**[Cite as *State v. Hobbs*, 2018-Ohio-4059.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | Case No. 17CA1054 |
| vs. | : | |
| LEE HOBBS, | : | DECISION AND JUDGMENT ENTRY |
| Defendant-Appellant. | : | |

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APPEARANCES:

Tyler E. Cantrell, West Union, Ohio, for Appellant.

David Kelley, Adams County Prosecuting Attorney, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for Appellee.

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CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-26-18
ABELE, J.

**{¶ 1}** This is an appeal from an Adams County Common Pleas Court judgment of conviction and sentence. Lee Hobbs, defendant below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING THE DEFENDANT THE ABILITY TO CALL ROBERT CHAMBERS AS A WITNESS."

**{¶ 2}** After law enforcement officers executed two separate search warrants against appellant's property, an Adams County Grand Jury returned an indictment that charged appellant with one count of fifth-degree felony aggravated possession of drugs and one count of second-degree felony aggravated possession of drugs, both in violation of R.C. 2925.11(A). Appellant entered not guilty pleas.

**{¶ 3}** Appellant later filed a motion to suppress the evidence gathered during the searches of his house. Appellant asserted that neither search warrant established probable cause to believe that his property contained evidence of a crime. At a hearing to consider appellant's motion, neither party presented any testimonial evidence. Instead, the parties agreed that the court was limited to the four corners of the search warrants and accompanying affidavits. The search warrants and affidavits reveal the following information.

**{¶ 4}** Adams County Sheriff's Deputy Brandon Asbury obtained the first search warrant, dated August 1, 2016. In his affidavit, Deputy Asbury averred that on July 31, 2016, he visited appellant's residence after an anonymous informant reported that appellant had been using methamphetamine and possibly was involved in manufacturing methamphetamine. When Deputy Asbury arrived at appellant's residence, he observed appellant in the backyard. Deputy Asbury proceeded to the backyard and noticed a marijuana plant growing on the roof of the

awning attached to the main house. The deputy asked to speak with appellant, but appellant fled into the house. As appellant fled, he dropped a glass tube that displayed burn marks and residue.

**{¶ 5}** While Deputy Asbury attempted to detain appellant, the deputy also observed inside the residence several pills, scales and a marijuana pipe. The deputy's affidavit does not, however, indicate whether he observed these items while remaining outside appellant's home, or if he had followed appellant into the home and then observed the items. Deputy Asbury further alleged that two individuals with drug convictions and/or drug-related arrests were present at appellant's home and that both of these individuals had purchased Sudafed in the previous week. The deputy stated that, based upon the foregoing facts, he believed appellant's residence contained methamphetamine, marijuana, other drugs of abuse and drug paraphernalia.

**{¶ 6}** A judge determined that the search warrant affidavit established probable cause to search appellant's property and to seize:

> Items of Evidence, including but not limited to: Unknown quantities of methamphetamine, marijuana, and any and all other drugs of abuse, and drug paraphernalia, including scales, packaging materials, and paraphernalia used for the sale and administration of said drugs, materials used in the cultivation of marijuana, money obtained from the sale of illegal drugs as well as weapons used for the protection of the above; which are: being concealed in violation of law, ORC 2925.11, Possession of Drugs and 2925.04; Cultivation of Marijuana, at the premises[.]

**{¶ 7}** After Deputy Asbury executed the search warrant, he found in appellant's bedroom four glass pipes that displayed white residue and burn marks. He discovered a fifth pipe in the kitchen. Subsequent testing revealed that one glass pipe contained trace amounts of methamphetamine.

**{¶ 8}** On November 23, 2016, Adams County Sheriff's Detective Sam Purdin requested a second warrant to search appellant's residence. Detective Purdin stated that he believed appellant's residence contained heroin, drugs of abuse and drug paraphernalia based upon the following facts and circumstances. Detective Purdin received a complaint that Robert Chambers had been selling drugs at Wal-Mart in West Union. Detective Purdin subsequently encountered Chambers at an unspecified location and discovered on Chambers' person a "shaver" and a hypodermic needle. The detective explained that a "shaver" is known to be used for cutting heroin. Chambers also admitted that he had used the needle for heroin. Chambers additionally indicated that he had been staying at appellant's residence.

**{¶ 9}** Approximately one week later, Detective Purdin visited appellant's residence, but no one answered. Detective Purdin, noted, however, Chambers' vehicle parked outside the residence. A judge determined that the search warrant affidavit established probable cause to search appellant's residence and to seize:

> Items of Evidence, including but not limited to: Unknown quantities of heroin and any and all other drugs of abuse, and drug paraphernalia, including scales, packaging materials, and paraphernalia used for the sale and administration of said drugs, money obtained from the sale of illegal drugs as well as weapons used for the protection of the above; which are: being concealed in violation of law, ORC 2925.11, Possession of Drugs at the premises[.]

**{¶ 10}** The detective later searched appellant's residence, including appellant's bedroom. While searching the bedroom, Detective Purdin found multiple baggies of methamphetamine under the mattress and another baggie in appellant's closet. Later testing revealed that the methamphetamine weighed approximately 19 grams.

**{¶ 11}** At the motion to suppress hearing, appellant argued that neither affidavit set forth adequate facts to establish probable cause to search his residence. With respect to the first warrant, appellant contended that the affidavit did not contain any information to illustrate the reliability of the informant's tip. Appellant thus alleged that the tip could not be used to establish probable cause.

**{¶ 12}** Appellant further alleged that the issuing judge's probable-cause determination rested upon evidence that Deputy Asbury discovered after he unlawfully entered appellant's residence. Appellant argued that, although the deputy claimed to have seen drug paraphernalia in open view, the deputy did not view the paraphernalia from a lawful vantage point. Appellant thus asserted that the drug paraphernalia is tainted evidence that may not form part of the probable-cause analysis.

**{¶ 13}** With respect to the second search warrant, appellant contended that the affidavit failed to set forth probable cause to believe that evidence of Chambers' criminal activity would be found at appellant's house. Appellant argued that the search warrant was inadequately particularized and should have been limited to Chambers' bedroom, or to those areas under Chambers' control. Appellant argued that the search warrant should not have authorized a search of his bedroom or person.

**{¶ 14}** After the court heard the parties' arguments, the court overruled appellant's motion. With respect to the first search warrant, the trial court found that the issuing judge had a substantial basis to conclude that probable cause existed to search appellant's property. The court noted that the anonymous informant initially led Deputy Asbury to appellant's residence and, given the nature of the tip about possible methamphetamine production, the deputy had

adequate grounds to conduct at least "a safety check" of appellant's residence. The court observed that during this "safety check," Deputy Asbury saw a marijuana plant growing on the roof of the awning attached to the main house. Deputy Asbury then asked to speak with appellant, but appellant fled inside the house. As appellant fled, he dropped a glass tube that displayed burn marks and residue. Deputy Asbury attempted to detain appellant and he observed pills, scales and a marijuana pipe. The court indicated that when the deputy attempted to detain appellant, the deputy "somehow ended up on the uh, in an area either outside of a screen door that uh, the glass was there, as suggests that he was in plain view. Or that uh, actually [appellant] may have gotten to the initial uh, part of the residence, but regardless uh, the uh, plain view doctrine which allows that to be a basis for uh, sometimes arrest, sometimes searches."

**{¶ 15}** The court noted that before that point, however, Deputy Asbury was aware of the following facts: (1) an anonymous source stated that appellant might be manufacturing methamphetamine on his property; (2) a marijuana plant was growing on appellant's property; (3) appellant fled when the deputy asked to speak with him; and (4) appellant dropped a glass tube that had burn marks and residue. The court determined that these facts gave the deputy reason to attempt to ensure the safety of the premises and persons on the premises. The court further found that as the deputy attempted to detain appellant, the deputy saw, in "plain view," pills, scales, and a marijuana pipe. The court observed that the deputy also noted the presence of two individuals who had recent drug-related convictions or arrests and who had purchased Sudafed within the previous week. The court also noted that Sudafed is used to manufacture

methamphetamine. The court determined that all of the foregoing circumstances set forth in the affidavit supported the issuing judge's probable-cause determination.

