to E.K. as a victim in the search-warrant affidavit. To successfully attack the veracity of a search-warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either knowingly and intentionally or with reckless disregard for the truth. *Franks v. Delaware* (1978), 438 U.S. 154, 155–156, 98 S.Ct. 2674, 57 L.Ed.2d 667. Even if the search-warrant affidavit contains false statements of that type, the warrant is still valid unless, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause. Id. at 156, 98 S.Ct. 2674, 57 L.Ed.2d 667. Here, the trial court found that (1) the affidavit's characterization of E.K. as a "victim" was false and misleading and (2) Wuertz provided this false information knowingly, intentionally, and in order to create probable cause to search appellee's home.

{¶ 56} In reviewing appellee's motion to suppress, we must accept the trial court's factual and credibility determinations if they are supported by competent, credible evidence. See *State v. Tolliver,* 10th Dist. No. 02AP–811, 2004-Ohio-1603, 2004 WL 625683, ¶ 38. We need not, however, defer to the court's interpretation of the language of the warrant affidavit itself. See *United States v. Garcia–Zambrano* (C.A.10, 2008), 530 F.3d 1249, 1256 (holding that when a district court's interpretation of a written warrant affidavit is based solely on the court's reading of the written words in the affidavit, the appellate court will not defer to the trial court's interpretation).

****554** {¶ 57} Here, the trial court interpreted the term "victim" to mean, and only to mean, "a person who is the object of a crime." I conclude, however, that it was improper for the trial court to apply such a limited definition. Specifically, it is ***207** improper for a court to invalidate warrants by interpreting the accompanying affidavits in a "hypertechnical" manner because the affidavits are drafted by nonlawyers in the midst and haste of a criminal investigation. *United States v. Ventresca* (1965), 380 U.S. 102, 108–109, 85 S.Ct. 741, 13 L.Ed.2d 684.

{¶ 58} Used more broadly, "victim" can mean (1) "a person who suffers from a destructive or injurious action" or (2) "a person who is deceived or cheated, as by his own emotions or ignorance, by the dishonesty of others, or by some impersonal agency." Webster's Encyclopedic Unabridged Dictionary (Random House 1997).

{¶ 59} The trial court noted that few people "would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization." I agree. And applying this characterization to what may have occurred between E.K. and appellee, an affiant could have reasonably concluded that E.K. was a "victim" under a definition broader than the one the court imposed. Therefore, the characterization of E.K. as a victim was not false, and the trial court erred by suppressing the evidence on that basis.

{¶ 60} I have not considered whether suppression may be appropriate on other grounds. Rather, I would sustain appellant's second assignment of error only to the extent that it argued that the trial court erred by concluding that the characterization of E.K. as a victim was false. Because the majority has determined otherwise, I respectfully dissent.

**All Citations**

195 Ohio App.3d 189, 959 N.E.2d 540, 2011 -Ohio- 3817



 

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APPENDIX F

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff, | : | Case No. 10CR-1958 |
| vs. | : | |
| LAWRENCE A. DIBBLE, | : | Judge Holbrook |
| Defendant. | : | |

**DECISION AND ENTRY**

Following a full course of appeals involving two suppression hearings, two decisions from the appellate court, and one opinion from the Supreme Court of Ohio, this matter again returns on remand from the Tenth District Court of Appeals. On remand, the Court is instructed "to re-examine Detective Wuertz's affidavit and consider whether it is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *State v. Dibble,* 10th Dist. No. 13AP-798, 2014-Ohio-5754, ¶24.

This Court conducted a hearing on March 10, 2016, and has further reviewed the original and all other transcripts, the pleadings submitted before and after the hearing, and all three appellate decisions. The parties were also given the opportunity to put on any additional evidence.

Initially, the Court notes that the inquiry of whether the information contained in the affidavit was sufficient to support a finding of probable cause to issue the warrant is not technically before it. Instead, the Court is constrained by the original judge's finding and the Tenth District's conclusion that it was without jurisdiction to consider the state's challenge to the underlying probable cause ruling. *Id., ¶14.* Regardless, given the

Supreme Court of Ohio's clear interpretation of the term "victim," and the statements contained within the affidavit, this Court would find that the affidavit does contain sufficient facts to support a finding of probable cause. The officer discussed events involving a camera used to take illicit photos of the minor victim and a similar course of conduct with victim E.K., facts that adequately form a nexus between the described offenses, the target location, and the items to be seized in the search.

During argument, Defendant argued that the Court could only decide the issue of the propriety of the good faith exception and is precluded from addressing the initial warrant. To that point, the Court finds that an affidavit that contains evidence sufficient to support a finding of probable cause is certainly not so lacking in indicia of probable cause as to render official belief in its existence unreasonable. More specifically, the Court finds that the affidavit discusses two similar situations of deviant behavior and connects aspects of that behavior to the location specified in the warrant. Further, based upon the evidence, any deficiencies within the affidavit are not so egregious that the executing officers could not reasonably presume the warrant was valid.

For the forgoing reasons, the Motion to Suppress is DENIED. The Court is appreciative of Defendant's situation and ORDERS the appellate bond to be $10,000 reporting recognizance bond with strict stay away from the victims as a condition of bond. The Defendant is to be under house arrest pending appeal.

**IT IS SO ORDERED.**

Franklin County Court of Common Pleas

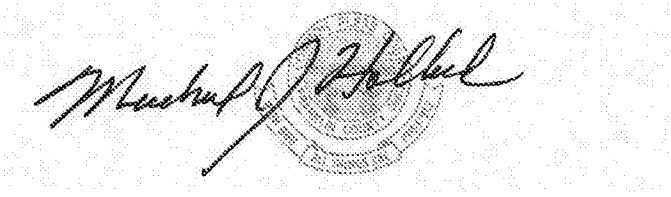
**Date:** 08-16-2016

**Case Title:** STATE OF OHIO -VS- LAWRENCE A DIBBLE

**Case Number:** 10CR001958

**Type:** ENTRY/ORDER

It Is So Ordered.



