COURT OF APPEALS
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO

PLAINTIFF-APPELLANT **CASE NUMBER 9-2000-43**

v.

LAVAUGHN COCHRAN **O P I N I O N**

DEFENDANT-APPELLEE

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: November 15, 2000.

ATTORNEYS:

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For Appellant.

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For Appellee.

WALTERS, J. Appellant, the State of Ohio, appeals a judgment of the Court of Common Pleas of Marion County, granting in part a motion to suppress evidence filed by Appellee, Lavaughn Cochran. For the reasons that follow, we reverse the judgment of the trial court.

During the early evening hours of January 20, 2000, officers from the Marion City Police Department and members of the Special Response Team executed a search warrant at a residence in Marion, Ohio. Earlier that day a confidential informant had purchased crack cocaine at the residence and informed officers that at least three black males from the Detroit, Michigan area were involved in drug trafficking and could be found there. Upon their arrival, police officers forcibly entered the residence and arrested several individuals matching that description.

After officers secured the area, Major Bill Collins of the Marion City Police Department observed Appellee walking up the driveway adjacent to the residence. Major Collins asked Appellee what he was doing in the area, and Appellee stated that he was attempting to visit a friend who lived at that location. Thereafter, Major Collins conducted a pat-down of Appellee's outer clothing to check for weapons. During the protective check for weapons, Major Collins retrieved a lock-blade knife from a pocket in Appellee's pants. Appellee was then placed

under arrest for carrying a concealed weapon. A subsequent search of Appellee's clothing revealed a crack pipe and several small rocks of crack cocaine.

On January 21, 2000, Detective Kitzmiller of the Marion Sheriff's Department filed an affidavit in the Marion Municipal Court, seeking a search warrant to test Appellee's urine for the presence of cocaine. After reviewing the affidavit and hearing testimony from Detective Kitzmiller, the Municipal Court Judge issued the search warrant. A subsequent analysis of Appellee's urine yielded a positive result for the presence of cocaine.

On February 3, 2000, a Marion County Grand Jury indicted Appellee on two counts of possession of drugs in violation of R.C. 2925.11(A),(C), fifth degree felonies. Thereafter, Appellee filed a motion to suppress both the evidence seized at the time of his arrest, and as a result of the search warrant issued on January 21, 2000. On May 11, 2000, the trial court held a suppression hearing, wherein Major Collins and Detective Kitzmiller testified on behalf of the State. Appellee presented no witnesses on his behalf.

On May 31, 2000, the trial court filed a judgment entry denying the motion to suppress with respect to the evidence recovered during the stop and subsequent arrest of Appellee. However, the trial court granted the motion to suppress with respect to the evidence recovered pursuant to the search warrant issued on January 21, 2000.

On May 31, 2000, the State appealed the judgment of the trial court granting the motion to suppress the evidence recovered pursuant to the search warrant. On June 9, 2000, Appellee filed a cross-appeal regarding the trial court's denial of his motion to suppress the evidence recovered during the stop and subsequent arrest. On July 14, 2000, this Court dismissed Appellee's cross-appeal, *sua sponte*, because the trial court's judgment denying the motion to suppress the evidence obtained during the stop and subsequent arrest is not a final appealable order.

Accordingly, the only matter for review is the trial court's suppression of the evidence obtained as a result of the search warrant issued on January 21, 2000. The State raises four assignments of error for our review.

Assignment of Error No. 1

> **The trial court erred in determining that a search warrant was invalid where the issuing magistrate had a substantial basis for concluding that probable cause existed.**

In *State v. George* (1989), 45 Ohio St.3d 325, at paragraph one of the syllabus, the Supreme Court of Ohio set forth the standard regarding the issuance of search warrants. Therein, the Court stated:

> **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.)**

In addition, regarding judicial review of the issuance of search warrants, the Court stated:

> **In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a *de novo* determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. (*Illinois v. Gates* [1983], 462 U.S. 213, 238-239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 followed.)**

In support of his argument that the trial court correctly held that there was no probable cause to support the issuance of the search warrant, Appellee cites a recent decision by this Court in *State v. Swearingen* (1999), 131 Ohio App.3d 124. In *Swearingen*, the appellant therein was indicted on one count of possession of cocaine, stemming from a drug test performed on a sample of his urine. The urine sample, which tested positive for cocaine, was obtained as a result of a search warrant. Following the indictment, the appellant filed a motion to suppress the

evidence. The trial court sustained the motion, finding no probable cause to support the issuance of the search warrant.