**{¶ 16}** With respect to the second search warrant, the court determined that the affidavit contained sufficient facts to indicate that appellant's residence, and the place where Chambers had been residing, may contain contraband.

**{¶ 17}** The court subsequently held a jury trial. At trial, Deputy Asbury testified that when he executed the search warrant, he found four glass pipes that contained residue and burn marks. Later testing revealed that one tube contained trace amounts of methamphetamine. Deputy Asbury also explained that he interviewed appellant at the sheriff's office, and appellant admitted that he smoked methamphetamine.

**{¶ 18}** Detective Purdin testified that on November 23, 2016, he searched appellant's bedroom and found several baggies that contained what appeared to be methamphetamine. Detective Purdin related that during an interview, appellant admitted that he used methamphetamine, but denied that he sold it. Detective Purdin told appellant that it appeared as if appellant had "flung" the baggie of methamphetamine into the closet and asked appellant if that is what had happened. Appellant responded, "I guess." He also asked appellant how much methamphetamine appellant thought he had, and appellant indicated that the smaller baggies contained "Meth," and "the bigger bags is the ICE. [sic]"

**{¶ 19}** After the state rested, appellant indicated that he wished to call Robert Chambers as a witness. Appellant's counsel stated that he believed that Chambers would testify that 15 grams of the methamphetamine found in appellant's residence belonged to Chambers.

**{¶ 20}** Chambers and his counsel appeared before the court and Chambers stated that, if appellant called him as a witness, Chambers would exercise his Fifth Amendment right. Appellant's counsel asked the court to allow him to call Chambers to the witness stand and require Chambers to invoke his Fifth Amendment right in open court. The state argued, however, that this procedure would be misleading and prejudicial. The court agreed that it would be prejudicial and overruled appellant's request.

**{¶ 21}** Appellant testified in his defense and explained that both Chambers and Chambers' girlfriend had access to appellant's house. Appellant also claimed that the glass tubes could have belonged to any one of them. Appellant admitted that he kept methamphetamine beneath his mattress, but denied that he possessed the larger amount of methamphetamine that law enforcement officers discovered in appellant's closet. Appellant also explained that when he admitted to Detective Purdin that he possessed methamphetamine, appellant believed that he only admitted to possessing the smaller amount of methamphetamine beneath his mattress. Appellant stated that he does not know how the methamphetamine ended up in his closet because he kept his methamphetamine under the mattress and nowhere else.

**{¶ 22}** On September 12, 2017, after hearing the evidence and counsels' arguments, the jury found appellant guilty of both counts. The court sentenced appellant to serve six years in prison. This appeal followed.

## I

## FIRST ASSIGNMENT OF ERROR

**{¶ 23}** In his first assignment of error, appellant asserts that the trial court erred by overruling his motion to suppress evidence. In particular, appellant argues that the trial court incorrectly determined that the searches of his residence did not offend the Fourth Amendment because neither search complied with the requirement that warrants be based upon probable cause. Appellant posits that neither affidavit set forth sufficient facts to establish a fair probability that evidence of any crimes would be discovered upon a search of his residence.

**{¶ 24}** Appellant alleges that the first affidavit failed to set forth adequate facts to allow the issuing judge to find probable cause to search appellant's residence. He contends that (1) the anonymous tip could not give rise to probable cause when the affidavit did not reveal any information regarding the informant's reliability and (2) the drug paraphernalia that Deputy Asbury viewed after he unlawfully entered appellant's residence cannot enter the probable-cause inquiry. Appellant contends that because Deputy Asbury did not view the paraphernalia from a lawful vantage point, the court must exclude any evidence obtained upon executing the warrant.

**{¶ 25}** With respect to the second affidavit, appellant asserts that the affidavit does not establish probable cause to search appellant's residence for the following reasons: (1) the affidavit did not allege that appellant had engaged in any criminal activity; and (2) the affidavit did not allege that any criminal activity had been occurring at appellant's house. Appellant further argues that the search warrant "was entirely too broad and was not in compliance with the particularity requirements." Appellant claims that the search warrant, if issued at all, should have been limited to Chambers' person and to the areas to which Chambers had access and should not have allowed a search of appellant's person and appellant's entire property.

STANDARDS OF REVIEW

1

Motion to Suppress Evidence

**{¶ 26}** Appellate review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. *E.g., State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 32; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Moore*, 2013-Ohio-5506, 5 N.E.3d 41 (4th Dist.), ¶ 7. Appellate courts thus "'must accept the trial court's findings of fact if they are supported by competent, credible evidence.'" *State v. Leak*, 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 12, quoting *Burnside* at ¶ 8. Accepting those facts as true, reviewing courts "'independently determine as a matter of law, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.'" *Id.*, *Burnside* at ¶ 8.

2

Search Warrant

**{¶ 27}** A court that is reviewing a defendant's challenge to a probable-cause determination in a search warrant must "accord great deference to the magistrate's" probable-cause determination and must resolve "doubtful or marginal cases" "in favor of upholding the warrant." *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph two of the syllabus. Indeed, any "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Thus, a reviewing court may not "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." *George* at paragraph two of the syllabus. Instead, a reviewing court's duty "is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id.*; *accord Gates*, 462 U.S. at 238-39; *Castagnola* at ¶ 35 (citations omitted). Additionally, reviewing courts must refrain from interpreting search-warrant affidavits "'in a hypertechnical, rather than a commonsense, manner.'" *Gates*, 462 U.S. at 236, quoting *United State v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). Nevertheless, "a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect." *United States v. Leon*, 468 U.S. 897, 915, 104 S.Ct. 3405, 3416-17, 82 L.Ed.2d 677 (1984), citing *Gates*, 462 U.S. at 238-239; *accord State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, 37 N.E.3d 123, ¶ 13 (stating that "reviewing courts must examine the totality of the circumstances").

B

FOURTH AMENDMENT PRINCIPLES

**{¶ 28}** The Fourth Amendment to the United States Constitution 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.

Article I, Section 14 of the Ohio Constitution contains nearly identical language and provides the same protection as the Fourth Amendment to the United States Constitution. *E.g., State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, 96 N.E.3d 262, ¶16, citing *State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, 37 N.E.3d 123, ¶ 12; *accord State v. Taylor*, 4th Dist. Lawrence No. 15CA12, 2016-Ohio-2781, 2016 WL 1734084, ¶ 31; *State v. Eatmon*, 4th Dist. Scioto No. 12CA3498, 2013-Ohio-4812, 2013 WL 5914938, ¶ 11.

**{¶ 29}** "The 'basic purpose of [the Fourth] Amendment' * * * 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter v. United States*, – U.S. –, 138 S.Ct. 2206, 2213 (2018); *accord Castagnola* at ¶ 33, quoting *Wolf v. Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), overruled on other grounds, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961) ("'The security of one's privacy against arbitrary intrusion by the police * * * is at the core of the Fourth Amendment.'"). Moreover, "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Payton v. New York*, 445 U.S. 573, 589, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *accord Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) ("[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."'" *Collins v. Virginia*, — U.S. —, 138 S.Ct. 1663, 1670 (2018), quoting *Jardines*, 569 U.S. at 6, quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). Accordingly, "the Fourth Amendment has drawn a firm line at the entrance to the

house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590; *accord State v. Maranger*, 2d Dist. Montgomery No. 27492, 2018-Ohio-1425, – N.Ed.3d —, ¶ 20 (citations omitted) ("[u]nless a recognized exception applies, the Fourth Amendment * * * mandates that police obtain a warrant based on probable cause in order to effectuate a lawful search."). We hasten to add, however, that "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Jardines*, 569 U.S. at 8, quoting *Kentucky v. King*, 563 U.S. 452, 469, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011) (holding that although officers entitled to approach home as any ordinary citizen might, officers may not approach home armed with trained narcotics dog for doing so constitutes an unreasonable search).