/s/ Judge Michael J. Holbrook

APPENDIX G

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO**

| | | |
|---|---|---|
| **STATE OF OHIO** | : | |
| | : | |
| **Plaintiff,** | : | |
| **vs.** | : | **CASE NO. 10CR-1958** |
| | : | |
| **LAWRENCE DIBBLE,** | : | **JUDGE TIMOTHY S. HORTON** |
| | : | |
| **Defendant.** | : | |

**DECISION AND ENTRY**

**GRANTING THE STATE OF OHIO'S MOTION FOR LEAVE TO FILE REPLY MEMORANDUM OPPOSING MOTION TO SUPPRESS FILED MARCH 6, 2013**

**AND**

**DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AS FILED FEBRUARY 4, 2013**

This matter is before the Court upon Defendant's Motion to Suppress Evidence, as filed on February 4, 2013. On February 12, 2013, the State of Ohio (the "State") filed Memorandum Opposing Motion to Dismiss. Defendant filed Response to State of Ohio's Memorandum Opposing Motion to Suppress on March 4, 2013.

The State also filed Motion for Leave to File Reply Memorandum Opposing Motion to Suppress on March 6, 2013. Within said Motion, the State seeks leave to file a sur-reply to respond to res judicata arguments raised by Defendant within his Response. Defendant did not file any opposition to the filing. However, upon review of the filings, the Court finds the Motion to be well-taken and hereby **GRANTS** the State of Ohio's Motion for Leave to File. Said filing shall be considered by the Court.

Said Motion to Suppress Evidence is hereby considered submitted to the Court pursuant to Loc. R. 21.01. Upon review and consideration of the motions, responses, and supporting evidence, the Court hereby **DENIES** Defendant's Motion to Suppress Evidence for the reasons that follow.

## I. FACTUAL AND PROCEDURAL HISTORY

On February 2, 2010, E.S. filed a report with the Upper Arlington Police Department (the "Department") alleging she had been sexually assaulted approximately a year prior, in April 2009, by her theater teacher, Defendant Lawrence Dibble. E.S. told Detective Wuertz at the Department that when she was a senior at The Wellington School, Defendant slid his hand up her thigh, under her skirt, touching her vaginal area. The incident occurred at school. E.S. agreed to wear a covert body wire monitored by Upper Arlington Police and approached the Defendant at school to confront him about the incident. In response to E.S.'s questions, Defendant responded, "I just wasn't thinking."

E.K. came with E.S. to the Police Department. E.K. reported to Det. Wuertz that Defendant had also been her theater teacher at The Wellington School. She told Det. Wuertz that after she graduated, when she was over 18 years-of-age, Defendant took nude photographs of her vaginal area. E.K. indicated to the Detective that she had consented to the activities with the Defendant and allowed Defendant to take the pictures.

On February 3, 2010 a search warrant was issued by a Judge of the Franklin County Municipal Court. The warrant authorized detectives and officers of the Upper Arlington Police to search the personal residence of Defendant Lawrence Dibble for evidence of the crime of "gross sexual imposition to include Computers, printers, scanners, photographs, cameras, video cameras, videotapes including memory devises and storage media, associated peripheral equipment and any and all types of related computer equipment and electronic storage media."

Detective Wuertz prepared and presented an affidavit in support of the warrant. Within the affidavit, Det. Wuertz referred to E.S. as Victim #1 and E.K. as Victim #2. The affidavit states as follows:

> On February 2, 2010 Victim #1 reported to the Upper Arlington Police Department that while a student at The Wellington School one of her teacher's, Lawrence A. Dibble touched her inappropriately. Victim #1 stated that she was rehearsing line [sic] for a play with Dibble in the school when he asked for a reward for getting his lines correct. He asked to touch Victim #1's stocking on her leg. Upon touching the stocking Dibble then proceeded to run his hand up under Victim #1's skirt brushing his fingers across her vaginal area. Victim #1 stated she was shocked and froze as Dibble then ran his hands over her buttocks, and lower abdomen area. Victim #2 was with Victim #1 while she made the report. Victim #2 stated she also had inappropriate contact with Dibble. Victim #2 stated it was after she had graduated high school where Dibble had

> also been her teacher. Victim #2 stated that Dibble had taken photo's [sic] of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim #2 told investigators that Dibble used a digital camera to take the photo's [sic], and made her wear a pillow case over her head while he took them.
>
> On February 2, 2010 Victim #1 went to The Wellington School at the direction of the Upper Arlington Police wearing a recording device. She had a conversation with Dibble about the inappropriate touching where he stated "I just wasn't thinking."
>
> Investigators from Upper Arlington believe Dibble's computers, camera's [sic], media storage devices, etc. may contain correspondence, and photos to substantiate Victim #1 and Victim #2's claims.

On that same day, February 3, 2010, Det. Wuertz executed the search warrant with members of the Upper Arlington Police Department.

On May 12, 2010, Defendant filed Motion to Suppress asserting that the affidavit was invalid because it contained knowingly false statements or statements made with reckless disregard for their veracity. The crux of Defendant's argument was that Detective Wuertz made a false statement when referring to E.K. as a "victim" given the lack of any criminal activity as it pertained to E.K. On June 29, 2010, this Court conducted a full hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). On July 1, 2010 this Court entered a written opinion granting Defendant's Motion to Suppress. The Tenth District Court of Appeals issued a discerning decision in *State v. Dibble*, 195 Ohio App.3d 189, 2011-Ohio-3817, 959 N.E.2d 540, which affirmed this trial court's decision.