On appeal, a majority of this Court (J. Shaw dissenting) affirmed the judgment of the trial court, holding that the magistrate lacked a substantial basis for determining that probable cause existed for issuing the warrant. In doing so, we noted that the trial court found that there was no testimony regarding the credibility and reliability of the informant whose hearsay statements were used in support of the probable cause determination. Additionally, although the informant purported to have personal knowledge of the appellant's drug use, the affidavit did not specifically mention when the informant and the appellant last used drugs together.

Without the informant's testimony, the only evidence to support the issuance of the search warrant was the appellant's prior history of drug use. We stated that "[i]f this inference upon an inference were permitted, the mere allegation of past drug use would be enough to forever satisfy the requirements of probable cause and allow for the issuance of a search warrant for a person's blood or urine at *any time* after such an allegation is made." *Swearingen*, at 130.

Despite our holding in *Swearingen*, however, the State argues that there is substantial evidence in the record to support the magistrate's determination that probable cause existed for the issuance of the search warrant herein. Specifically,

the State notes that Appellee was seen approaching a crack house wherein police had, just minutes before, searched for drugs and found a large amount of crack cocaine. Appellee told police officers that he was there to see a friend named Michael Oliver, whom police had arrested for possession of cocaine only moments prior to Appellee's arrival. During a pat-down and subsequent search of Appellee's clothing, police found a knife, a crack pipe, and several rocks of crack cocaine.

In addition to the aforementioned evidence, Detective Kitzmiller testified at the probable cause hearing that Appellee has a history of prior drug charges. Detective Kitzmiller also testified that there is a high probability that individuals found with crack cocaine in the vicinity of a crack house are using the drug. Finally, Detective Kitzmiller testified that Appellee refused to submit to a voluntary screening of his urine, which is a sign that cocaine is probably in his system.

After examining the evidence contained in the record, we find that this case is distinguishable from *Swearingen*. Unlike *Swearingen*, the record herein demonstrates that there is ample evidence in addition to Appellee's history of prior drug use to support the finding of probable cause to issue the search warrant. As set forth in *George*, *supra*, the attesting officer need only demonstrate to the

magistrate that there is a fair probability that evidence or contraband will be found in a certain place.

Because the evidence in the record demonstrates such a fair probability, we find that the trial court erred in suppressing the evidence obtained pursuant to the search warrant, and conclude that there was a substantial basis for the magistrate to have determined that probable cause existed to issue the search warrant.

In the alternative to the argument above, Appellee argues that the test results from his urine sample were obtained as a direct result of evidence that was illegally seized at the time of his detention and subsequent arrest. Specifically, Appellee argues that the initial detention was invalid, and all evidence thereafter should be excluded as a "fruit of the poisonous tree". *See, Wong Sun v. United States* (1963), 371 U.S. 471. However, on July 14, 2000, we held that the issue regarding the suppression of evidence obtained during the initial detention and subsequent arrest of Appellee is not a final appealable order. Therefore, we may not address the merits of this argument at this time.

Accordingly, the State's first assignment of error is well taken and is therefore sustained.

Assignment of Error No. 2

The trial court erred in suppressing evidence obtained by the officers who were acting in objectively reasonable reliance of a search warrant issued by a detached and neutral magistrate.

The Supreme Court of Ohio previously addressed the "good faith exception" to the exclusionary rule as:

> **The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. (*United States v. Leon* [1984], 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, followed.)**

George, *supra*, at paragraph three of the syllabus.