C

STANDARD FOR ISSUING SEARCH WARRANT

**{¶ 30}** A search warrant may only be issued (1) upon probable cause, (2) supported by oath or affirmation, (3) particularly describing the place to be searched and the person and/or things to be seized. *See King*, 563 U.S. at 459 (explaining that the Fourth Amendment allows warrant to issue only when "probable cause is properly established and the scope of the authorized search is set out with particularity"); *accord* R.C. 2933.23;[1] Crim.R. 41.[2] "The

[1] R.C. 2933.23 states:

> A search warrant shall not be issued until there is filed with the judge or magistrate an affidavit that particularly describes the place to be searched, names or describes the person to be searched, and names or describes the property to be search for and seized; that states substantially the offense in relation to the property and that the affiant believes and has good cause to believe that the property is concealed at the place or on the person; and that states the facts upon which the affiant's belief is based.

A judge or magistrate may issue a search warrant if "satisfied that grounds for the issuance of the warrant exist or

essential protection of the warrant requirement of the Fourth Amendment * * * is in 'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Gates*, 462 U.S. at 240, quoting *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Accordingly, a search-warrant "affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." *Franks v. Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Moreover, the facts and circumstances set forth in the "affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause." *Gates*, 462 U.S. at 239. A search-warrant affidavit need not, however, comply with any "'[t]echnical requirements of elaborate specificity.'" Id. at 235, quoting *Ventresca*, 380 U.S. at 108. Instead,

> [i]n determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

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that there is probable cause to believe that they exist." *Id.*

[2] Crim.R. 41 likewise requires a request for a search warrant to include a sworn affidavit "establishing the grounds for issuing the warrant." Crim.R. 41(C)(1). "[T]he affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located." *Id.* The judge may issue a search warrant if the judge finds that "probable cause exists." Crim.R. 41(C)(2). "The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished." *Id.*

*George* at paragraph one of the syllabus, quoting *Gates*, 462 U.S. at 238-239; *accord Castagnola* at ¶ 35 ("[T]he evidence must be sufficient for the magistrate to conclude that there is a fair probability that evidence of a crime will be found in a particular place.").

**{¶ 31}** Additionally, "[w]hen oral testimony is not offered in support of a search-warrant affidavit, the magistrate determines the sufficiency by 'evaluating only [the facts alleged within] the four corners of the affidavit and [applying] an objective reasonableness standard.'" *Castagnola* at ¶ 39, quoting *United States v. Richards*, 659 F.3d 527, 559 (6th Cir. 2011), fn. 11 (Moore, J., concurring in judgment only). Furthermore, "[s]pecial considerations to be taken into account when determining whether to issue a search warrant include how stale the information relied upon is, when the facts relied upon occurred, and whether there is a nexus between the alleged crime, the object to be seized, and the place to be searched." *Id.* at ¶ 34 (citation omitted).

**{¶ 32}** A search warrant issued after a magistrate or judge has independently determined that probable cause to search exists will enjoy a presumption of validity. *State v. Parks*, 4th Dist. Ross No. 1306, 1987 WL 16567 (Sept. 3, 1987), *4; *see Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (noting that search-warrant affidavit presumed valid). Thus, "'the burden is on a defendant who seeks to suppress evidence obtained under a regularly issued warrant to show the want of probable cause.'" *United States v. de la Fuente*, 548 F.2d 528, 534 (5th Cir.1977), quoting *Batten v. United States*, 188 F.2d 75, 77 (5 Cir. 1951); *accord Xenia v. Wallace*, 37 Ohio St.3d 216, 218, 524 N.E.2d 889 (1988), citing *de la Fuente* (stating that "[t]he burden of initially establishing whether a search or seizure was authorized by a warrant is on the party challenging the legality of the search or seizure"); *State v. Wallace*,

2012-Ohio-6270, 986 N.E.2d 498, ¶ 27 (7th Dist.) (explaining that a defendant who "attacks the validity of a search conducted under a warrant" carries "the burden of proof * * * to establish that evidence obtained pursuant to the warrant should be suppressed"); *State v. Clouser*, 4th Dist. Highland No. 16CA4, 2016-Ohio-5370, ¶ 13.

**{¶ 33}** In the case at bar, as we explain below, we do not believe that appellant satisfied his burden to show the want of probable cause.

D

PROBABLE CAUSE

**{¶ 34}** "Probable cause [to search] exists when 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Grubbs*, 547 U.S. 90, 95, 126 S.Ct. 1494, 1499, 164 L.Ed.2d 195 (2006), quoting *Gates*, 462 U.S. at 238. While the term "probable cause" may elude "precise definition," it generally means "'"a reasonable ground for belief * * *."'" *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 800, 157 L.Ed.2d 769, (2003), quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed.2d 1879 (1949), quoting *Carroll v. United States*, 267 U.S. 132, 161, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *State v. Moore*, 90 Ohio St.3d 47, 49, 734 N.E.2d 804 (2000).

**{¶ 35}** "'Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.'" *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶73, quoting *Adams v. Williams*, 407 U.S. 143, 149, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Instead, probable cause requires "'only the probability, and not a prima facie showing, of criminal activity.'" *Gates*, 462 U.S. at 235,

quoting *Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Consequently, "[p]robable cause 'is not a high bar.'" *District of Columbia v. Wesby*, 138 S.Ct. 577, 585-86, 199 L.Ed.2d 453, quoting *Kaley v. United States*, 571 U.S. –, –, 134 S.Ct. 1090, 1103, 188 L.Ed.2d 46 (2014).

**{¶ 36}** Furthermore, "probable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. Courts must eschew "rigid rules, bright-line tests, and mechanistic inquiries" and instead employ "a more flexible, all-things-considered approach." *Florida v. Harris*, 568 U.S. 237, 243-44, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013). Thus, the existence of probable cause depends upon the totality of the circumstances and "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Gates*, 462 U.S. at 231, quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed.2d 1879 (1949). In other words, probable cause "'must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" *Id.* at 232, quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

E

AUGUST 1, 2016 SEARCH WARRANT

**{¶ 37}** In the case sub judice, appellant contends that the first affidavit failed to set forth adequate facts to establish a fair probability that a search of his residence would uncover evidence of a crime. Appellant alleges that without any reliability indicators, the anonymous tip could not support a probable cause finding. Appellant further asserts that Deputy Asbury could

not rely upon the paraphernalia observed in "plain view" to establish probable cause to search his residence. Appellant claims that Deputy Asbury did not view the items from a lawful vantage point, but instead, the deputy viewed the items after unlawfully following appellant inside the residence. Appellant thus alleges that this illegally obtained evidence cannot enter the probable cause analysis and taints the subsequent search.

**{¶ 38}** Generally, an anonymous tip may factor into the totality of the circumstances used to assess the existence of probable cause to issue a search warrant. *Gates*, 462 U.S. at 230-231. While "an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of [the] report," they are not "rigid" requirements that must be met in order for an informant's tip to establish probable cause. *Id.* Instead, "[i]nformants' tips doubtless come in many shapes and sizes from many different types of persons" and "[r]igid legal rules are ill-suited to an area of such diversity." *Id.* at 232. The totality-of-the-circumstances approach thus "permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Id.* at 234. Any deficiency with an informant's veracity, reliability, or basis of knowledge "may be compensated for * * * by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233 (citations omitted).