On appeal to the Supreme Court of Ohio, the Supreme Court in a split decision held that Defendant could not sustain a claim under the *Franks* test because the references to E.K. as a "victim" made by Detective Wuertz "were not false statements made intentionally or with reckless disregard for the truth." *State v. Dibble*, 133 Ohio St.3d 451, 2012-Ohio-4630, 979 N.E.2d 247, ¶16 (2012). The Ohio Supreme Court left open the issue of whether the warrant was supported by sufficient information to provide probable cause to search Defendant's home. Ultimately, the Supreme Court remanded the matter to this Court to hold another hearing on the issue of suppression to specifically review the affidavit on its face to determine the sufficiency of the probable cause to search the Defendant's home.

On March 12, 2013, the Court held another hearing on the issue of suppression pursuant to the Supreme Court's remand. The State and Defendant did not call any witnesses or present any new

evidence, and instead jointly presented the transcript from the June 29, 2010 hearing in support of their respective positions.

## II. LAW AND ANALYSIS

This Court is presented with a two-part question. First, the Court must determine whether the affidavit submitted in support of the search warrant contains sufficient probable cause to support the decision to issue the warrant under the "totality-of-the-circumstances" test of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983). If the first question is answered in the negative, the Court must then determine whether the evidence obtained by law enforcement officers as the result of their execution of the faulty search warrant should be admissible in the prosecution's case-in-chief under the "good faith exception" to the exclusionary rule, as set forth in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L. Ed.2d 677 (1984).

### A. The Affidavit Is Insufficient to Support a Finding of Probable Cause.

In making the determination of whether there was a substantial basis to conclude that probable cause existed, the issuing court must:

> make a practical, commonsense 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. (Emphasis added.)

*State v. George,* 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), at paragraph one of the syllabus, quoting *Illinois v. Gates, supra,* at 238-39. When the sufficiency of an affidavit submitted in support of a search warrant is in question, the duty of the reviewing court is to determine whether the issuing court had a "substantial basis for concluding that probable cause existed." *Id.* at paragraph 2 of the syllabus, following *Illinois v. Gates*, *supra*, at 238-39. "The term probable cause *** means less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion." *State v. George*, 45 Ohio St. 3d 325, 329, 544 N.E.2d 640 (1989).

Upon review of the Motions, the arguments of Counsel, and all of the evidence presented and stipulated to during the March 12, 2013 hearing, this Court finds that the affidavit is insufficient to support probable cause to search Defendant's home.

The *affidavit* does not contain any information that establishes there is a *substantial* basis to conclude that evidence of gross sexual imposition or evidence of correspondence or photographs that substantiate E.S.'s claims would be found in Defendant's home. The affidavit does not contain any indication that the illegal activity that E.S. complained of occurred in Defendant's home. Detective Wuertz freely admitted that the affidavit is void of any allegation by E.S. that "would lead [him] to believe that there was any type of computer conversation, phone calls, picture taking, or anything else" as it applied to E.S.. (June 29, 2010 Hearing Tr. at 13:8-15). According to the affidavit, all inappropriate touching occurred at the Wellington School. The affidavit does not contain any information indicating that there was any written correspondence between E.S. and Defendant. Nor does the affidavit indicate that Defendant took any photographs of E.S., let alone kept the pictures in his home. When testifying, Detective Wuertz admitted that based upon what was written in the affidavit, there was "no real probable cause to be searching the home of Mr. Dibble." (June 29, 2010 Hearing Tr. at 13:16-20). Consequently, the affidavit clearly lacks any basis that evidence of a crime would be found in Defendant's home in regards to E.S..

As it pertains to E.K., the record is devoid of a substantial basis that evidence of any crime regarding E.K. would be found in Defendant's home based upon the allegations of E.K. Wherefore, as aptly stated by Justice Pfeiffer's dissent, "any information about Dibble's relationship with E.K., a consenting adult, describes no crime, and thus provides no basis for a search." *State v. Dibble*, 133 Ohio St.3d 451, at ¶28. When testifying, Detective Wuertz stated that any touching that occurred between Defendant and E.K. occurred after E.K. graduated from high school and occurred after she was 18 years old. (June 29, 2010 Hearing Tr. at 14:7-17). In fact, Detective Wuertz admitted to receiving a four-page statement from E.K. that indicated that her interactions with Defendant were consensual. (*Id.* at 14:18-17:13). Detective Wuertz admitted that the Defendant took photographs of E.K. with her permission:

> Q: Okay. And it is this person [E.K.] who claims pictures were taken with her okay, correct, with her permission? Nothing in there indicates it wasn't. Is that correct?
>
> A: Correct.

(June 29, 2010 Hearing Tr. at 17:9-13). Ultimately, E.K. was a consenting adult, and thus the statements regarding E.K. within the affidavit provides no basis for a search of Defendant's home.

The State submits that the affidavit supports a finding of probable cause because, although the statements regarding E.K. do not describe crimes, they are relevant to support the issuance of the warrant for evidence of criminal activity regarding E.S. under a "mere evidence" standard; the State claims that Defendant engaged in grooming. The State asserts that a "warrant can issue for 'mere evidence' having a nexus to criminal behavior because it 'will aid in a particular apprehension or conviction.'" (Memo. in Opp., page 6, citing *Warden v. Hayden,* 387 U.S. 294, 306, 87 S.Ct. 1642 (1967).

