

[Cite as *State v. Cubic*, 2009-Ohio-5051.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF MEDINA    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

PHILLIP CUBIC

Appellant

C. A. No.     09CA0005-M

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE No.     08-CR-0097

DECISION AND JOURNAL ENTRY

Dated: September 28, 2009

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DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Police investigated an anonymous tip that Phillip Cubic and his brothers were operating a methamphetamine lab in a garage at their residence in Brunswick. Mr. Cubic was arrested after police executed a search warrant at the property. He was convicted of two felony drug offenses and has appealed, arguing that the evidence obtained via the search warrant should have been suppressed because the warrant was not issued based on probable cause. He has also argued that the trial court incorrectly denied his request for a hearing based on claimed material mistakes in the warrant affidavit. Mr. Cubic’s convictions are affirmed because the warrant was based on probable cause and Mr. Cubic failed to present sufficient evidence to require the trial court to hold a hearing on the veracity of the law enforcement official who requested the search warrant.

## BACKGROUND

{¶2} Police arrested Mr. Cubic after they executed a search warrant at 1829 Rocklyn Drive, Brunswick, Ohio. Agent John Stayrook, of the Medina County Drug Task Force, obtained the warrant based on his affidavit. According to that affidavit, in April 2007, the Brunswick City Police Department informed the Medina County Drug Task Force that it had received an anonymous call reporting that “Phillip Cubic and Mr. Cubic’s brothers are suspected of operating a methamphetamine lab out of the Cubics’ garage . . . [at] Phillip Cubic’s residence [that] is located at 1829 Rocklyn Drive, Brunswick, Medina County, State of Ohio.” It appears from the affidavit that the anonymous caller also provided Phillip Cubic’s date of birth, social security number, and telephone number.

{¶3} Agent Stayrook included in his affidavit that his agency had placed the Rocklyn Drive residence under surveillance in December 2007. On three of four surveillance dates, “several vehicle[s] were observed arriving at the residence, then departing the residence after a brief duration.” Agent Stayrook went on to say that he conducted two “trash pull[s]” at the Rocklyn Drive address. On both occasions, he found in the trash “green/brown vegetable matter and mail address[ed] to [the target residence].” The green/brown vegetable matter from each trash pull field tested positive for the presence of marijuana. The second trash pull also produced “numerous pieces of burnt foil, several clear plastic bags with a corner missing, four small zip lock bags, corners of clear plastic bags, [and] two pieces of broken smoking device with residue.”

{¶4} One week after the second trash pull, Agent Stayrook audited the Ohio Pseudoephedrine Transaction Logs of various local pharmacies. According to his affidavit, he found that the logs from two local pharmacies contained records of numerous purchases of

pseudoephedrine products “by persons with the last name of Cubic residing at 1829 Rocklyn Drive, Brunswick.” He said that, “[f]rom October 9, 2006 to January 30, 2008, Jason, Dale and Phillip Cubic purchased from . . . Discount Drug Mart and Walgreens 4,436 pills containing [p]seudoephedrine and three boxes containing an unknown amount of [such] pills.” “In April 2007, Phillip Cubic purchased 144 pills containing [p]seudoephedrine from Discount Drug Mart and Walgreens in two days.” According to the affidavit, the audit revealed that Dale and Jason Cubic had each made similarly large purchases within two or three-day spans in April and September 2007. Agent Stayrook said that, in his training and experience, “[p]seudoephedrine is the main precursor in the manufacturing of methamphetamine.” He attached the relevant pharmacy logs to his affidavit.

{¶5} Agent Stayrook requested and received a warrant authorizing a night-time search to protect agent safety and to minimize the destruction of evidence. He requested and received authority to search people and vehicles found on the property. The warrant also authorized police to locate and seize any marijuana, cocaine, or any other controlled substance or contraband, drug processing paraphernalia, weapons, or drug trafficking records. Mr. Cubic was not at the house when the search was conducted. Officers reportedly found evidence tending to show that methamphetamine was being produced in one of the garages at the Rocklyn Drive residence.

{¶6} The State charged Mr. Cubic with illegal manufacture of methamphetamine in the vicinity of a school and illegal assembly or possession of chemicals for the manufacture of drugs. Initially, he pleaded not guilty and moved to suppress all of the evidence obtained in the search of the Rocklyn Drive property, arguing that the anonymous tip and subsequent investigation did not create probable cause sufficient to support a warrant. Mr. Cubic’s brother, Erick Hash,

moved to suppress the same evidence in his companion case, arguing that Agent Stayrook's affidavit included false statements.

