[Cite as *State v. Moore*, 2016-Ohio-7594.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 16-CA-26
	:	
CHAD A. MOORE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 15-CR-619
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 28, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
KENNETH W. OSWALT LICKING CO. PROSECUTOR BRYAN R. MOORE 20 S. Second St., Fourth Floor Newark, OH 43055	ROBERT C. BANNERMAN P.O. Box 77466 Columbus, OH 43207-0098

Delaney, J.

{¶1} Appellant Chad A. Moore appeals from the March 24, 2016 Judgment Entry of the Licking County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose on September 2, 2015 at an address on Columbus Road in Licking County, Ohio when the Licking County SWAT team and the Central Ohio Drug Enforcement Task Force (CODE TF) executed a daytime no-knock search warrant at appellant's residence. Appellant and a female were found in bed and appellant was holding a gray safe. Inside the safe were approximately 50 grams of methamphetamine, "jeweler bags," a digital scale, and cash. The ensuing search of the residence located a marijuana grow operation and firearms. Appellant is prohibited from possessing firearms due to a felony attempted drug trafficking conviction.

{¶3} On September 3, 2015, Detective Kyle Boerstler of the Licking County Sheriff's Department filed a "Criminal Complaint/Arrest Warrant" charging appellant with one count of aggravated drug trafficking (methamphetamine) pursuant to R.C. 2925.03(A)(2)(C)(1)(d), a felony of the first degree.

{¶4} Appellant's initial appearance occurred on September 3, 2015 and a preliminary hearing was scheduled for September 10, 2015. On September 8, 2015, appellee moved to continue the preliminary hearing for a week "in order to allow additional time for investigation purposes before this matter is presented to the [grand jury.]" The trial court granted the motion on September 9, 2015, continuing the preliminary hearing to September 17, 2015.

{¶5} On September 17, 2015, appellant was charged by indictment upon one count each of aggravated drug possession (methamphetamine) [Count I], cultivation of marijuana [Count II], having weapons while under disability [Count III], and possession of criminal tools [Count IV]. Counts I, II, and IV were accompanied by firearm and forfeiture specifications.[1] About one hour after the indictment was filed, appellant filed a motion to dismiss the criminal complaint because he was not afforded a timely preliminary hearing.

{¶6} Appellant filed a (second) pro se motion to dismiss the criminal complaint on September 21, 2015 although he was represented by counsel.

{¶7} An oral hearing on the motion(s) to dismiss the criminal complaint was held on September 24, 2015 and the trial court overruled the motions by judgment entry.

{¶8} Appellant entered pleas of not guilty and the matter proceeded to pretrial litigation. Appellant filed a number of motions, both pro se and by counsel. Relevant to this appeal, defense trial counsel filed a "Motion to Suppress Evidence Based upon Invalid Search Warrant" on November 2, 2015, arguing the affidavit in support of the search warrant does not support a finding of probable cause. Appellant argued the information provided by "James Springs" was stale and the affiant did not personally speak to a second unnamed source whose credibility was not ascertained or referenced in the affidavit.

{¶9} Appellee responded with a memorandum in opposition.

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[1] Appellee later dismissed the firearm specification to Count I only.

The forfeiture specifications were later dismissed by the trial court because "the jury was dismissed without findings as to the forfeiture specifications * * *." Judgment Entry, March 24, 2016.

{¶10} The trial court considered the motion to suppress pursuant to a non-oral hearing limited to reviewing the four corners of the affidavit. The trial court overruled the motion to suppress by judgment entry dated November 30, 2015.

{¶11} The matter proceeded to trial by jury and appellant was found guilty as charged. Appellant was sentenced to an aggregate prison term of eleven and a half years.

{¶12} Appellant now appeals from the judgment entry of his convictions and sentence.

{¶13} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶14} "I. APPELLANT WAS DENIED DUE PROCESS AFFORDED BY THE 5TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION, OHIO LAW AND CRIMINAL RULES WHEN HIS PRELIMINARY HEARING WAS CONTINUED BY THE STATE WITHOUT DUE PROCESS OR JUSITIFICATION."

{¶15} "II. APPELLANT'S MOTION TO SUPPRESS DUE TO A FALSE AND DEFECTIVE SEARCH WARRANT SHOULD HAVE BEEN GRANTED."

ANALYSIS

I.