The State argues that the U.S. Supreme Court's decision in *Hayden* supports its argument that the warrant was appropriately issued to search for mere evidence of a crime. *Hayden*, however, does not apply to the case *sub judice*. *Hayden* involves the collection of clothing, which had evidentiary value, during the pendency of a valid and authorized search of the defendant's home. The question of *Hayden*, therefore, was whether the police were permitted to seize particular types of evidence during an otherwise valid search. Prior to *Hayden*, the U.S. Supreme Court had carved out a distinction between a search for merely evidentiary materials and one for an instrumentality. The *Hayden* Court ultimately rejected the mere evidence rule—thereby permitting seizure of both instrumentalities and mere evidence of a crime—and embraced the Fourth Amendment as the protector of a right to privacy. 387 U.S. at 306-07. In so doing, however, the Court held that even if its rejection of the mere evidence rule may enlarge the area of permissible searches, the protections of the Fourth Amendment, like the reasonableness and warrant requirements and the remedy of suppression, would safeguard one's right to privacy. *Id.* at 309. In essence, although *Hayden* opened the doors to allow the police to search for items of only evidentiary value, the U.S. Supreme Court recognized that the police must still satisfy the requirements necessary for a warrant.

Here, the State asks this Court to permit the admission of evidence seized from the Defendant's home because the mere evidence standard permits a warrant to issue for search of items of evidentiary value. The State argues that E.K. is a witness with information regarding potential

evidence at the Defendant's home that may aid in Defendant's conviction for the crime allegedly committed against E.S. The State disregards, however, the fact that there must be an established nexus to the place to be searched. E.K. never indicated that she saw E.S., any contraband related to E.S., or anything illegal at all in the home. There is no question here regarding the quality or type of evidence that the state wants to seize. Here, the question is whether the State can even get into the Defendant's home in the first place. The State's analysis is not congruent with the reasoning set forth in *Hayden*. The State's reasoning is rooted in assumptions that cannot properly support the conclusion it asks this Court to reach.

Even if the pictures taken of E.K. suggest some kind of ulterior purpose regarding E.S., it is clear that the affidavit is void of any indication that the pictures of E.K. were taken at the Defendant's home. The affidavit is also void of any references of time to indicate how long ago the pictures were taken. (It is clear based upon the testimony of Detective Wuertz that E.S. did not report the inappropriate touching incident until a year after it occurred, and that E.K. had been out of high school for approximately two years at the time the report was made as she was a year older than E.S. See June 29, 2010 Tr. at 28:3-8; 29:22-23). In other words, there is no indication that the pictures were recently taken and, therefore, still at the Defendant's home if in fact he kept them there.

Unfortunately, the affidavit contains no evidence that any illegal activity ever took place at Defendant's home, nor any indication that his home contained evidence related to E.S. The information contained in the affidavit is insufficient to create a nexus between the Defendant's home—perhaps the most sacred of all personal property—and illegal conduct that took place at the school. There must be specific information to provide a sufficient nexus between the Defendant's alleged illegal behavior and his residence to establish probable cause to search Defendant's home, but the evidence supported fails to provide a mere suspicion that illegal (not morally reprehensible) conduct took place in the home.

Justice Scalia, writing for the U.S. Supreme Court majority in *Florida v. Jardines*, 2013 U.S. LEXIS 2542, 24 Fla. L. Weekly Fed. S 117 (March 26, 2013) very recently reiterated the importance of protecting the home from unreasonable searches: "[W]hen it comes to the Fourth Amendment, the

home is first among equals. At the Amendment's "very core" stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* at *7-8. This right would be of little practical value if the police were permitted to enter an individual's home on a fishing expedition based upon a hunch or an affidavit that in no way indicates that evidence of a crime will be found within that home. Accordingly, there was not a substantial basis to conclude that probable cause existed to search Defendant's home.

**B. Application of the Good Faith Exception.**

The State contends that even if the affidavit is insufficient to support a finding of probable cause to search the Defendant's home, the evidence collected there should be admissible under the objective good faith exception to the exclusionary rule. The United States Supreme Court officially recognized the existence of a good faith exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897, 922-23, 104 S.Ct. 3405 (1984).

In *Leon*, the U.S. Supreme Court determined that the Fourth Amendment exclusionary rule should not operate to suppress evidence officers obtained when acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate or judge issued but ultimately found to be unsupported by probable cause. *Leon*, 468 U.S. 897, 918-23. Although courts consider it the clearest indication that an officer acted in good faith, "the fact that a neutral magistrate [or judge] has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness." *Messerschmidt v. Millender,* 132 S.Ct. 1235, 1245, 182 L. Ed.2d 47 (2012).

There are four categories that the Supreme Court has identified in which the good faith exception does not apply because police reliance on a warrant is not objectionably reasonable. *Leon*, *supra* at, at 923. The categories contemplate extraordinary circumstances where:

> (1) the magistrate or judge was misled by information in an affidavit that the affiant knew was false or would have know was false except for his reckless disregard of the truth; (2) the issuing [judge] wholly abandoned his judicial role; (3) an officer purports to rely upon a warrant based on an affidavit 'so lacking' in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) depending on the circumstances of a particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

*State v. George,* 45 Ohio St.3d 325, 332-33, 544 N.E.2d 640 (1989), citing *Leon, supra,* at 923.

Upon this Court's first review of the totality of the circumstances, (including its observation of the Detective's demeanor at the first hearing, and its consideration of the law enforcement reports, affidavits, summaries, etc.), this Court found that the Detective's passion for the pursuit of justice unfortunately translated into a purposeful misrepresentation to obtain a warrant—a situation that arguably falls into the first category listed above.