{¶7} The trial court held a joint hearing on the motions. After the lawyers made oral argument and Mr. Hash's lawyer briefly cross-examined Agent Stayrook, the trial court said there was no reason to continue the hearing at that time. It noted that, if Mr. Cubic was correct in his argument that the affidavit, on its face, failed to present probable cause sufficient to support the warrant, then the court would not need to reach Mr. Hash's argument that the affidavit included false statements. As an evidentiary hearing would only be necessary to determine the false statements issue, the trial court ended the hearing. The trial court told the parties that it would consider the four corners of the affidavit first and issue a ruling regarding whether the affidavit presented probable cause sufficient to support issuance of the warrant. It further said that, after that ruling, "we'll all gather together to see what our next step is." The trial court allowed time for each side to present additional briefing. In his subsequent brief, Mr. Cubic added an argument that Agent Stayrook had misled the judge who issued the warrant by including "material mistakes" in his affidavit "in reckless disregard of the truth." The trial court denied Mr. Cubic's motion to suppress, ruling that the affidavit was sufficient, under the totality of the circumstances standard, to provide the issuing court probable cause to issue the search warrant.

{¶8} Shortly thereafter, the trial court held a joint status conference for the four cases stemming from the investigation of the Rocklyn Drive residence. Mr. Cubic was present at the conference and was represented by counsel. The transcript of the conference reveals that neither Mr. Cubic nor any other defendant raised an objection regarding the claimed false or misleading statements in the affidavit and nobody requested an evidentiary hearing on that issue.

{¶9} Later, after one of his brothers accepted a plea deal and agreed to testify against him, Mr. Cubic changed his plea to no contest. The trial court found him guilty on both counts and sentenced him to four years in prison. He has appealed, arguing that the trial court incorrectly denied his motion to suppress because the affidavit was not sufficient to support the warrant and that the trial court incorrectly denied his “right to a hearing and to present evidence in support of his motion to suppress evidence.”

#### EVIDENTIARY HEARING

{¶10} Mr. Cubic’s first assignment of error is that the trial court incorrectly denied his right to an evidentiary hearing in support of his motion to suppress evidence obtained through the search warrant. The Fourth Amendment to the United States Constitution provides that search warrants must be based on probable cause and “supported by Oath or affirmation . . . .” An affidavit supporting a warrant enjoys a presumption of validity. *State v. Roberts*, 62 Ohio St. 2d 170, 178 (1980). In order to overcome that presumption, the defendant must support his allegations with something more than “conclusional accusations, or the mere desire to cross-examine.” *Id.*

{¶11} 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 (1980) (citing *Franks v. Delaware*, 438 U.S. 154, 171-72 (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 affiant included a false statement in the affidavit either knowingly and intentionally, or with reckless disregard for the truth. *Id.* at 177 (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 (quoting *Franks*, 478 U.S. at 171-72).

{¶12} Mr. Cubic failed to make a substantial preliminary showing to the trial court that Agent Stayrook’s affidavit contained false statements made knowingly or with reckless disregard for the truth. See *Franks v. Delaware*, 438 U.S. 154, 155 (1978). Mr. Cubic did not initially challenge Agent Stayrook’s veracity. He did not mention the allegations until after his co-defendant’s lawyer presented a veracity challenge at the truncated joint hearing on the motion to suppress. Although Mr. Cubic’s supplemental brief in support of his motion to suppress included two allegations of “material mistakes” in the affidavit that he claimed evidenced a “reckless disregard for the truth,” he did not include any offer of proof in support of his allegations, nor did he satisfactorily explain its absence. In fact, he seemed to argue to the trial court that, without first obtaining evidence via a hearing, he would not be able to support his attack on the veracity of the affiant. After the trial court determined that the affidavit was, on its face, sufficient to support the finding of probable cause and overruled Mr. Cubic’s motion to suppress, Mr. Cubic did not request a hearing regarding Agent Stayrook’s veracity.

{¶13} Mr. Cubic failed to make the showing necessary to overcome the affidavit’s presumption of validity. See *State v. Roberts*, 62 Ohio St. 2d 170, 178 (1980). Mr. Cubic’s first

assignment of error is overruled because the trial court did not incorrectly deny his request for an evidentiary hearing.

#### PROBABLE CAUSE

{¶14} Mr. Cubic’s second assignment of error is that the trial court incorrectly denied his motion to suppress because the affidavit supporting the search warrant lacked a sufficient showing of probable cause. Mr. Cubic has attacked four of the facts the trial court relied on to determine that the affidavit supported the search warrant. He has argued that: (1) he did not own the Rocklyn Drive house; (2) police did not find evidence that there was marijuana in the house; (3) police did not present evidence that he was buying materials used to make methamphetamine; and (4) a vague reference to cars quickly arriving and departing from the house is not sufficient to support a warrant. For the most part, these assertions do not go to whether the affidavit was sufficient on its face, but rather to Agent Stayrook’s veracity. As discussed in regard to Mr. Cubic’s first assignment of error, however, he did not make a sufficient showing to overcome the affidavit’s presumption of validity. In determining whether a search warrant was issued based on probable cause, a court may only consider the information included in the affidavit. *State v. Armstead*, 9th Dist. No. 06CA0050-M, 2007-Ohio-1898, at ¶16.