**{¶ 39}** Furthermore, independent police investigation that corroborates a tipster's information can provide "'sufficient indicia of the reliability and veracity of the informant's statements.'" *State v. Rieves*, 8th Dist. Cuyahoga No. 105386, 2018-Ohio-955, 2018 WL 1353213, ¶ 26, quoting *State v. Pustelnik*, 8th Dist. Cuyahoga No. 91779, 2009-Ohio-3458, 2009

WL 2054313, ¶ 23, and citing *State v. Ross*, 6th Dist. Lucas No. L–96–266, 1998 WL 15916 (Jan. 16, 1998) ("Even in cases involving anonymous informants, a tip is sufficient where certain important or key elements of the tip are corroborated by police observation or investigation."); *accord Gates*, 462 U.S. at 241-242 (recognizing value of independent police corroboration when ascertaining whether informant's tip supports probable-cause determination). "Corroboration lends credence to the remaining unverified portion of the informant's story by demonstrating that the informant has, to the extent tested, spoken truthfully." *State v. Goddard*, 4th Dist. Washington No. 97CA23, 1998 WL 716662 (Oct. 2, 1998), *5 and *6 (concluding that even though search-warrant "affidavit was lacking in showing a basis of the informant's knowledge and in establishing his veracity, the corroborating efforts of the police bridge the gap between the impermissible and a constitutionally justifiable search"). Therefore, an anonymous tip subsequently corroborated by independent police investigation may establish probable cause to issue a search warrant. *Rieves* at ¶ 26; *Pustelnik* at ¶ 23; *accord State v. Graddy*, 55 Ohio St.2d 132, 136, 378 N.E.2d 723, 726 (1978) (explaining that "if an affidavit is insufficient * * * in its recitation of facts to demonstrate the [informant]'s reliability, corroboration in other parts of the affidavit of certain parts of the tip may be sufficient for the magistrate to conclude that the probability exists that the informant is speaking truthfully, is not "fabricating his report out of whole cloth," and should, therefore, be considered credible and trustworthy as to his tip"); *State v. Quinn*, 12th Dist. Butler No. CA2011-06-116, 2012-Ohio-3123, 2012 WL 2692458 (determining that anonymous tip coupled with evidence from trash pull established probable cause to issue search warrant); *State v. McGorty*, 5th Dist. Stark No. 2007CA00257, 2008-Ohio-2643, 2008 WL 2572039 (finding that probable cause supported search warrant when

marijuana residue discovered in trash independently corroborated anonymous informant's tip); *State v. Akers*, 12th Dist. Butler No. CA2007-07-163, 2008-Ohio-4164, 2008 WL 3823715, ¶ 25 (concluding that probable cause for search warrant existed when sandwich bag containing marijuana remains in defendant's trash partially corroborated anonymous tip that defendant was selling methamphetamine, marijuana, and cocaine); *State v. Baas*, 10th Dist. Franklin No. 13AP-644, 2014-Ohio-1191, 2014 WL 1347637 (determining that anonymous tip coupled with evidence from trash pull established probable cause for search warrant).

**{¶ 40}** In the case at bar, although the affidavit does not contain any indicia regarding the informant's veracity, reliability, or basis of knowledge, Deputy Asbury subsequently observed corroborating facts when he visited appellant's residence to investigate the tip. Here, Deputy Asbury observed appellant drop a glass tube that contained burn marks and residue. Those versed in law enforcement might reasonably believe that a glass tube that displays burn marks and residue indicates illegal drug use or possession. Thus, the deputy's observation of the glass tube that contained burn marks and residue tended to support the informant's tip that appellant had used methamphetamine.

**{¶ 41}** Furthermore, when the deputy attempted to speak with appellant, appellant ran. Generally, unprovoked flight from an approaching law enforcement officer "'is certainly suggestive' of wrongdoing and can be treated as 'suspicious behavior' that factors into the totality of the circumstances." *Wesby*, 138 S.Ct. at 587, quoting *Wardlow*, 528 U.S. at 124-125. In fact, "'deliberately furtive actions and flight at the approach of * * * law officers are strong indicia of *mens rea*.'" *Id.*, quoting *Sibron v. New York*, 392 U.S. 40, 66, 88 S.Ct. 1889, 20

L.Ed.2d 917 (1968) (emphasis added). Here, appellant's flight suggests that appellant was attempting to hide something that he did not want the deputy to observe, and also indicated that criminal activity may have been afoot. Appellant's flight, therefore, added to Deputy Asbury's suspicion that appellant was engaged in criminal conduct.

**{¶ 42}** In addition, once appellant fled, Deputy Asbury attempted to detain appellant. During the attempt to detain appellant, Deputy Asbury observed paraphernalia inside appellant's residence. Appellant asserts, however, that Deputy Asbury did not view the paraphernalia from a lawful vantage point and, in his attempt to detain appellant, the deputy crossed the threshold into appellant's home and observed paraphernalia in "plain view." Appellant thus claims that only by the deputy's "illegal and unwarranted entry" did he view the paraphernalia. Consequently, appellant contends that none of the paraphernalia that Deputy Asbury viewed, while he attempted to detain appellant, may factor into the probable-cause inquiry.

**{¶ 43}** We initially note that, although appellant asserts that Deputy Asbury observed the paraphernalia in "plain view," "[t]he plain view doctrine applies to warrantless seizures, not warrantless searches. The open view doctrine applies where an officer views an object that is not subject to a reasonable expectation of privacy. No search occurs because the owner of the object has voluntarily exposed it to public view." *State v. Bradford*, 4th Dist. Adams No. 09CA880, 2010-Ohio-1784, 2010 WL 1632318, ¶ 35, citing Katz and Giannelli, Ohio Criminal Law (2 Ed.), Section 16:3. Thus, "if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point." *Minnesota v.*

*Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 2137, 124 L.Ed.2d 334, (1993) (citations omitted); *Florida v. Riley*, 488 U.S. 445, 449, 109 S.Ct. 693, 696, 102 L.Ed.2d 835 (1989), quoting *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) ("'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'"); *see State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006, 2007 WL 284330, ¶ 17 (2007) (stating that "mere observation of an object in plain view does not constitute a search"). Consequently, "information obtained as a result of observation of an object in plain sight may be the basis for probable cause * * *." *Texas v. Brown*, 460 U.S. 730, 739, 103 S.Ct. 1535, 1541, 75 L.Ed.2d 502 (1983), fn. 4; *see generally Washington v. Chrisman*, 455 U.S. 1, 12–14, 102 S.Ct. 812, 819–20, 70 L.Ed.2d 778 (1982) (White, J., dissenting) (explaining that "[i]f a police officer passing by an open door of a home sees incriminating evidence within the house, his observation may provide probable cause for the issuance of a search warrant").

**{¶ 44}** Furthermore, law enforcement officers generally "'are free to observe whatever may be seen from a place where they are entitled to be.'" *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006, ¶ 15, quoting *United States v. Fields*, 113 F.3d 313, 321 (C.A.2, 1997); *State v. Johnson*, 4th Dist. Athens No. 06CA34, 2007–Ohio–4662, ¶ 14 ("Generally, the police are free to observe whatever may be seen from a place where they are entitled to be."). Thus, "if a police officer is lawfully on a person's property and observes objects in plain or open view, no warrant is required to look at them." *Buzzard* at ¶ 16, citing

*Horton v. California*, 496 U.S. 128, 134–137, 140–142, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); *State v. Halczyszak*, 25 Ohio St.3d 301, 303, 496 N.E.2d 925 (1986), quoting *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983) (stating that "'once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost'").

**{¶ 45}** As we more thoroughly explained in *State v. Bradford*:

> When the police enter private property to conduct an investigation and they restrict their movement to places where the public is expressly or implicitly invited, they have not infringed upon any Fourth Amendment protection. See *State v. Hart* (Dec. 23, 1997), Athens App. No. 97CA18, 1997 WL 800898, at *2, fn. 8, citing 1 LaFave, Search and Seizure (3 Ed.1996), 506–508, Section 2 .3(f). In other words, home owners normally have a limited expectation of privacy in their driveway, sidewalk, doorstep, or other normal routes of access to the home. *Id.*, citing *State v. Durch* (1984), 17 Ohio App.3d 262, 263, 479 N.E.2d 892. Even in the home and areas surrounding it, the Fourth Amendment does not protect what one readily exposes to the open view of others, regardless of where that exposure takes place. Katz, Ohio Arrest, Search and Seizure (2009 Ed.), Sections 1:8 and 14:1. Thus, an officer who goes to the front door of a house on official business and observes some form of contraband inside the house while standing at the doorstep has not conducted a search. But if the officer should go to the side window and climb a ladder or stand upon a bucket to gain a view of the inside, the officer has exceeded the occupant's implicit invitation to the public and

> now is treading upon Fourth Amendment protections. *See State v. Peterson,* 173 Ohio App.3d 575, 2007–Ohio–5667, 879 N.E.2d 806, at ¶ 13 (when police make observations from a position to which the officer has not been expressly or implicitly invited, the intrusion is unlawful).