However, on appeal, the majority found that Detective Wuertz's statements within the affidavit "were not false statements made intentionally or with reckless disregard for the truth." *Dibble,* 133 Ohio St.3d at ¶16-19. In so doing, the majority effectively narrows the scope of consideration of this Court regarding credibility and its determination of the good faith exception to the exclusionary rule in this case. See also, *Id.* at ¶25. The Supreme Court concluded that Detective Wuertz's actions cannot be considered intentionally false or misleading, or made with malice. Consequently, this Court cannot conclude that the statements made by Detective Wuertz within the affidavit qualify as statements that the "affiant knew was false or would have know was false except for his reckless disregard of the truth" as required under the first category listed above. *State v. George, supra.*

In addition, there is no argument, nor does this Court suggest, that the issuing Judge wholly abandoned her role. And, this is not an extraordinary circumstance where the warrant or affidavit were so inadequate in terms of its particularity of place to be search or items to be seized as to qualify under the other remaining *Leon* categories.

As such, this Court finds that Detective Wuertz acted in objectively reasonable reliance on a search warrant issued by a detached and neutral judge under the good faith exception to the exclusionary rule.

### C. The Constitutionality of Crim.R. 41(C)(2) Need Not Be Determined. Based Upon the Court's Ruling Above, the Issue is Rendered Moot.

The State argues that the affidavit and warrant are valid on their face because additional unrecorded testimony made by Detective Wuertz to the issuing judge supports a finding of probable cause. Crim.R. 41(C) prohibits a court from considering testimony unless it is transcribed. (March 12,

2013 Hearing Tr. at 7:7-12); see also *State v. Shepcaro*, 45 Ohio App.2d 293, 298 (10th Dist., 1975). Therefore, the State asserts the Rule is unconstitutional.

Without rendering judgment,[1] this Court questions whether the State has thoroughly considered the realities of what it is asking this Court to determine regarding Crim.R. 41(C)(2). The Rule's requirement is not an extraordinary or an onerous burden. Crim.R. 41(C) ensures an efficient review of the warrant by another court. Without a record, courts would waste a colossal amount of judicial resources by subjecting issuing judges or magistrates into court to recite their memory of "off-the-record" conversations held six, twelve, or even eighteen months prior to a suppression hearing. This, in turn, could lead to the erosion of the intellectual separation between the issuing and reviewing courts; a reviewing court is tasked with a secondary and objective review.

Though the State may now move the Court to find Crim.R. 41(C)(2), a procedural rule, to be unconstitutional, the requirement of the Rule is a protection for both the State and defendants alike: it exists to avoid the possibility of justification for a search becoming based upon facts or evidence discovered during the course of execution of the warrant, and protects the police from being accused of such acts.

This Court, however, does not rule on this issue. Without consideration of the extrinsic conversations between the Detective and the issuing judge, this Court has found that the good faith exception applies. Accordingly, the issue of the constitutionality of Crim.R. 41(C) has been rendered moot.

## III. DECISION

The Defendant's Motion to Suppress is hereby **DENIED.**

**THIS IS A FINAL APPEALABLE ORDER.**

**IT IS SO ORDERED.**

**JUDGE TIMOTHY S. HORTON**

[1] The Court notes that simply because a statute requires more than the U.S. Constitution, it does not necessarily follow that the provision is unconstitutional. It has long been held that the Federal Constitution "provides a floor below which state court decisions may not fall." *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993).

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Franklin County Court of Common Pleas

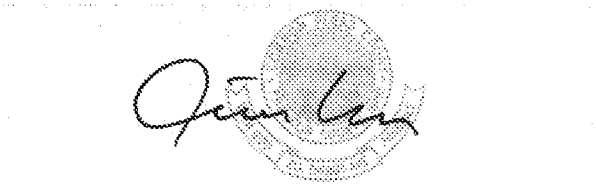
**Date:** 04-30-2013

**Case Title:** STATE OF OHIO -VS- LAWRENCE A DIBBLE

**Case Number:** 10CR001958

**Type:** ENTRY/ORDER

It Is So Ordered.



/s/ Judge Timothy S. Horton

Court Disposition

Case Number: 10CR001958

Case Style: STATE OF OHIO -VS- LAWRENCE A DIBBLE

Motion Tie Off Information:

1. Motion CMS Document Id: 10CR001958002[redacted]980000
   Document Title: 02-04-2013-SUPPRESS - MOTION TO
   Disposition: MOTION DENIED

2. Motion CMS Document Id: 10CR001958002[redacted]980000
   Document Title: 03-06-2013-EXTENSION OF TIME TO FILE - MOTION FOR
   Disposition: MOTION GRANTED

**IN THE COURT OF COMMON PLEAS**
**OF FRANKLIN COUNTY, OHIO**

| | | |
|---|---|---|
| **STATE OF OHIO** | : | |
| | : | |
| **Plaintiff,** | : | |
| **vs.** | : | **CASE NO. 10CR-03-1958** |
| | : | |
| **LAWRENCE A. DIBBLE,** | : | **JUDGE TIMOTHY S. HORTON** |
| | : | |
| **Defendant.** | : | |

**DECISION AND ENTRY**
**GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

Dated this 1st day of July, 2010

**Statement of Facts**

On February 2, 2010, E.S. (referred to by Detective Wuertz as "Victim #1" in the Search Warrant) reported to Upper Arlington Police Detective Andrew Wuertz that she had been sexually assaulted by a teacher while she was a student at The Wellington School located at 3650 Reed Road, Upper Arlington, in Franklin County, Ohio. E.S. told Detective Wuertz that on or around April 2009, Defendant slid his hand up her thigh, under her skirt, touching her vaginal area. Add itionally, E.S. claims that Defendant slid his hand around her back and felt her buttocks and lower abdomen before pulling his hand away. On February 2, 2010, E.S. agreed to wear a covert body wire monitored by Upper Arlington Police Department and approached Defendant at school about the incident. Defendant responded "honestly I just wasn't thinking" and apologized to her.