{¶15} “In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a [judge], neither a trial court nor an appellate court should substitute its own judgment for that of the [issuing judge] . . . .” *State v. Tejada*, 9th Dist. No. 20947, 2002-Ohio-5777, at ¶7 (quoting *State v. George*, 45 Ohio St. 3d 325, paragraph two of the syllabus (1989) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983))). “[T]he duty of a reviewing court is simply to ensure that the [issuing judge] had a substantial basis for concluding

that probable cause existed [and] . . . doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.” *Id.* (quoting *George*, 45 Ohio St. 3d 325, paragraph two of the syllabus, citing *Gates*, 462 U.S. at 238).

{¶16} Courts must follow a totality-of-the-circumstances approach in making the determination of whether an informant’s tip sufficiently supports a finding of probable cause. *State v. Tejada*, 9th Dist. No. 20947, 2002-Ohio-5777, at ¶9 (citing *Illinois v. Gates*, 462 U.S. 213, 233 (1983)). The judge issuing a warrant must assess the adequacy of the affidavit in support of the request for a warrant by making a “practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.* at ¶6 (quoting *State v. George*, 45 Ohio St. 3d 325, at paragraph one of the syllabus (1989) (quoting *Gates*, 462 U.S. at 238-39)). Probable cause does not require “an actual showing” of criminal activity, but “only a probability or substantial chance of criminal activity.” *Gates*, 462 U.S. at 245 n.13.

{¶17} Agent Stayrook’s affidavit was not based solely on an anonymous tip, but included information about a police investigation that lasted two months. During that time, agents from the Medina County Drug Task Force sought evidence to corroborate the tip they had received regarding a methamphetamine lab at the Rocklyn Drive address. According to Agent Stayrook, the address was first put under surveillance on four occasions. On three of those dates, agents reported cars stopping at the house for “a brief duration.” Agent Stayrook further said in his affidavit that he examined the trash found at the Rocklyn Drive address on two dates in January 2008. He said that, on both occasions, he found mail addressed to 1829 Rocklyn Drive in the bags of trash removed for examination. On both dates, field tests revealed the presence of



marijuana in the trash, and the second trash pull produced various other suspicious items, such as burnt foil and clear plastic bags with a corner missing.

{¶18} In early February 2008, Agent Stayrook found evidence that Mr. Cubic and others sharing his last name and address had purchased 4436 pills containing pseudoephedrine between October 2006 and January 2008. Agent Stayrook's affidavit also included a reference to pseudoephedrine being a "precursor" of methamphetamine.

{¶19} This Court is not required to determine whether any one the Agent's points, taken alone, would have been sufficient to support the search warrant in this case. Taken together, the circumstances recounted in the affidavit warranted suspicion. The issuing court had a substantial basis to determine that there was probable cause to believe that evidence of the manufacture and sale of illegal drugs would be found at the Rocklyn Drive address.

{¶20} As part of Mr. Cubic's second assignment of error, he has argued that the search warrant violated the Fourth Amendment by authorizing police to search any people found on the premises when the warrant was executed. Mr. Cubic has not refuted the State's assertion that he was not present at the Rocklyn Drive address when police executed the warrant. Mr. Cubic was not searched under the authority of the search warrant and cannot make this argument on behalf of others who were searched at the scene. See *State v. Dennis*, 79 Ohio St. 3d 421, 426 (1997) ("Fourth Amendment rights are personal in nature and may not be vicariously asserted by others.").

{¶21} As part of Mr. Cubic's second assignment of error, he has also argued that the search warrant was invalid because the affidavit contained only general allegations that people involved in the sale of illegal drugs also tend to maintain covert records of those sales and assets purchased with illicit profits. Based on those allegations, the search warrant authorized officers

to seize any such records or assets found in the search. Mr. Cubic has argued that the warrant was not valid because it was not based on specific allegations that he maintained covert records of drug sales or that he possessed assets purchased with illicit profits. This Court need not consider this argument because Mr. Cubic forfeited it by not raising it before the trial court. *State v. Williams*, 51 Ohio St. 2d 112, paragraph one of the syllabus (1977); *State v. Ralston*, 4th Dist. No. 06CA2898, 2007-Ohio-177, at ¶16. The same is true of his argument that the warrant was invalid either because it was not executed at night, as authorized, or because it was not executed within the permissible three-day period. This Court will not address alleged errors the defendant could have brought, but failed to bring to the trial court's attention. *Williams*, 51 Ohio St. 2d 112, at paragraph one of the syllabus. Mr. Cubic's second assignment of error is overruled.

#### CONCLUSION

{¶22} The trial court did not incorrectly deny Mr. Cubic's request for an evidentiary hearing on his motion to suppress because Mr. Cubic failed to overcome the warrant affidavit's presumption of validity. The trial court did not incorrectly deny Mr. Cubic's motion to suppress because the warrant was based on probable cause.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

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CLAIR E. DICKINSON  
FOR THE COURT

WHITMORE, J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

MICHAEL J. CALLOW, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney and MICHAEL P. MCNAMARA, assisant prosecuting attorney, for appellee.