[Cite as *State v. Acord*, 2009-Ohio-4263.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-001
	:	O P I N I O N
- vs -		8/24/2009
	:	
ROBERT N. ACORD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08 CRI 00189

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BRESSLER, P.J.

{¶1} Defendant-appellant, Robert Acord, appeals his convictions in the Fayette County Court of Common Pleas for 51 counts of illegal use of a minor in nudity-oriented material or performance, 78 counts of pandering sexually-oriented matter involving a minor, and eight counts of rape. We affirm the convictions.

{¶2} In August 2008, Fayette County social services agencies were advised that Acord was sexually abusing his two nieces, ages eight and 11. The children described a

history of extensive sexual abuse by Acord, including digital penetration, vaginal and anal intercourse, forced fellatio, and exposure to child pornography. Acord often forced the older sister to videotape and take pictures of his sexual acts with the eight-year-old, and would then download the media onto his personal computer.

{¶3} Soon after the sisters reported the abuse, police officers from Washington Court House, Ohio sought and obtained a warrant to search Acord's home. Officers arrived at approximately 12:40 in the afternoon of August 20th to execute the warrant, and approached the west side and front of Acord's home. Sergeant Russell Lowe positioned himself at the front door, knocked loudly, and announced his presence to execute the warrant. Detective Chancey Scott took position at a window on the other side of the house. Although it had an intact screen, the window was open so that through it, Scott could see a bed, television set, and a desk with a computer on it.

{¶4} Though Lowe continued to announce their presence as law enforcement officers, Acord did not open the door. Scott went around the side of the house and informed Lowe that they could gain entrance through the window, and he and Officer M.J. Boone went back around the house to do so. After Scott and Boone went back to the window and repeatedly announced their presence, Scott began to remove the screen from the window. Before Scott could remove the entire screen, a male voice from inside the bedroom, later identified as Acord, asked, "what [was] going on." Officers told Acord to show his hands and get on the ground. Acord refused, and instead, began to exit the room, at which time Scott entered through the window and restrained Acord on the bed. When Lowe heard the scuffle, he kicked down the front door, joined the officers in the bedroom, and helped detain Acord.

{¶5} Once Acord was subdued, officers gave him a copy of the warrant and then executed it. During the search, the police seized multiple items, including computers, digital cameras, Polaroid cameras, and various CDs, videos, and DVDs. These items contained

hundreds of pornographic images and evidence that corroborated the sisters' story. Based on the evidence seized from the first search, police sought and obtained a second warrant to search for other evidence specific to the rape allegations, including the bedding from Acord's bed, sexual toys, and clothing the sisters were seen wearing in the seized photographs and videos. The judge also approved a subsequent warrant, thereby permitting officers to take DNA samples from Acord to compare to the evidence seized during the second search.

{¶6} Acord was indicted on 72 counts of illegal use of a minor in sexually-oriented material or performance, 98 counts of pandering sexually-oriented matter involving a minor, and eight counts of rape. Acord then filed two motions to suppress the evidence seized during the searches, claiming that the supporting affidavits were defective, so that the warrants lacked probable cause, and also that the officers failed to execute the proper knock and announce protocol. The trial court overruled Acord's motions. Soon thereafter, Acord pled no contest to 51 counts of illegal use of a minor in nudity-oriented material or performance, 78 counts of pandering sexually-oriented matter involving a minor, and eight counts of rape.

{¶7} The trial court sentenced Acord to five consecutive life sentences for five counts of rape, and three concurrent life sentences on the other three rape counts. For each of the 115 second-degree felony counts, the trial court sentenced Acord to eight years on each count and added an additional 14 years for the fifth-degree felonies committed. Acord now appeals his convictions, raising two assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN REFUSING TO SUPPRESS EVIDENCE WHEREIN THE WARRANT TO SEARCH WAS ISSUED WITHOUT PROBABLE CAUSE TO BELIEVE THAT THE EVIDENCE SOUGHT WAS IN APPELLANT'S RESIDENCE AND WHERE PROPERTY SEIZED WAS NOT THAT

DESCRIBED IN THE AFFIDAVIT FOR THE SEARCH WARRANT."

{¶10} In his first assignment of error, Acord asserts that the trial court erred by overruling his motions to suppress because the search warrants lacked probable cause. There is no merit to this argument.

{¶11} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Id. Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶12} As echoed in Section 14, Article I of the Ohio Constitution, the Fourth Amendment to the United State Constitution guarantees that "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."

{¶13} Crim. R. 41(C) governs the issuance of search warrants, and states in pertinent part, "a warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The 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."

{¶14} While the Fourth Amendment does not contain an express mandate that evidence seized as a result of an illegal search must be suppressed, the exclusionary rule is inherent in the amendment's protectionary language. "The rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *United States v. Leon* (1984), 468 U.S. 897, 906, 104 S.Ct. 3405, citing *United States v. Clandra* (1974), 414 U.S. 338, 348, 94 S.Ct. 613.