Also on February 2, 2010, L.K. (referred to by Detective Wuertz as "Victim #2" in the Search Warrant) reported to Detective Wuertz that she had a consensual relationship with the Defendant after she graduated from Wellington and after she turned 18 years old. L.K. indicated that she was a student of Defendant at Wellington before she graduated in 2008 but that their relationship developed in the Fall of 2008. While L.K. was a student, she served as Defendant's

student aide and routinely gave him back massages in his office. Both girls allege that Defendant held himself out as a father figure to them. While there are no allegations by L.K. that relate to the period of time when she was a Wellington student or under the age of eighteen, L.K. told Detective Wuertz that Defendant took nude photographs of her that were inappropriate at his home located at 6595 Brock Street, Dublin, Ohio months after her graduation. Also, Defendant told L.K. that he needed to feel her heartbeat in order to connect with her at a different level. The Defendant instructed L.K. to remove her shirt and bra so that he could feel her heartbeat through her breast.

On February 3, 2010, Detective Wuertz appeared before Judge Peeples and requested that a search warrant be issued to search Defendant's residence. The search warrant sought evidence of the crime of Gross Sexual Imposition, including, but not limited to computers, videotapes, and any other types of electronic storage media. Detective Wuertz executed a search warrant which included a sworn attachment and evidence was seized based on this information. Defendant was subsequently arrested and charged with sixteen felony counts of Voyeurism and four misdemeanor counts of Voyeurism, along with one count of Gross Sexual Imposition.

On May 12, 2010, Defendant filed a Motion to Suppress Evidence. On June 3, 2010, the State of Ohio filed a Memorandum Contra. On June 29, 2010, the Court conducted a Suppression Hearing and heard the testimony of Detective Wuertz and admitted exhibits into evidence.

**Procedural History**

Ohio Rule of Criminal Procedure 41 sets out the requirements of the contents of a search warrant. CrimR. 41(C) provides in pertinent part the following:

> A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person 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.

* * *

Upon the receipt of the warrant and affidavit, the Judge must find that there is probable cause to issue the warrant. *Id.* The 10th District Court of Appeals has held that a Judge may not consider oral testimony as probable cause unless the oral testimony is made under oath and recorded. *State v. Shepacro* (1975), 45 Ohio App. 2d 293.

In *Carroll v. United States* (1925), 267 U.S. 132, 162, probable cause exists when the affidavit demonstrates:

> facts and circumstances within their [the officers swearing to the affidavits] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief [that the things to be searched for and seized were connected with a crime, and that they were to be found in the location sough to be searched].

When the truthfulness of the attached affidavit is questioned, a hearing is required. Defendant must present a preliminary showing that there is a false statement made knowingly and intentionally, or with reckless disregard for the truth, by the affiant included in the sworn warrant affidavit. *Franks v. Delaware* (1978), 98 S. Ct. 2674. In *Franks*, the Supreme Court set out a two-prong test which would require the court to suppress evidence if a Defendant could prove that the search warrant was executed invalidly. *Id* at 2676. First, Defendant must establish by a preponderance of the evidence the affidavit contained false statements that were made knowingly and intentionally or with a reckless disregard to the truth. Second, if the Defendant meets his burden and the affidavit's remaining content is insufficient to establish probable cause, the false material in the warrant must be voided and the fruits of the search excluded. *Id.*

**Law & Argument**

**I. Defendant claims the affidavit attached to the search warrant contained false and misleading information which was deliberately used to satisfy the existence of probable cause to support the search.**

In the present matter, Defendant argues that Detective Wuertz knowingly and intentionally provided false and misleading information in his affidavit supporting the search

warrant presented to Judge Peeples. Specifically, Detective Wuertz admits that he mentions L.K. as Victim #2 six different times in order to get a search warrant. (Transcript pages 13 &17, hereto after referred to as "Tr. ___") Detective Wuertz also admits that the activity for which L.K. complains occurred between two consenting adults. (Tr. 20) At the Motion to Suppress hearing on June 29, 2010, Defendant presented the following exhibits: (1) Search Warrant with the attached affidavit indicating two victims (Def. Ex. 1); (2) Complaint of E.S. for Gross Sexual Imposition (Def. Ex. 2); (3) Arrest Information Form including Detective Wuertz's statements of fact pertaining to E.S. (Def. Ex. 3); and (4) Ohio Uniform Incident ("U-10") Report indicating only one victim, E.S. (Def. Ex. 4). Defendant presented this evidence to show that Detective Wuertz falsely included the information of L.K. and referred to her as Victim #2 in the affidavit supporting the search warrant solely for purposes of creating sufficient probable cause to search Defendant's house.

**II. The State of Ohio claims that the search warrant was valid and further that the good faith exception should prohibit the exclusion of the evidence regardless of the validity of the warrant.**

The State claims that the use of the term "victim" by Detective Wuertz was not improper based on his personal belief that the events described to him by L.K. were not consensual and therefore she was a victim. In the alternative, the State argues that the misuse of the term "victim" does not rise to the level of being "intentionally" false or made "with reckless disregard for the truth" requiring the evidence to be suppressed. Moreover, the State cites *Herring v. United States*, supporting that even if the warrant was invalid, Upper Arlington Police acted in good faith while executing the search and therefore such evidence should not be suppressed.