*Id.*, 4th Dist. Adams No. 09CA880, 2010-Ohio-1784, 2010 WL 1632318, ¶ 36; *accord State v. Scoggins*, 4th Dist. Scioto No. 16CA3767, 2017-Ohio-8989, 2017 WL 6372589, ¶18 (determining that officers who were lawfully on premises in order to conduct a probation check did not conduct an unconstitutional search when they observed, in open view, an active one-pot methamphetamine lab inside a vehicle located in the driveway).

**{¶ 46}** Any intrusion required to observe an object in open view, however, "must be justified by a warrant, by an exception to the warrant requirement, or by other circumstances authorizing [the officer's] presence." *Chrisman*, 455 U.S. at 12–14 (White, J., dissenting). Otherwise, evidence observed in open view is tainted and cannot form part of the probable-cause inquiry. *See generally State v. Carter*, 69 Ohio St.3d 57, 67-68, 630 N.E.2d 355 (1994), citing *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599) (observing that United States Supreme Court has implied that "an unpurged illegality irreparably taints [a] search warrant when evidence is illegally obtained" and concluding that warrant would not have issued but for illegally obtained evidence); *State v. Little*, 183 Ohio App.3d 680, 2009-Ohio-4403, 918 N.E.2d 230 (2nd Dist.), ¶ 56 (concluding that when probable cause for search warrant derived from evidence discovered during unlawful search, evidence discovered during execution of search warrant should be suppressed).

**{¶ 47}** When an officer bases a search-warrant affidavit upon evidence that the officer viewed from an unlawful vantage point, a subsequently issued search warrant is not necessarily invalid, however. *United States v. Giordano*, 416 U.S. 505, 555, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (citations omitted) (Powell, J., concurring in part and dissenting in part) ("[T]he inclusion in an affidavit of indisputably tainted allegations does not necessarily render the resulting warrant invalid."); *accord United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987) ("The mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant."). Instead, "'if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant [i]s nevertheless valid.'" *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 16, *holding modified on other grounds by State v. Downour*, 126 Ohio St.3d 508, 2010-Ohio-4503, 935 N.E.2d 828, quoting *United States v. Karo*, 468 U.S. 705, 719, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). "The ultimate inquiry * * * is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause." *Giordano*, 416 U.S. at 555 (Powell, J., concurring in part and dissenting in part); *accord Gross* at ¶ 17 (quoting and listing line of federal cases that adopt foregoing language from Justice Powell's opinion).

**{¶ 48}** In the case at bar, the search-warrant affidavit does not specifically state that the deputy entered appellant's residence, nor does the affidavit reveal whether the deputy invaded the curtilage of appellant's residence during his pursuit. Instead, the search warrant affidavit indicates that appellant "fled back into the house" and that the deputy then "attempt[ed] to detain [appellant]." One conclusion is that the deputy's attempt to detain appellant occurred inside the

residence or curtilage. Another conclusion is that the deputy attempted to detain appellant, but ultimately was unsuccessful in entering the residence or curtilage to secure appellant's person. Yet, during this attempt, the deputy could see inside appellant's residence and observed paraphernalia, as well as two individuals with drug-related convictions and arrests who also had purchased Sudafed within the past week.

**{¶ 49}** After our review, we find it unnecessary to determine whether Deputy Asbury viewed the paraphernalia from a lawful vantage point. Instead, assuming, *arguendo,* that the deputy stood at an unlawful vantage point, the affidavit contains adequate untainted evidence to support a probable-cause determination. We first point out that "the detection of * * * marijuana plants alone justifie[s] the issuance of the search warrant." *State v. Bolen,* 3rd Dist. No. 13-16-01, 2016-Ohio-7821, 76 N.E.3d 636, 2016 WL 6876328, ¶ 37, *appeal not allowed,* 150 Ohio St.3d 1430, 2017-Ohio-7567, 81 N.E.3d 1271; *accord State v. Ortman,* 4th Dist. Ross No. 999, 1984 WL 5640 (Sept. 4, 1984), *3 (stating that observing marijuana plants alone established probable cause); *see State v. Harris,* 2nd Dist. Montgomery No. 26810, 2016-Ohio-7097, 2016 WL 5724118, ¶ 21, quoting *Goode* at ¶ 17 (noting that "'an officer's observation that a home contains marijuana may create probable cause that a felony is in progress'"); *State v. Littrell,* 9th Dist. Summit No. 27020, 2014-Ohio-4654, 21 N.E.3d 675, ¶ 17 (pointing out that aerial observance of marijuana provides probable cause for search warrant); *United States v. Mitchell,* 720 Fed.Appx. 146, 152, 2018 WL 1517170 (4th Cir.2018), fn. 4 (stating that "[t]he odor of marijuana alone provides probable cause to believe that evidence of marijuana possession would be found in [defendant]'s residence"). In fact, an officer's direct

observation of contraband "'is precisely what a judicial officer needs to provide a basis for a warrant.'" *State v. Mims*, 6th Dist. Ottawa No. OT-05-030, 2006-Ohio-862, 2006 WL 456766, ¶ 18, quoting *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

**{¶ 50}** In the case at bar, Deputy Asbury observed a marijuana plant on appellant's premises. Appellant has not suggested that the deputy viewed the marijuana plant from an unlawful vantage point.[3] Thus, Deputy Asbury's observation of the marijuana plant, standing alone, provided the issuing judge with a substantial basis to believe that a search of appellant's property would uncover evidence of a crime. In addition to the marijuana plant, appellant fled upon Deputy Asbury's approach. As we previously indicated, appellant's flight justified the deputy's belief that appellant was engaged in criminal activity.

**{¶ 51}** Moreover, as appellant fled, he dropped a glass tube that contained burn marks and residue. Although the deputy's search-warrant affidavit does not indicate why he reasonably believes the glass tube suggested criminal activity, the issuing judge could have fairly inferred that the glass tube, coupled with evidence of burn marks and residue, suggested that appellant had used it to ingest some type of a controlled substance.

**{¶ 52}** Therefore, we believe that the totality of the circumstances set forth in the affidavit, even without the deputy's observations while attempting to detain appellant, adequately support the issuing judge's probable-cause determination. The marijuana plant alone suggested criminal activity. Appellant's flight upon Deputy Asbury's approach, the glass tube, and the

[3] We observe that law enforcement officers may approach an individual's residence, just as any ordinary citizen might. *Jardines*, 569 U.S. at 8.

informant's tip further lent additional support to the issuing judge's finding that there was a fair probability of criminal conduct occurring on appellant's property.

**{¶ 53}** We recognize that the trial court seems to have justified any intrusion the deputy made into appellant's residence by appearing to rely upon the violative nature of clandestine methamphetamine labs.[4] The court found that the anonymous informant's statement that appellant "possibly" was involved in manufacturing methamphetamine at his residence, the growing marijuana plant, appellant's flight upon seeing Deputy Asbury, and appellant's dropping of a glass tube with burn marks and residue gave the deputy "reason to at least try to secure [appellant]. Not only for [appellant's] safety, but for the safety of others." We need not address this issue, however. Rather, as we indicated above, we believe that the affidavit contains adequate facts to support the issuing judge's probable-cause determination, even without the evidence the deputy noticed while trying to detain appellant.