{¶15} However, the exclusionary rule need not be employed when police properly execute a legal warrant issued by a detached judge that is supported by probable cause. *State v. George* (1989), 45 Ohio St.3d 325. Because "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," when determining whether the supporting affidavit provides sufficient probable cause, the issuing judge need only make a practical, commonsense decision using a totality of the circumstances approach. *Illinois v. Gates* (1983), 462 U.S. 213, 232, 103 S.Ct. 2317; *State v. Akers*, Butler App. No. CA2007-07-163, 2008-Ohio-4164.

{¶16} When reviewing a judge's decision to issue a warrant, neither a trial court nor an appellate court will conduct a de novo determination as to whether the affidavit provided sufficient probable cause. *Akers* at ¶14. Instead, the reviewing court need only ensure that the judge had a substantial basis for concluding that the probable cause existed. Id. "Reasonable, commonsense inferences are permitted when assessing the legal sufficiency of an affidavit in support of a search warrant, if such inferences are based upon facts actually alleged in the affidavit." *State v. Harris* (Nov. 6, 2000), Clermont App. No. CA2000-02-011, 7.

{¶17} Acord argues that the affidavits in support of the warrants were defective because they failed to fulfill several Crim.R. 41(C) requirements, thereby failing to provide the necessary probable cause.

A. First Warrant

{¶18} In the first affidavit, Sergeant Lowe states that there was good cause to believe that evidence of the offense of illegal use of a minor in a nudity-oriented material or performance would be found in Acord's house. Acord points out that the address mentioned in the body of the affidavit is incorrect so that the police could not know where to search. The trial court found that this mistake was a technical one, rather than a constitutional error, and did not negate the affidavit's compliance with Crim. R. 41(C). We find no error in this conclusion.

{¶19} While it is true that the wrong address was included in one paragraph of the body of the affidavit, the heading of the affidavit lists Acord's name and correct address in bold letters. The affidavit also states, "upon checking it was found that Robert Neal Acord lives at 652 Peddicord Ave ***. Said residence is a single story single family dwelling with a covered front porch and "652" in black numbers over the attached garage door to the left of the porch. Said property being brick and white sided."

{¶20} During the motion to suppress hearing, Sergeant Lowe stated that he used an affidavit from a previous case as a template for the affidavit he submitted in Acord's case, and inadvertently did not change the previous address in the third paragraph of the affidavit. However, based on the clear description provided in the fifth paragraph, and the bolded address at the top of the affidavit, it is obvious that the police knew where to execute the search. The mere fact that Lowe neglected to change the address in the body of the affidavit does not negate compliance with Crim.R. 41(C), as the bolded address and specific description of Acord's house successfully named and described the place to be searched.

{¶21} Acord also asserts that Lowe's affidavit fails to particularly describe the items to be searched and seized. However, a review of the record indicates otherwise. Sergeant Lowe averred that he had good cause to believe that evidence of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323, would be found at Acord's home. He also attached the initial abuse report from Nationwide Children's Hospital to his affidavit and incorporated it by reference. In the report, the sisters described what implements Acord used while he molested them and further provided details regarding where the abuse occurred.

{¶22} In its decision overruling Acord's first motion to suppress, the trial court specifically stated that before issuing the warrant, it read the attached hospital report and that the report contained various details regarding the existence of evidence in Acord's home. Specifically, when asked where the abuse occurred, the children answered that it occurred in Acord's bedroom and living room at his home. The children also stated that Acord made them watch "sex movies" with him, including one video of Hannah Montana[1] having sex with her father. The younger sister also stated that Acord would make her perform sex acts while her older sister recorded the acts and took pictures. According to the sisters' statements, Acord would then download the media onto his home computer.

{¶23} Having read this attachment, the issuing judge had a strong basis of facts on which to make a reasonable, commonsense inference that the police would be searching for computers, cameras, and other equipment used to perpetuate a violation of R.C. 2907.323, and that the evidence would be located at Acord's home.

{¶24} Acord also asserts that the first warrant is not supported by probable cause because the affidavit fails to state the factual basis for Lowe's belief that seizeable property

1. Hannah Montana is a popular show on the Disney Channel in which a teenage girl, who has a close relationship with her father and brother, lives a double-life in order to hide her identity as a pop star.

would be found at his home. However, in the fourth paragraph of the affidavit, Lowe states that the police received a report that Acord had been molesting the children and that "Acord had both children perform oral sex on him, attempted to have intercourse with both vaginal and anal, showed them pornography and had the oldre [sic] child take photo's [sic] of him performing sex acts on the younger child." This statement sets forth ample facts on which Lowe based his belief that evidence of a violation of R.C. 2907.323 would be found. As previously stated, the hospital report also establishes that the abuse occurred at Acord's home, specifically in his bedroom and living room, so that it is reasonable to infer that the evidence of illegal use of a minor in nudity-oriented material or performance would be found at Acord's home.