{¶16} In his first assignment of error, appellant argues he was entitled to dismissal of the pending felony charge against him when no preliminary hearing was held within ten days of his arrest. We disagree.

{¶17} A person charged with a felony who is held in jail is entitled to a preliminary hearing within ten days of arrest on the pending charge. R.C. 2945.71(C)(1). R.C.

2945.72(H) permits extension of the time limits for a preliminary hearing by "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." If the accused is not afforded a timely preliminary hearing, the felony charge shall be dismissed and any further criminal proceedings based upon the same conduct are barred. See, R.C. 2945.73(A) and (D).

{¶18} In the instant case, appellant argues the felony charge of aggravated drug trafficking should have been dismissed because appellee's motion to continue the preliminary hearing was premised upon an unreasonable basis: appellee's cited need for further investigation.

{¶19} Appellee responds that this argument is moot because the indictment was filed before appellant's motion to dismiss, citing *State ex rel. Haynes v. Powers,* 20 Ohio St.2d 46, 254 N.E.2d 19 (1969) (per curiam) and *State v. Morris,* 42 Ohio St.2d 307. In *Haynes*, the Court noted the discharge provision of R.C. 2945.73 "is not self-executing" and "some timely and proper action by or [on] behalf of an accused must be initiated to secure the required release." *Haynes*, supra, 20 Ohio St.2d at 48. The *Haynes* Court also reaffirmed its previous holdings that "there is no constitutional right to a preliminary hearing and that when an indictment is returned by a grand jury a hearing under Section 2937.10, Revised Code, is no longer necessary." Id., citing *State v. Wigglesworth*, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969) [death penalty reversed on other grounds in *Wigglesworth v. Ohio*, 403 U.S. 947, 91 S.Ct. 2284, 29 L.Ed.2d 857].

{¶20} It is evident from the record the indictment was filed prior to appellant's motion to dismiss. Moreover, the filing of the indictment obviated the requirement of a

preliminary hearing. *Haynes*, supra. Appellant's trial counsel acknowledged the mootness of this argument at the oral hearing on September 24, 2015. (T. 5-6).

{¶21} Appellant's first assignment of error is overruled.

II.

{¶22} In his second assignment of error, appellant argues the trial court erred in overruling the motion to suppress. We disagree.

{¶23} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶24} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486,

597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See*, Williams*, supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

{¶25} As the United States Supreme Court held in *Ornelas v. U.S.,* 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), "...as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶26} In the instant case, no evidence was taken on the motion to suppress and the issues were solely argued from the four corners of the affidavit attached to the search warrant. In *State v. Kithcart*, 5th Dist. Ashland No. 12-COA-048, 2013-Ohio-3022, 995 N.E.2d 918, ¶¶ 9-10, we noted strict adherence to *Spinelli v. U.S.,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) has been modified and retooled by the United States Supreme Court in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and by the Supreme Court of Ohio in *State v. George,* 45 Ohio St.3d 325, 544 N.E.2d 640 (1989). The *George* court held the following at paragraph one of the syllabus and 329, respectively:

> [syllabus] 1. In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, common-sense

decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* [1983], 462 U.S. 213, 238–239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 followed.)

[329] The *Gates* decision provides considerable elaboration as to the "fair probability" standard applicable to the magistrate's probable cause determination. We find the following passage particularly instructive:

" * * * '[T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation * * *. It imports a seizure made under circumstances which warrant suspicion' [quoting from *Locke v. United States* (1813), 11 U.S. 339, 7 Cranch 339, 348, 3 L.Ed. 364]. More recently, we said that 'the *quanta* * * * of proof' appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar,* 338 U.S., at 173 [69 S.Ct. 1302, 93 L.Ed. 1879]. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. * * * [I]t is clear that *'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' Spinelli,* 393 U.S., at 419 [89 S.Ct. 584, 21 L.Ed.2d

637]. See Model Code of Pre–Arraignment Procedure § 210.1(7) (Prop. Off. Draft 1972); 1 W. LaFave, Search and Seizure § 3.2(e) (1978)." (Emphasis added.) *Illinois v. Gates, supra,* at 235 [103 S.Ct. 2317, 76 L.Ed.2d 527].

In *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), the United States Supreme Court explained "probable cause" as: "[i]n dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Using the totality of the circumstances, we find there was probable cause to issue the search warrant.