**{¶ 54}** Therefore, based upon the foregoing reasons, we do not agree with appellant that the August 1, 2016 search warrant is invalid.

F

NOVEMBER 23, 2016 SEARCH WARRANT

[4] We observe that Ohio law states that "the risk of explosion or fire from the illegal manufacture of methamphetamine causing injury to the public constitutes exigent circumstances and reasonable grounds to believe that there is an immediate need to protect the lives, or property, of the officer and other individuals in the vicinity of the illegal manufacture." R.C. 2933.33(A). Therefore, officers may conduct a warrantless search of premises when they have "probable cause to believe that particular premises are used for the illegal manufacture of methamphetamine." R.C. 2933.33(A); *accord State v. Weaver*, 11th Dist. Ashtabula No. 2017-A-0038, 2018-Ohio-2675, 2018 WL 3348987, ¶15; *State v. Robinson*, 4th Dist. Lawrence No. 13CA18, 2015-Ohio-2635, ¶ 51; *State v. White*, 175 Ohio App.3d 302, 2008-Ohio-657, ¶19 (9th Dist.).

**{¶ 55}** Appellant also asserts that the second affidavit fails to contain adequate facts to establish a fair probability that a search of his residence would uncover evidence of a crime. Appellant points out that the affidavit indicates that a third person, Robert Chambers, had allegedly been selling heroin at a Wal-Mart location, and that the affidavit does not indicate that Chambers had engaged in any such activity at appellant's residence. Appellant further observes that although Chambers may have resided at appellant's residence, the affidavit fails to contain adequate facts to allow an inference that Chambers stashed heroin inside appellant's residence. In essence, appellant contends that the affidavit failed to set forth a nexus between Chambers' criminal activity and the place to be searched—appellant's residence.

**{¶ 56}** Appellant further asserts that even if Chambers' activity established probable cause to search appellant's residence, the warrant should have limited the search to those areas within Chambers' control and should not have allowed a search of the entire premises and all persons present. Appellant thus argues that the search warrant was not sufficiently particularized as to Chambers' activity and was overbroad in that it permitted officers to search appellant's bedroom and person.

1

Probable Cause to Search Property

**{¶ 57}** "[I]n criminal investigations a warrant to search for recoverable items is reasonable 'only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.'" *Zurcher v. Stanford Daily*, 436 U.S. 547, 555, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978), quoting *Camara v. Municipal Court*, 387 U.S. 523, 534–535, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967). "The critical element in a reasonable search is not that the owner of the

property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Id.* at 556 (footnote omitted). Thus, "'[o]nce it is established that probable cause exists to believe a * * * crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime.'" *Id.* at 558, quoting *United States v. Manufacturers Nat. Bank of Detroit*, 536 F.2d 699, 703 (1976), cert. denied *sub nom. Wingate v. United States*, 429 U.S. 1039, 97 S.Ct. 735, 50 L.Ed.2d 749 (1977). For this reason, "it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest." *Id.* at 559.

**{¶ 58}** Based upon the holding in *Zurcher*, we do not agree with appellant that the search warrant was invalid to the extent that the affidavit did not specify any reason to believe that appellant had engaged in criminal activity. Nonetheless, an affidavit must set forth adequate facts to establish a nexus between the place or person to be searched and the evidence sought. *State v. England*, 1st Dist. Hamilton No. C-040253, 2005-Ohio-375, 2005 WL 267669, ¶¶ 9-10; *accord United States v. McPhearson*, 469 F.3d 518, 524, (6th Cir.2006), quoting *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir.2004) (explaining that probable cause for search warrant requires "a nexus between the place to be searched and the evidence sought"); *Castagnola* at ¶ 34 (noting that before issuing search warrant, magistrate or judge should consider "whether there is a nexus between the alleged crime, the object to be seized, and the place to be searched"); *see State v. Harry*, 12th Dist. No. CA2008–01–013, 2008–Ohio–6380, ¶ 16 (stating that Crim.R.

41(C) "requires that there be a 'nexus' between the place to be searched and the items to be seized"). Although "'ideally every affidavit would contain direct evidence linking the place to be searched to the crime,'" direct evidence is not necessary. *England* at ¶ 10, quoting *United States v. Whitner*, 219 F.3d 289, 297 (C.A.3, 2000), and citing *United States v. Patrick*, C.A.3 No. 04-1721 (Jan. 6, 2005). Instead, "'[t]o establish the nexus between the place and objects sought, the court may look to the type of crime, the nature of the [evidence sought], the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide [evidence].'" *State v. Vaughters*, 4th Dist. Scioto No. 2086, 1993 WL 63464 (Mar. 2, 1993), *4, quoting *United States v. Lucarz*, 430 F.2d 1051, 1055 (C.A.9, 1970); *accord England* at ¶ 10. Accordingly, "[t]he nexus between the items sought and the place to be searched depends upon all of the circumstances of each individual case." *State v. Freeman*, 4th Dist. No. 06CA3, 2006–Ohio–5020, 2006 WL 2773451, ¶ 13; *accord State v. Nelson*, 12th Dist. Clermont No. CA2017-08-042, 2018-Ohio-2819, 2018 WL 3430301, ¶ 23, citing *State v. Marler*, 2d Dist. Clark No. 2007 CA 8, 2009-Ohio-2423, ¶ 26. A sufficient nexus exists between the evidence sought and the place to be searched when the facts set forth in the search-warrant affidavit adequately "'"indicate why evidence of illegal activity will be found in a particular place."'" *State v. Phillips*, 10th Dist. Franklin No. 15AP-1038, 2016-Ohio-5944, ¶ 14, quoting *United States v. Washington*, 380 F.3d 236, 240 (6th Cir.2004), quoting *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir.2004).

**{¶ 59}** "To establish probable cause to search a home, the facts must be sufficient to justify a conclusion that the property that is the subject of the search is probably on the premises to be searched." *State v. Freeman*, 4th Dist. Highland No. 06CA3, 2006-Ohio-5020, 2006 WL

2773451, ¶ 13. With respect to search warrants involving drug dealers' residences, "an issuing judge may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking." *United States v. Williams*, 544 F.3d 683, 687 (6th Cir.2008). A probable-cause determination need not, therefore, be based upon an officer's observation of illegal drug activity at or near the residence to be searched. *State v. Myers*, 9th Dist. Summit No. 27576, 2015-Ohio-2135, 2015 WL 3498640, ¶ 13 (citations omitted) (stating that conclusion that drug dealer likely to store drugs at residence "naturally flows" from status as drug dealer and noting that "connection between drug traffickers and their residences has been consistently recognized by the courts"); *State v. Joiner*, 8th Dist. Cuyahoga No. 81394, 2003–Ohio–3324, ¶ 25 (upholding search warrant for residence even though the investigating officer "could not say * * * that he knew of excessive traffic in and out of the [residence], nor could he point to any specific incidents which led him to believe that the defendant was selling drugs from that apartment"). Instead, "[b]ecause drug traffickers tend to keep evidence of their illicit activities in their residences, evidence of an individual's drug trafficking supports probable cause to search his residence even where observed illegal activity is not at or near the residence to be searched." *State v. Reece*, 3rd Dist. Marion No. 9-17-27, 2017-Ohio-8789, 2017 WL 5989077, ¶ 20.

**{¶ 60}** Additionally, as this court recently recognized,

> courts routinely recognize that it is logical or a matter of common sense to infer that those engaged in drug crimes will maintain drugs and other evidence in their residences, even without specific evidence of the presence of drugs or drug evidence in the home. Moreover, courts have held that such warrants are not invalid solely because the affidavit did not detail actual observation of illegal activity or contraband in the room to be searched. "To do so would be to elevate probable cause to the status of positive cause."