{¶25} Keeping in mind that we should accord great deference to the judge's determination of probable cause, we find that based upon the facts and circumstances alleged in the affidavit and attached report, there was a substantial probability that evidence used to facilitate the abuse and illegal use of a minor in nudity-oriented material or performance would be located at Acord's home. Therefore, the affidavit was in compliance with Crim. R. 41(C) and provided ample probable cause on which to issue the warrant.

B. Second Warrant

{¶26} Acord next asserts that the second warrant permitting the police to search and seize the bedding, female clothing, and sexual toys from Acord's home was deficient because it too was not supported by probable cause. Again, Acord asserts that Lowe's second affidavit failed to give a description of property to be searched for and seized, and lacked a basis to believe that the evidence would be located at Acord's residence.

{¶27} However, in addition to a recitation of the information contained in the first warrant, Lowe included a description of the items seized during the first search and stated

that the seized evidence depicted Acord raping the children. Specifically, Lowe stated, "after receiving a search warrant on 08-20-08, items were seized and have been found to contain video and stills of the said Robert N. Acord having sex with the eight year old victim as well as photos of the victim dressed up and possing [sic] nude. All of the said photos appear to have been taken in the said residence and the items sought are to identify the location as well as provide further evidence of the stated crimes." This section of the affidavit clearly states the reason Lowe believed the items would be found in Acord's home and also describes the property to be searched as items depicted in the pictures and videos. Therefore, Acord's claim that the second affidavit fails to provide the necessary probable cause fails.

C. Good Faith

{¶28} We also note that even if the warrants were not supported by probable cause and were invalidly issued, the officers demonstrated a good faith reliance on the warrants during execution.

{¶29} The exclusionary rule will not be applied when the executing officers rely in good faith on the warrant issued by a detached and neutral magistrate even if the warrant is not supported by probable cause. *State v. Macke*, Clinton App. No. CA2007-08-033, 2008-Ohio-1888. So long as the officer's reliance is objectively reasonable, the evidence will not be suppressed. Id. However, an executing officer cannot have reasonably relied on the warrant when he knows that the supporting affidavit the magistrate relied on is false or misleading, the magistrate wholly abandoned his role, the warrant is facially deficient, or where an officer relies "on the warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923.

{¶30} Here, the warrants were issued by a detached and neutral judge who made the

determination that the affidavits provided the requisite probable cause to issue the warrants. The executing officers knew that the affidavit did not include false or misleading information because one of the executing officers was the affiant. Lowe read the children's abuse report and reviewed the facts with the executing officers so that they too knew the factual basis for the search before executing the warrant. Additionally, despite the few technical errors in the affidavits, the officers knew what property was to be searched, and arrived at Acord's house to do so. The issuing judge did not abandon his role, and instead issued proper warrants free from any defects. Officers were also able to determine that based on the facts indicated in the affidavit, the warrants appeared to be supported by probable cause. Therefore, even in light of the few clerical errors in the affidavit, and even if the warrants lacked probable cause, the officers relied on the warrants in good faith and properly executed the searches.

{¶31} Having found that neither warrant was issued without probable cause, and that the officers otherwise relied on the warrants in good faith, Acord's first assignment of error is overruled.

{¶32} Assignment of Error No. 2:

{¶33} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN REFUSING TO SUPPRESS EVIDENCE SEIZED BY OFFICERS WHO VIOLATED THE KNOCK AND ANNOUNCE PROVISIONS OF OHIO LAW SET OUT IN R.C. 2935.12."

{¶34} In his second assignment of error, Acord claims that the trial court erred in overruling his second motion to suppress because the officers who executed the first search warrant failed to properly follow knock and announce protocol. This argument lacks merit.

{¶35} "The common law knock and announce principle forms part of the Fourth Amendment reasonableness inquiry. *Wilson v. Arkansas* (1995), 514 U.S. 927, 115 S.Ct. 1914. The Supreme Court observed that the common law recognized the principle that individuals should be provided the opportunity to comply with the law and to avoid the

destruction of property occasioned by a forcible entry. *State v. Allen*, Montgomery App. No. 18788, 2002-Ohio-263. Ohio codified the knock and announce rule in R.C. 2935.12, which states in pertinent part that when a police officer executes a search warrant, he "may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance ***."

{¶36} In short, the knock and announce rule directs police to "first knock on the door, announce their purpose, and identify themselves before they forcibly enter the home." *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, ¶9. "What the knock-and-announce rule has never protected is one's interest in preventing the government from seeing or taking evidence described in the warrant." *Macke*, 2008-Ohio-1888 at ¶27.