The State argues that the exclusionary rule should not have been applied because Detective Kitzmiller acted in objectively reasonable reliance upon the search warrant issued by a neutral and detached magistrate. Appellee, however, argues that the record is completely void of evidence to create an objectively reasonable belief that probable cause existed for the issuance of the search warrant. Rather, the magistrate's decision was based on Detective Kitzmiller's subjective beliefs.

Despite Appellee's argument, the record does not suggest that Detective Kitzmiller's beliefs were not objectively reasonable. In addition to the ample objective evidence in the record supporting the finding of probable cause, Detective Kitzmiller testified at the suppression hearing that he has worked as a law enforcement officer for approximately fourteen and a half years. Since 1999, he has obtained or been involved in approximately sixteen search warrants.

Detective Kitzmiller also testified that he is familiar with and understands the concept of probable cause. Finally, he testified that he believed that the search warrant he obtained was valid.

Therefore, we find that in addition to our holding regarding probable cause, the "good faith exception", as outlined in *George*, *supra*, precluded the application of the exclusionary rule.

Accordingly, the State's second assignment of error is well taken and is therefore sustained.

Assignment of Error No. 3

> **The trial court erred in ruling that in order to obtain a search warrant, there must be probable cause that evidence will be recovered which relates to a crime that was committed within the county in which the issuing magistrate is located.**

The State argues that the trial court misstated the standard for probable cause in its ruling on Appellee's motion to suppress. On page ten of the ruling, the trial court stated:

> **Therefore, to justify an invasive search of the defendant's body for a urine sample, it was necessary to establish probable cause that the defendant had used some form of cocaine, in a time period which would allow the metabolites to remain in the urine on the date he is to be tested, and that such use occurred in Marion County, Ohio. *****

Specifically, the State argues that it is not necessary that Appellee used the crack cocaine in Marion County, Ohio in order to support a finding of probable cause.

In support of its argument, the State notes Crim.R. 41(A), which states:

> **A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.**

As to the issuance of a search warrant, it does not matter where the crime took place but, rather, where the search will take place. There is nothing before us to suggest otherwise. Therefore, we find that the trial court erred in its ruling on Appellee's motion to suppress by stating that probable cause requires a finding that Appellee used the crack cocaine in Marion County, Ohio.

Accordingly, the State's third assignment of error is well taken and is therefore sustained.

Assignment of Error No. 4

> **The trial court erred in ruling that non-constitutional defects in the search warrant application result in a suppression of evidence.**

The State's final argument is that the trial court cited several non-constitutional defects in the affidavit in support of the search warrant, as justification for suppressing the evidence. First, the trial court ruled that the affidavit failed to state with specificity the property to be searched for and seized pursuant to Crim.R. 41. Additionally, the trial court ruled that the testimony supporting the search warrant was intermingled, as it related to three different search warrants.

The Supreme Court of Ohio previously held that "[t]he exclusionary rule has been applied by this court to violations of a constitutional nature only." *City of Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 234. *See, also, State v, Myers* (1971), 26 Ohio St.2d 190, 196 (refusing to apply the exclusionary rule to statutory violations falling short of constitutional violations). The Court has specifically refused to apply the exclusionary rule to non-constitutional violations of Crim.R. 41. *State v. Downs* (1977), 51 Ohio St.2d 47, 64, judgment vacated on separate grounds in *Downs v. Ohio* (l978), 438 U.S. 509.

After reviewing the record, we find that any procedural errors in the affidavit pursuant to Crim.R. 41 are non-constitutional in nature. Therefore, the trial court erred in applying the exclusionary rule to suppress the evidence for these reasons.

Accordingly, the State's fourth assignment of error is well taken and is therefore sustained.

Having found error prejudicial to the Appellant herein, in the particulars assigned and argued, the judgment of the trial court is hereby reversed and the matter is remanded for further proceedings in accordance with this opinion.

Judgment reversed and Cause remanded.

SHAW and BRYANT, JJ., concur.
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