*State v. Baker*, 4th Dist. Washington No. 16CA30, 2018-Ohio-762, 2018 WL 1137521, ¶ 17 (citation omitted), quoting *United States v. Laws*, 808 F.2d 92, 106 (D.C.Cir. 1986). Thus, "[e]vidence of drug trafficking, without more, furnishes probable cause to search [a suspect]'s residence because drug traffickers often keep evidence of their illicit activities in their residences." *Reece* at ¶ 21.

**{¶ 61}** Furthermore, "'"[t]he justification for allowing a search of a person's residence when that person is suspected of criminal activity is the commonsense realization that one tends to conceal fruits and instrumentalities of a crime in a place to which easy access may be had and in which privacy is nevertheless maintained. In normal situations, few places are more convenient than one's residence for use in planning criminal activities and hiding fruits of a crime."'" *State v. Rigel*, 2017-Ohio-7640, 97 N.E.3d 825 (2nd Dist,), ¶ 43, appeal not allowed, 152 Ohio St.3d 1423, 2018-Ohio-923, 93 N.E.3d 1004, quoting *United States v. Kapordelis*, 569 F.3d 1291,1310 (11th Cir.2009), quoting *United States v. Green*, 634 F.2d 222, 226 (5th Cir.1981); *accord State v. Clayton*, 8th Dist. Cuyahoga No. 102277, 2015-Ohio-4370, 2015 WL 6392185, ¶ 18.

**{¶ 62}** In the case sub judice, after our review of the affidavit we believe that the issuing judge had a substantial basis to conclude that a search of appellant's residence likely would uncover evidence of Chambers' drug activity. Detective Purdin stated in the affidavit that he found a "shaver" and a hypodermic needle on Chambers' person. Detective Purdin explained that a "shaver" is used to cut heroin. This fact permitted an inference that Chambers had used the shaver to cut heroin. Furthermore, Chambers' admitted that he used the needle to inject heroin. Chambers' admission, along with the shaver, allows a reasonable inference that

Chambers possessed heroin. Chambers advised the detective that Chambers had been residing at appellant's residence. Chambers' statement that he had been residing at appellant's residence supports a reasonable inference Chambers may have stashed his drug supply at appellant's residence. *Baker* at ¶ 17 (noting that it is "logical or a matter of common sense to infer that those engaged in drug crimes will maintain drugs and other evidence in their residences").

**{¶ 63}** Even though appellant may have been the owner of the property searched, the affidavit set forth adequate facts to permit an inference that Chambers had been residing at appellant's residence for at least one week, and that a search of appellant's residence likely would lead to evidence that related to Chambers' drug activity. Detective Purdin stated that, when he visited appellant's residence approximately one week after Chambers had informed the detective that Chambers had been residing at appellant's residence, the detective noted that Chambers' vehicle was parked on the premises. The affidavit, therefore, allowed the issuing judge to make a common-sense determination that Chambers had been residing at appellant's residence for a sufficient length of time such that Chambers may have indeed stored drugs on appellant's premise. We also note that even if the facts arguably present a "marginal case," the Ohio Supreme Court has cautioned reviewing courts to rule "in favor of upholding the warrant." *George* at paragraph two of the syllabus.

**{¶ 64}** We therefore conclude that the affidavit set forth adequate facts to support a finding that a search of appellant's residence likely would uncover evidence relating to Chambers' drug use. We again note that "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that

the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher*, 436 U.S. at 556.

2

Scope of Search

**{¶ 65}** Appellant next challenges the scope of the search that the warrant authorized. Appellant contends that, if the judge had issued the warrant at all, the warrant should have limited the search to areas under Chambers' control and should not have allowed officers to search appellant's bedroom or person.

**{¶ 66}** The Fourth Amendment requires a search warrant to particularly describe "'the place to be searched' and 'the persons or things to be seized.'" *United States v. Grubbs*, 547 U.S. 90, 97, 126 S.Ct. 1494, 1500, 164 L.Ed.2d 195 (2006). A search is "clearly 'unreasonable' under the Fourth Amendment" when the search warrant fails to particularly describe the place to be searched or the persons or things to be seized. *Groh v. Ramirez*, 540 U.S. 551, 563, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004); *accord Castagnola* at ¶ 89, quoting *Massachusetts v. Sheppard*, 468 U.S. 981, 988, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), fn. 5 (stating that "'a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional'").

**{¶ 67}** The purpose of requiring search warrants to "particularly describe the place to be searched and the persons or things to be seized" is to prevent "wide-ranging exploratory searches." *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). Accordingly, a search warrant must be limited "to the specific areas and things for which there is probable cause to search" and "carefully tailored to its justifications." *Id.* The scope of a

lawful search is therefore "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 2170–71, 72 L.Ed.2d 572 (1982); *State v. Halczyszak*, 25 Ohio St.3d 301, 323, 496 N.E.2d 925 (1986), fn. 9 (stating that search conducted pursuant to warrant "is limited to those areas which may reasonably contain the items listed in the warrant"). "If the scope of the search exceeds that permitted by the terms of a validly issued warrant * * *, the subsequent seizure is unconstitutional without more." *Horton v. California*, 496 U.S. 128, 140, 110 S.Ct. 2301, 2310, 110 L.Ed.2d 112 (1990).

**{¶ 68}** The *Ross* court more specifically explained the scope of a lawful search as follows:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

*Id.* at 820–21 (footnotes omitted). However, "probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, [and] probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." *Id.* at 824.

**{¶ 69}** In the case at bar, officers had probable cause to believe that Chambers stashed heroin and other drugs at appellant's residence. Officers may have reasonably believed that drugs are often packaged in small quantities and are easily concealed. Officers could, therefore, search any place within appellant's residence where heroin or drugs of abuse might be found, including closets, chests, drawers, and containers in which drugs might be found. *United States v. Edwards*, 885 F.2d 377, 388–89 (7th Cir.1989) (noting that warrant to search items that are easily concealed entitled officers "to open drawers, closets, containers and other items that might conceal these items"); *see United States v. Bills*, 1994 WL 459650, *1 (10th Cir.1994) (warrant authorizing search for drugs and money allowed officer to look under bed sheet). Unlike searching for a stolen lawnmower in a bedroom, the warrant in this case did not authorize a search for items that could not plausibly be found in the locations searched. *See Ross*, 456 U.S. at 824. Instead, because drugs are easily concealed, it was entirely plausible that drugs would be found hidden beneath a mattress or scattered in a closet. *See State v. Workman*, 12th Dist. Clermont No. CA2016-10-065, 2017-Ohio-2802, 2017 WL 2241590, ¶ 12, appeal not allowed, 150 Ohio St.3d 1454, 2017-Ohio-8136, 83 N.E.3d 939, 2017 WL 4543669, ¶ 12 (2017) (noting that small items may be "located in a multitude of spaces throughout the home"). Indeed, when a warrant authorizes officers to search "property for a small, easy-to-conceal item, it would be extremely difficult for [a defendant] to establish that the officers searched in places not authorized." *United States v. Garcia*, 496 F.3d 495, 498 (6th Cir.2007). Thus, we do not find it unreasonable for the officers to have believed that Chambers might have stashed heroin or other drugs of abuse anywhere within appellant's home, including in appellant's bedroom or closet.

**{¶ 70}** We recognize appellant's concern that the warrant should have limited the search to areas under Chambers' control and should not have authorized a search of appellant's bedroom. Appellant has not, however, cited any authority to support his argument that a premises-warrant must be limited to those specific areas of the premises under the sole control of the individual who is the subject of the warrant. Instead, appellant generally claims that the warrant is not sufficiently particularized and is overbroad.

**{¶ 71}** Courts have identified two primary concerns when evaluating whether a search warrant complies with the Fourth Amendment requirement to particularly describe the place to be searched and the person or items to be seized. "The first issue is whether the warrant provides sufficient information to 'guide and control' the judgment of the executing officer in what to seize.'" *Castagnola* at ¶ 79, quoting *United States v. Upham*, 168 F.3d 532, 535 (1st Cir.1999). "Warrants that fail to describe the items to be seized with as much specificity as the government's knowledge and the circumstances allow are 'invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized.'" *Id.* at ¶ 80, quoting *United States v. Fuccillo*, 808 F.2d 173, 176 (1st Cir.1987). A search warrant must, therefore, clearly state "the specific evidence sought" and must leave "'nothing * * * to the discretion of the officer executing the warrant.'" *Id.* at ¶ 89, quoting *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed.2d 231 (1927).