{¶37} Acord asserts that the executing officers violated the knock and announce rule because the police officers were not in uniform, failed to announce their presence, did not announce that they were there to execute a search warrant, and that the officers waited an unreasonably short amount of time before entering his home. However, a review of the record indicates otherwise.

{¶38} The trial court heard testimony at the second suppression hearing from two of the officers who executed the first search warrant. Detective Chancey Scott first testified that he participated in the search, and arrived at Acord's home in the afternoon of August 20, 2008. He and Officer M.J. Boone (who was in his police-issued uniform) took position at the back of Acord's home. There, the two observed an open window, through which they could see a bed, television set, desk, and computer. Scott testified that through the window, he could hear Sergeant Lowe knocking loudly, and announcing police presence. At that point, Scott went around to the front of the house and informed Lowe that the window in the back of the house was ajar and that the officers could gain entrance into the house through the

window.

{¶39} When Scot went back around the house, he announced "several times" that it was the police department, and began to remove the screen after he heard no response. When he began to remove the rubber gaskets that held the screen in place, he heard a male voice, later identified as Acord, ask what was going on. Scott stated that he and Officer Boone identified themselves as police officers and told Acord that they had a search warrant. Scott testified he ordered Acord to show his hands, which Acord refused to do, and that as Acord started to leave the room, he removed the screen and entered through the window in time to detain Acord face-down on the bed. Scott testified that soon after he entered the window and began to detain Acord, Lowe broke down the front door and joined them in the bedroom.

{¶40} Sergeant Lowe testified that he arrived at Acord's home at 12:41 in the afternoon and began "knocking, announcing several times, pounding on the front door to the point where the windows were rattling in the front, screamed in or yelled in, screamed in windows that were right at the front of the house near the porch several times. After several minutes of that …" At that point in his testimony, the prosecutor interrupted Lowe to ask him if he knew how many times he actually announced police presence, to which Lowe responded, "Total, I would have to say at least five or six. Each time pounding and knocking harder and harder." Lowe then continued his testimony and stated that after approximately four to five minutes, Scott came around the house and informed him that the window was open and that they could gain entrance once the screen was removed. Lowe authorized the entrance and kicked the door down once he heard yelling inside and was aware that Acord was in the house, trying to flee the bedroom. After entering through the front door, Lowe handed Acord a copy of the warrant, and then executed the search.

{¶41} After hearing this testimony, the trial court overruled Acord's second motion to

suppress, finding that the officers acted in accordance with the knock and announce protocol when executing the search warrant. We find no error in this conclusion.

{¶42} Though Acord claims that officers failed to announce their presence, testimony indicates that Lowe and Scott identified themselves as police officers several times before entering the home. Lowe knocked so loudly that the windows and front of the house were shaking, and that from the time he arrived at Acord's front door, he identified himself as police.

{¶43} Acord's claim that the officers did not announce that they were there to execute a search warrant is also rebutted by Scott and Lowe's testimony that they announced their presence and stated that they were there to execute the warrant. The trial court found their testimony credible, and we defer to that finding.

{¶44} Because the testimony indicated that Lowe and Scott waited several minutes before entering the home, Accord's assertion that the officers waited an unreasonably short amount of time before entering his house is also meritless. Officers executed the warrant in the afternoon, at a time when it is reasonable to assume Acord would be awake and able to respond to police presence. Even if Scott and Lowe were unable to state exactly how long they waited, the record is clear that after Lowe began knocking and announcing, the wait before entrance was long enough for Scott to walk around the house, peer through the open window, walk back around the house, discuss with Lowe the possibility of entering the house through the window, walk back to the window, and begin removing gaskets that held the screen in place. This amount of time, consistent with the officers' testimony that they waited at least several minutes, was more than enough time for Acord to open his door or to inquire further from Lowe or Scott regarding their presence at his house that day.

{¶45} Although we have found that the officers did not violate the knock and announce rule, we also note that the evidence would have been admissible even in the face

of a violation of the rule. As the Supreme Court stated in *Hudson v. Michigan* (2006), 547 U.S. 586, 126 S.Ct. 2159, and as adopted by the Ohio Supreme Court in *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, a violation of the knock and announce rule does not necessarily require suppression of all evidence found in the execution of the search warrant.

{¶46} Instead, the courts noted the high cost the exclusionary rule has on society by "permitting the guilty to go free and the dangerous to remain at large." *Oliver*, 2007-Ohio-372 at ¶12. Therefore, before employing the exclusionary rule, a court must consider the toll of suppressing evidence and implement the exclusionary rule "only in cases where its power to deter police misconduct outweighs its costs to the public." Id.

{¶47} Having found that executing officers did not violate the knock and announce rule and that the evidence would not have been suppressed otherwise, Acord's second assignment of error is overruled.

{¶48} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

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