**1. This Court finds that Defendant proved by a preponderance of evidence that the affidavit supporting the search warrant contained false statements made knowingly and intentionally by Detective Wuertz.**

Detective Wuertz submitted an attachment to his affidavit for the search warrant (Def. Ex. 1) which reads in pertinent part with respect to L.K. (Victim #2) as follows:

> Victim #2 was with Victim #1 while she made the report. Victim #2 stated she also had inappropriate contact with Dibble. Victim #2 stated that it was after she had graduated high school where Dibble had also been her teacher. Victim #2 stated that Dibble had taken photo's [sic] of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim #2 told investigators that Dibble used a digital camera to take the photo's [sic], and made her wear a pillow case over her head while he took them. *** Investigators from Upper Arlington believe Dibble's computers, camera's [sic], media storage devices, etc. may contain correspondence, and photos to substantiate Victim #1 and Victim#2's claims.

At the Suppression Hearing, Detective Wuertz testified that he understood that all references regarding Defendant's computer, camera, photos, telephone calls all related only to Victim #2. In fact, Detective Wuertz provides the following answers:

> Q. And nothing about Victim #1 indicates anything that would lead you to believe that there was any type of computer conversation, phone calls, picture taking, or anything else, any of the information in your affidavit, your sworn statement here, as it applies to Victim #1. Is that fair to say?
>
> **A. Correct.**
>
> Q. So as it applies to Victim #1, it's fair to say also that there's no real probable cause to be searching the home of Mr. Dibble. Is that correct?
>
> **A. As far as what's written here, correct.**
>
> Q. Okay. You then identify someone you refer to as Victim #2. In fact, you used the term Victim #2 six times. Is that not correct?
>
> **A. Correct.**

(Tr. 13)

Detective Wuertz was also questioned extensively about his use of the term "victim" as it relates to L.K. and the clear contradiction of the detective's failure to list L.K. on any of the three different documents that he routinely uses when investigating and filing criminal complaints. Detective Wuertz's reasons for listing L.K. as a "victim" only on the search warrant are intentionally misleading and false. Detective Wuertz fully understood at the time he petitioned

the court for a search warrant that he did not have probable cause for any criminal charge against Defendant as it relates to L.K. and lacked a good faith belief that the information he possessed would lead to any future charges. The following responses by Detective Wuertz yield no other conclusions:

> Q. You never filed a charge against this girl or that involved this girl [Victim #2] ever, correct?
>
> **A. Correct.**
>
> Q. Okay. You never filled a report, a U-10 or another report, that indicates she's [Victim #2] a victim. Is that correct?
>
> **A. Correct.**
>
> Q. Okay. And yet you refer to her six times as victim in your sworn affidavit to get a search warrant.
>
> **A. That is correct.**
>
> Q. Okay. And only the information from her would be the probable cause basis to be able to search the home of Mr. Dibble, correct? At that point in time, detective, that's correct, is it not?
>
> **A. At that point in time.**

(Tr. 21-22)

> Q. And I guess that's ultimately my point. There is no probable cause for a charge against L.K, is there?
>
> **A. Against Mr. Dibble for L.K.**
>
> Q. Correct.
>
> **A. Right.**

(Tr. 43-44)

Detective Wuertz has been a member of the Upper Arlington Division of Police for thirteen years and has served as a detective for the past three years. He is an experienced police detective. In the instant matter, Detective Wuertz completed three different forms that provided him opportunities to list L.K. as a victim. First, the Complaint of Victim #1 filed with the Franklin County Municipal Court fails to reference L.K. as a victim or otherwise. (Def. Ex. 2)

Second, there's no mention of L.K. in Detective Wuertz's Arrest Information Form. (Def. Ex. 3). Third, Detective Wuertz does not mention L.K. in his Ohio Uniform Incident U-10 Report and specifically notes that only "1" victim is involved. (Def. Ex. 4). Fourth, Detective Wuertz believes that Victim #2 is as much of a victim as Victim #1. Yet, the detective never files a complaint, u-10 report, or arrest report specifically as it pertains to Victim#2. Detective Wuertz states in his affidavit for the search warrant that he believes the Defendant's computers, cameras, media storage devices at his house may contain information to "substantiate Victim #1 and Victim#2's claims." However, this statement is rebutted by is own testimony and clearly illustrates the importance for Victim #2's inclusion in the affidavit.

This Court finds that Defendant has shown by a preponderance of the evidence that the affidavit supporting the search warrant contained false statements. Defendant's Motion to Suppress combined with the evidence provided at the Suppression Hearing on June 29, 2010, demonstrates that Detective Wuertz knowingly and intentionally made false statements in his affidavit to Judge Peeples. Detective Wuertz testified that he personally believes L.K. is a victim. However, his personal beliefs are not enough to show negligence or innocent mistake regarding the inclusion of the term "victim" in the affidavit. Detective Wuertz admitted that at that point in time (February 3, 2010) only the information from L.K.'s interview would be the probable cause basis for searching Defendant's home. (Tr. 22) This Court finds that Detective Wuertz knowingly and intentionally included the false characterization of L.K. in order to create probable cause to search Defendant's home.

Detective Wuertz chose to temporarily substitute his professional training and understanding of the law with his moral and personal feelings regarding whether L.K. is a "victim." This Court would find few people, if any, who would argue with the notion that even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization. However, if there

does not exist probable cause to satisfy our constitutional standards of reasonableness for a search of criminal activity, as defined by law, then such search is invalid.

According to Black's Law Dictionary the term "victim" is defined as a person who is the object of a crime. Detective Wuertz's use of the word "victim" when referring to L.K. in the affidavit supporting the search warrant is improper. Detective Wuertz knows the definition of victim and deliberately chose not to include L.K. in any of his other police documents.