{¶27} In the instant case, appellant minimizes the information verifying current drug activity. Detective Boerstler is the declarant of the affidavit dated September 1, 2015. James Springs is a named informant in the affidavit; Springs' daughter was involved in an altercation with appellant on or around August 31, 2015. Springs initially came forward to the Licking County Sheriff's Department to report the domestic violence incident. Springs reported he had worked on the property "about three weeks ago" and observed a marijuana grow operation in addition to a large quantity of methamphetamine in a Ziploc bag. Springs stated he did not come forward sooner because appellant is known to be armed and another family living on the property is also known to be armed. The affidavit further states Detective Collins of CODE TF spoke to a C.I. "in the past week" about methamphetamine dealt by appellant from the same property. Records of electrical

service usage demonstrated a "spike" in August 2015 corroborating the possibility of a marijuana grow operation. The detective observed no obvious reason for the large amount of electrical use. The affidavit further notes appellant's "extensive criminal history" of charges related to drugs and weapons and cites Boerstler's own training, experience, and affiliation with CODE TF. We find the affidavit for search warrant is supported by probable cause pursuant to *George*, supra, 45 Ohio St.3d at 325.

{¶28} Appellant also overstates the value of the proffered affidavit of Andrew Beck, whom appellant purports to be the C.I. cited in Boerstler's affidavit. We first note it is not demonstrated in the record that "Andrew Beck" is the C.I. Collins spoke to.[2] The Ohio Supreme Court has held that "a challenge to the factual veracity of a warrant affidavit must be supported by 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,* 62 Ohio St.2d 170, 178, 405 N.E.2d 247 (1980), citing *Franks v. Delaware,* 438 U.S. 154, 171-72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). As the United States Supreme Court first held in *Franks,* a challenge to the affiant's veracity requires "allegations of deliberate falsehood or of reckless disregard for the truth." *Franks,* 438 U.S. at 171. Such allegations must be supported by an "offer of proof [that] should include the submission of affidavits or otherwise reliable statements, or their absence should be satisfactorily explained." *Roberts,* 62 Ohio St.2d at 178. In order to require a trial court to hold a hearing, a defendant must first "make[ ] a substantial preliminary showing" that the

[2] Immediately prior to the jury trial, when the trial court questioned appellant about the pro se motion to suppress, the prosecutor stated Andrew Beck would not be called as a witness. (T. 23). We are unable to find any unequivocal identification of "Andrew Beck" as the C.I. in the record.

affiant included a false statement in the affidavit either knowingly and intentionally, or with reckless disregard for the truth. Id. at 177, citing quoting *Franks,* 478 U.S. at 155. Even if a defendant makes a sufficient preliminary showing, a hearing is not required unless, without the allegedly false statements, the affidavit is unable to support a finding of probable cause. Id. at 178, citing *Franks,* 478 U.S. at 171-72.

{¶29} The affidavit of Andrew Beck is not a substantial preliminary showing of false statements in the affidavit supporting the search warrant. We do not find that appellant has demonstrated anywhere in the record, let alone by a preponderance of the evidence, that Boerstler included a false statement in the affidavit either knowingly or intentionally, or that he acted with reckless disregard with respect to any statement made within the affidavit. *State v. Jefferson*, 5th Dist. Richland No. 09 CA 20, 2009-Ohio-5485, ¶ 47, citing *Franks*, supra. Moreover, even if we were to redact the C.I. portion of the affidavit, the remaining information supports a finding of probable cause.

{¶30} A search warrant affidavit may properly be based on hearsay, on fleeting observations, and on tips received from unnamed informants whose identity often will be properly protected from revelation. *State v. Jefferson*, 5th Dist. Richland No. 09-CA-20, 2009-Ohio-5485, ¶ 46, citing *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967). We conclude the affidavit for search warrant in this case supports the common-sense inference drawn by the trial court that there were illicit drugs located in the residence. *State v. Iceman*, 5th Dist. Ashland No. CA-882, unreported, 1987 WL 28154, *1, citing *State v. Ok Sun Bean*, 13 Ohio App.3d 69, 468 N.E.2d 146 (6th Dist.1983).

{¶31} Appellant's second assignment of error is overruled.

CONCLUSION

{¶32} Appellant's two assignments of error are overruled and the judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J. and

Hoffman, P.J.

Wise, J., concur.