FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4138

JEROME JERMAINE HOUSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
Jan Shackelford, Judge.

November 15, 2019

PER CURIAM.

AFFIRMED.

ROBERTS and WINOKUR, JJ., concur; BILBREY, J., specially concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

BILBREY, J., specially concurring.

Appellant challenges the judgment and sentence following his no contest plea to trafficking in cocaine and lesser drug charges. I agree that we are correct to affirm because we cannot reach the issue of whether the trial court committed error in refusing to unseal the affidavit in support of the search warrant which led to the discovery of the drugs. *See* Fla. R. App. P. 9.140(b)(2)(A) (listing the limited situations where a defendant can appeal following a guilty or no contest plea). I write in hope of providing guidance to trial courts regarding the sealing of affidavits in support of search warrants and to defendants when confronted with a trial court's refusal to unseal an affidavit.

A search warrant was issued on December 21, 2017, to allow the Escambia County Sheriff's Office (ECSO) to search a residence.[1] The search warrant was based on an affidavit that purportedly established probable cause for the search. *See* Art. I, § 12, Fla. Const.; §§ 933.02, 933.04, & 933.18, Fla. Stat. (2017). The search warrant directed that the affidavit was to be sealed and held in the custody of the ECSO. Upon execution of the warrant, Appellant was discovered in the residence along with cocaine and various other evidence of drug trafficking. Appellant was arrested and charged with the offenses that led to his plea.

Appellant, through counsel, filed a notice of discovery. *See* Fla. R. Crim. P. 3.220(a). As part of its obligation in response to the notice, the State should have disclosed and allowed Appellant to copy "any documents relating" to "any search or seizure." Fla. R. Crim. P. 3.200(b)(1)(I). This obligation includes disclosing the documents supporting the issuance of the search warrant. *State v. Wooten*, 260 So. 3d 1060, 1066 (Fla. 4th DCA 2018) (holding that the application for issuance of a search warrant must be provided to a defendant as part of discovery).

[1] The circuit judge who issued the warrant was not the trial judge assigned to the resulting criminal case.

After the State provided discovery exhibits that did not include the affidavit, Appellant moved to unseal the affidavit filed in support of the warrant.[2] Appellant's motion alleged the "State's entire case is based upon the execution of the search warrant" and it was necessary to view the affidavit to determine whether it supported probable cause for the warrant.

In a written response, the State opposed unsealing the affidavit and cited civil cases where third-parties were required to overcome a presumption that the records were properly sealed. *See, e.g., Scott v. Nelson,* 697 So. 2d 207 (Fla. 1st DCA 1997); *Russell v. Miami Herald Pub. Co.*, 570 So. 2d 979 (Fla. 2d DCA 1990).[3] The State further wrote that the affidavit "is related to an on-going investigation with law enforcement that could be harmed and possible confidential sources could be placed in danger if the affidavit is unsealed."

At the hearing on the motion to unseal the affidavit, the State maintained its argument that the affidavit was related to on-going investigations. The assistant state attorney argued that although she did not "know any of the specifics" of the affidavit, she had been informed by the ECSO that the "affidavit needs to be remained sealed." Although an affidavit in support of a search warrant is a "record of the judicial branch," the affidavit here was never filed with the court or submitted for an in camera review and is not part of the record on appeal.[4] *See* Fla. R. Jud. Admin. 2.420(c)(6). The trial court denied the motion to unseal.

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[2] The search warrant and the return and inventory were filed in the court file and are part of the record on appeal.

[3] Given the State's discovery obligations under rule 3.220(b), the civil cases regarding third-party access to sealed documents are likely inapplicable.

[4] We are therefore unable to review the affidavit for probable cause. If we had the affidavit under seal, and if we had jurisdiction to consider the appeal, we possibly could decide whether the affidavit supported probable cause and whether failure to unseal was harmless error. *See Downing v. State*, 536 So. 2d 189 (Fla. 1988). I would urge trial courts mandate that, barring some

Appellant then filed a motion to suppress the evidence seized in the search. Appellant claimed the search was unlawful but was unable to offer any support for his assertion without the affidavit. The State moved to strike the motion to suppress as not containing any basis to suppress. *See* Fla. R. Crim. P. 3.190(g). After a brief hearing, the trial court struck the motion to suppress. Appellant thereafter entered a no contest plea, was sentenced to 37.8 months in prison, and brought this appeal.

Prior to entering the no contest plea, there was a discussion in court regarding Appellant's ability to appeal but no stipulation that "an issue reserved for appeal is dispositive of the case." *Churchill v. State*, 219 So. 3d 14, 17 (Fla. 2018).[5] Although other district courts may disagree, we have taken a narrow view on what is "dispositive" because we want to avoid piecemeal litigation. *See Milliron v. State*, 274 So. 3d 1173 (Fla. 1st DCA 2019). We have previously stated that "[a]n issue is dispositive only when it is clear that there will be no trial, regardless of the outcome of the appeal." *Williams v. State*, 134 So. 3d 975, 976 (Fla. 1st DCA 2012). Here, the striking of the motion to suppress and the denial of the motion to unseal the affidavit were not dispositive. Even if we had jurisdiction and reversed those decisions, that would not end the trial court's case.

By not conducting an in camera review before prohibiting disclosure of the affidavit and by not determining whether the

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extraordinary circumstance, items remaining under seal be placed in the court file and not be held in the custody of third-parties. Rule 2.420(b), Florida Rules of Judicial Administration, mandates retention of judicial branch records by a custodian within the judicial branch.

[5] In *Churchill*, the Florida Supreme Court directed that if there is a stipulation of dispositiveness an appellate court is bound by the stipulation since it "establishes that the State cannot or will not continue with its prosecution if the defendant prevails on appeal." 219 So. 3d at 17.

court could "partially restrict the disclosure" and still protect any purported interest of the State, the trial court may have committed error.[6] *See* Fla. R. Crim. P. 3.220(b)(2). But short of risking trial and a possible 30-year sentence on the first degree felony trafficking charge so as to preserve the claim of error, how could the Appellant have brought the trial court's refusal to unseal the affidavit before us for review? I suggest that this situation would be well-suited for a petition under our original jurisdiction, whether brought as petition for a writ of mandamus or a petition for a writ of certiorari.[7] *See* Art. V, § 4(b)(3), Fla. Const.; Fla. R. App. P. 9.100. We could then review a trial court's refusal to unseal the affidavit.

Andy Thomas, Public Defender, Barbara J. Busharis, Assistant Public Defender, and Kasey Lacey, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, Damaris E. Reynolds, Assistant Attorney General, and Jennifer J. Moore, Assistant Attorney General, Tallahassee, for Appellee.

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[6] Certainly, it is possible there were matters in the affidavit that did not have to be disclosed. For instance, the identity of any confidential informant could have been withheld absent a sufficient showing by Appellant. *See State v. Carter*, 29 So. 3d 1217 (Fla. 2d DCA 2010). While rule 3.200(g)(2) allows the State to withhold the identity of an informant, as to other purported confidential information I read rule 3.220(b)(2) to put the burden on the State to show the need for confidentiality for most other discovery.

[7] I will leave it for another day to determine which writ would be the appropriate remedy.