**{¶ 72}** "The second issue is whether the category as specified is too broad in that it includes items that should not be seized." *Castagnola* at ¶ 79, citing *United States v. Kow*, 58 F.3d 423, 427 (9th Cir.1995). A search warrant that includes broad categories of items to be

seized may nevertheless be valid when the description is "'"as specific as the circumstances and the nature of the activity under investigation permit."'" *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir.2001), quoting *United States v. Henson*, 848 F.2d 1374, 1383 (6th Cir.1988), quoting *United States v. Blum*, 753 F.2d 999, 1001 (11th Cir.1985); *accord Castagnola* at ¶ 80.

**{¶ 73}** In the case at bar, appellant's argument does not relate to either of the concerns identified above. Appellant has not asserted that the search warrant failed to particularly describe the items to be seized or that the category of items to be seized was too broad. Rather, appellant's complaint appears to be that the affidavit failed to set forth facts to establish probable cause to believe that appellant committed any drug-related offenses so as to justify a search of his bedroom. We believe that we fully addressed this argument in our previous discussions. *See Zurcher*, 436 U.S. at 556 (footnote omitted) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."); *Ross, supra* (describing scope of search pursuant to warrant).

**{¶ 74}** To the extent appellant challenges the search warrant as authorizing the search of "all persons," we note that he has not alleged that officers recovered any incriminating evidence from his person and has not argued that the trial court should have suppressed any evidence recovered from his person. The record is not even clear whether any evidence was, in fact, recovered from appellant's person. Moreover, none of the evidence introduced at trial indicated that officers recovered it from appellant's person. We therefore find it unnecessary to determine whether the search warrant was unreasonable in that it allowed the search of all persons present irrespective of those persons' involvement in Chambers' suspected drug activity. *See generally*

*State v. Kinney*, 83 Ohio St.3d 85, 698 N.E.2d 49 (1998) (observing that "a warrant should still be considered too general if it subjects to search or seizure individuals against whom no probable cause exists" and that "the requirement of specificity tailors the authority of a warrant so that those against whom no suspicion lies will remain outside its scope"). Consequently, we do not agree with appellant that the November 23, 2016 search-warrant affidavit failed to establish probable cause to search his residence or that the officers exceeded the scope of the authorized search.

**{¶ 75}** Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

SECOND ASSIGNMENT OF ERROR

**{¶ 76}** In his second assignment of error, appellant asserts that the trial court erred by denying his request to call Chambers to the witness stand. Appellant contends that even though Chambers stated that he intended to assert his privilege against self-incrimination if called to testify during appellant's case-in-chief, the trial court should have nevertheless permitted appellant to call Chambers as a witness and require him to assert his Fifth Amendment privilege before the jury.

**{¶ 77}** A trial court possesses discretion to excuse a witness from testifying when the witness asserts the Fifth Amendment privilege against self-incrimination. *State v. Landrum*, 53 Ohio St.3d 107, 121, 559 N.E.2d 710 (1990) (concluding that trial "court acted within its discretion" by excusing witness from testifying based upon witness's assertion of Fifth

Amendment); *State v. Linkous*, 4th Dist. Scioto No. 12CA3517, 2013-Ohio-5853, 2013 WL 6918875, ¶ 57, citing *State v. Williams*, 4th Dist. Scioto No. 11 CA3408, 2012–Ohio–4693, ¶ 63. "A reviewing court will not, therefore, reverse a trial court's decision to excuse a witness from testifying absent an abuse of discretion." *Linkous* at ¶ 57. An "abuse of discretion" means that the court acted in an "'unreasonable, arbitrary, or unconscionable'" manner or employed "'a view or action that no conscientious judge could honestly have taken.'" *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. Furthermore, a trial court generally abuses its discretion when it fails to engage in a "'sound reasoning process.'" *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Additionally, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

**{¶ 78}** More than twenty years ago, the Ohio Supreme Court rejected the notion that a criminal defendant possesses a right to call a witness to the stand when the witness advises the court that the witness intends to invoke the Fifth Amendment privilege against self-incrimination. *State v. Kirk*, 72 Ohio St.3d 564, 651 N.E.2d 981 (1995). In *Kirk*, the defendant wished to call a witness to testify in his defense, even though the witness informed the court that the witness would assert his Fifth Amendment right. The trial court excused the witness from appearing. The defendant later appealed.

**{¶ 79}** The Ohio Supreme Court disagreed with the defendant that the trial court should have permitted him to call the witness to the stand. The court explained:

> In the present case, defendant did not have a right to place [the witness] on the stand for the sole purpose of having him assert his Fifth Amendment privilege in front of the jury. Where a defendant is not entitled to call a witness to the stand because of the witness' intention to assert the Fifth Amendment privilege against self-incrimination, the defendant is entitled to request an instruction that the jury should draw no inference from the absence of the witness because the witness was not available to either side. Such an instruction is intended to reduce the danger that the jury would, in fact, draw an inference from the absence of a witness who could corroborate defendant's testimony.
>
> Furthermore, a trial court may exclude a person from appearing as a witness on behalf of a criminal defendant at trial if the court determines that the witness will not offer any testimony, but merely intends to assert the Fifth Amendment privilege against self-incrimination.

*Kirk*, 72 Ohio St.3d at 569.

**{¶ 80}** We applied this rule in *State v. Williams*, 4th Dist. Scioto No. 11CA3408, 2012-Ohio-4693, 2012 WL 4789848. We stated:

> The record clearly demonstrates had the trial court permitted [the defendant] to call [the witness] to testify, [the witness] merely would have invoked his Fifth Amendment right to silence. Per *Kirk*, the trial court was justified in excluding [the witness] because he would not have offered any testimony, but instead merely asserted his Fifth Amendment privilege against self-incrimination.

*Id.* at ¶ 66.

**{¶ 81}** Moreover, "'"t]he fact that a witness decides to invoke his or her Fifth Amendment right not to testify does not deny the defendant seeking to call that witness a fair trial."'" *Linkous* at ¶ 55, quoting *State v. Parker*, 8th Dist. Cuyahoga No. 96941, 2012-Ohio-362, ¶ 29, quoting *United States v. Stapleton*, 297 Fed.Appx. 413 (C.A.6, 2008).

**{¶ 82}** In the case sub judice, based upon the foregoing established case law, we do not agree with appellant that the trial court abused its discretion by rejecting appellant's request to call Chambers as a witness and to require Chambers to assert his Fifth Amendment privilege before the jury. *Kirk* clearly held that a trial court may excuse such a witness from being called to testify at trial.[5]

**{¶ 83}** Furthermore, appellant bases his argument upon a 2010 case from the Fifth District Court of Appeals, *State v. Allen*, 5th Dist. Delaware No. 2009-CA-13, 2010-Ohio-4644, 2010 WL 3784818, ¶¶ 219-222. We find *Allen* readily distinguishable, however. In *Allen*, the prosecutor, not the defendant, called the defendant's wife to testify. The prosecutor later discovered that the defendant's wife intended to assert spousal privilege. The issue the *Allen* court addressed was not whether a defendant has a right to call a witness to the stand when the witness intends to invoke the Fifth Amendment. Instead, the *Allen* court addressed whether the "prosecution used the witness's assertion of the privilege to create an inference that established a critical element of the state's case." *Id.* at ¶ 223. We therefore find *Allen* inapposite.

**{¶ 84}** Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[5] Appellant has not argued that the trial court improperly determined that Chambers possessed a valid Fifth Amendment privilege. We therefore do not address this issue and express no opinion on its merits.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.