The State claims that there were additional oral communications between Detective Wuertz and Judge Peeples, however, no record of which was presented as evidence. Therefore, the first prong of the *Franks* test has been satisfied.

The Court now considers if the remaining allegations in the search warrant, without the false language, constitute probable cause. The remaining allegations include the statements made by E.S. regarding the inappropriate touching while she was a student at The Wellington School. This Court finds that these statements taken individually do not constitute a probable cause to search Defendant's home for evidence of Gross Sexual Imposition. Nothing in E.S.'s testimony gives rise to evidentiary material located in Defendant's home. Therefore, the second prong of the *Franks* test is met and the warrant was not based on probable cause.

**2. This Court finds that the "Good Faith" exception is not applicable.**

The "Good Faith" exception discussed in *Herring* prohibits exclusion of evidence if the police have an objectionably reasonable good faith reliance under a warrant that is invalid. *Herring v. United States* (2009), 129 S. Ct. 695. In *Herring*, a computer error was the cause of the invalid warrant; therefore the court found the police were acting in good faith executing the warrant. In contrast, there was no electronic error to blame with the facts given in Detective Wuertz's sworn affidavit. Alternately, this present matter is comparable to the facts in *Franks*. *Franks v. Delaware, supra.* In *Franks*, the police included information from a fake informant

to obtain a search warrant. Here, Detective Wuertz inappropriately included L.K. in his affidavit as "Victim #2" in order to obtain the search warrant.

This Court observed Detective Wuertz's testimony, appearance, and demeanor and find that he lacks credibility in regards to his reasoning of using "Victim #2" in the affidavit and regarding the additional conversation with Judge Peeples. There is no additional evidence besides his personal testimony to indicate this was an innocent mistake or that he had additional conversations with Judge Peeples outside the language included in the affidavit.

**3. This Court finds that the search violated the Defendant's constitutional rights afforded by the 4th Amendment and therefore the evidence obtained during the search is inadmissible.**

The Ohio Constitution Article 1, Section 14 states:

> The right of the people to be secure in their persons, houses, papers and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the personas and things to be seized.

The Constitution along with the rules of Criminal Procedure in Ohio allow for the protection of all individuals and their basic civil rights. Search warrants issued and executed without probable cause undermines the entire criminal justice system and strips individuals of their fundamental rights.

The protection of one's privacy is a fundamental right created by this country's founding fathers. Our fundamental rights are cornerstone to our democratic society. It is the principal duty of the judiciary to uphold the rights of the citizens.

Over one hundred years ago, United States Supreme Court Justice Bradley discussed the principles of search by the government into man's privacies of life and that governmental searches affect the very essence of constitutional liberty and security. Justice Bradley states the main problem with the principal:

> [i]s not the breaking of [defendant's] doors and the rummaging of his drawers, that constitutes the essence of the offence; but it is the

> invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence – it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. *Boyd v. United States*, 116 U.S. 616, 630.

Lord Camden in 1765 stated: "It is very certain, that the law obligeth no man to accuse himself***that search for evidence is disallowed upon the same principle." *Entick v. Carrington* (1765), 19 Howell's State Trials 1029, 1073.

Over time, warrants were created by the Courts to allow government officials limited rights to search into one's personal property. Search warrants are issued under limitations and restraints since there is a strong presumption to avoid violating one's fundamental right to privacy. There are also several circumstances in which warrants are not necessary prior to the search. None of the exceptions apply to this case, so this Court will not discuss those.

Here, Detective Wuertz falsely included L.K. in his affidavit supporting the search warrant. In the Search Warrant (Def. Ex. 1) it is clear that the only charge was Gross Sexual Imposition, which was not what L.K. was alleging. Detective Wuertz's personal subjective view regarding L.K.'s victim status is not credible evidence. In *Terry*, the Court states that the subjective view of the police officers does not determine the scope of reasonableness or probable cause. *Terry v. Ohio*, 367 U.S. 643. Moreover, in *Herring*, "the pertinent analysis of deterrence and culpability is objective, not an 'inquiry into the subjective awareness of arresting officers.'" *Herring v. United States*, 129 S. Ct. 695, 703.

This Court finds fundamental civil rights to be paramount. Under *Mapp*, this Court must exclude any illegally seized evidence. *Mapp v. Ohio* (1961), 367 U.S. 643. Therefore, the evidence seized from Defendant's home is inadmissible.

**Conclusion**

Since the penalties of abuse of process are so severe, this Court promotes and encourages following the process set out by law. When the proper procedure is not followed, it not only

infringes on the constitutional rights of defendants who are by law presumed innocent unless proven guilty but it also greatly affects the rights of the victim to bring their abusers to justice.

Accordingly, it is hereby ORDERED that Defendant's Motion to Suppress Evidence is **GRANTED** and ORDERED that all evidence seized from Defendant's home is **INADMISSABLE.**

IT IS SO ORDERED.

TIMOTHY S. HORTON, JUDGE

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APPENDIX I

158 Ohio St.3d 1467
(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)
Supreme Court of Ohio.

STATE
v.
DIBBLE

2018-0552
|
April 14, 2020

Franklin App. No. 16AP-629, 2017-Ohio-9321

***691** CASE ANNOUNCEMENTS

RECONSIDERATION OF PRIOR DECISIONS

Reported at —— Ohio St.3d ——, 2020-Ohio-546, —— N.E.3d ——. On motion for reconsideration. Motion denied.

O'Connor, C.J., and Donnelly, J., dissent.

Michael Tucker, J., of the Second District Court of Appeals, sitting for French, J.

**All Citations**

158 Ohio St.3d 1467, 142 N.E.3d 690 (Table), 2020 -Ohio-1393

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