[Cite as *State v. Commins*, 2009-Ohio-6415.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NOS. CA2009-06-004 CA2009-06-005
- vs -	:	O P I N I O N
	:	12/7/2009
TRAVIS M. COMMINS,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case Nos. CRI2005-5142 and CRI2008-5317

Richard W. Moyer, Clinton County Prosecuting Attorney, Brian A. Shidaker, 103 East Main Street, Wilmington, OH 45177, for plaintiff-appellant

Herbert Hass, 114 East Eighth Street, Cincinnati, OH 45202, for plaintiff-appellee

YOUNG, P.J.

{¶1} The state of Ohio appeals the decision of the Clinton County Court of Common Pleas granting the motion to suppress of defendant-appellee, Travis Commins.[1]

{¶2} In 2008, Commins was indicted on one count each of illegal assembly

1. Pursuant to Loc.R.6(A), we have sua sponte removed this appeal from the accelerated calendar.

or possession of chemicals for the manufacture of drugs, illegal manufacture of drugs, possession of drugs, and possessing criminal tools.[2] The first three counts involved methamphetamine. The charges against Commins were the result of a search of a residence in Midland, Ohio allegedly occupied by Commins and his girlfriend. Commins filed several motions, including a motion to suppress evidence.

{¶3} A hearing on the motion revealed that the warrant used to search the residence was signed by Magistrate Helen Rowlands of the Clinton County Common Pleas Court, and not by Judge John W. Rudduck of the Clinton County Common Pleas Court (trial judge). Magistrate Rowlands is not an elected official; she was appointed by the trial judge in February 2003 to fulfill certain responsibilities. Following the hearing, the trial judge directed the parties to address whether Magistrate Rowlands was legally authorized to issue the search warrant in the case at bar, and if not, whether the "good faith" exception adopted by the United States Supreme Court in *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, applied.

{¶4} On February 5, 2009, a hearing was held regarding the legality of the search warrant signed by Magistrate Rowlands. Both she and Detective Douglas Eastes of the Clinton County Sheriff's Office testified as follows:

{¶5} Magistrate Rowlands started issuing search warrants in 2006 after she was contacted by the Clinton County Sheriff's Office. At the time, the sheriff's office needed a search warrant and all three judges were out of the county attending a

2. This is a simplification of what happened procedurally below. The record shows that the state filed three different indictments against Commins and later moved to dismiss some of the counts. The specific details regarding the filed indictments and the dismissed counts are not relevant to the issues on appeal.

judicial conference. After the sheriff's office asked her if she had the authority to issue search warrants, Magistrate Rowlands quickly researched the issue under R.C. 2933.23 and on the Westlaw database. Based upon a cursory review of cases and believing R.C. 2933.23 gave her the authority to issue search warrants, Magistrate Rowlands issued the search warrant needed by the sheriff's office. Over the course of the next two or three years, she issued between 10 and 20 search warrants.

{¶6} Magistrate Rowlands testified that once "the Judge became aware [ ] I was doing search warrants based upon something that came out in the News Journal, I was questioned [ ] as to whether or not I would be covered under insurance for issuing search warrants." As a result, she contacted the Ohio Association of Magistrates, specifically asked them whether their insurance policy covered the issuance of search warrants (they replied it did), and asked for a copy of the policy. Subsequently, Magistrate Rowlands asked the Clinton County Prosecutor's Office to compare the association's insurance policy with the county's insurance policy to see if additional insurance was needed. After the Clinton County Commissioners and the County Administrator received the association's insurance policy from the prosecutor's office, they contacted Magistrate Rowlands and told her she was covered under the county's insurance policy; no further insurance was necessary.

{¶7} Magistrate Rowlands stated that when the sheriff's office contacted her about the first search warrant, the officers were sent to her by the prosecutor's office; every search warrant she issued was reviewed beforehand by the prosecutor's office; and whenever she issued a search warrant, including the one at issue on appeal, she truly believed she had the authority to do so and was acting in good faith.

{¶8} Detective Eastes prepared the search warrant at issue in this case and the accompanying affidavit. Detective Eastes testified that whether a search warrant was issued by a judge or a magistrate, all affidavits and search warrants were prepared the same way; search warrants issued by Magistrate Rowlands were reviewed beforehand by a prosecuting attorney present in the courtroom; other detectives have asked Magistrate Rowlands to issue search warrants; and he has done so when judges were available. He could not recall whether judges were available to sign the search warrant in the case at bar.

{¶9} With regard to the first search warrant issued by Magistrate Rowlands, Detective Eastes testified that before he went to her, he first asked his supervisor whether the magistrate had the authority to issue a search warrant. His supervisor replied he would ask the prosecutor's office. Later on, the supervisor told the detective that Magistrate Rowlands was not insured to sign a search warrant but that once "the County insured that, [ ] she would be able to sign warrants." The supervisor later advised Detective Eastes that Magistrate Rowlands was insured and was able to sign search warrants if available. Detective Eastes testified he never talked to the prosecutor's office regarding Magistrate Rowlands' authority to issue search warrants.

{¶10} Until Magistrate Rowlands' authority to issue a search warrant became an issue in the case at bar, Detective Eastes never questioned her authority to issue search warrants; in fact, he believed she had the authority to issue search warrants, including the search warrant in the case at bar; and based upon that belief, he executed the search warrant at issue in good faith.

{¶11} The state filed a post-hearing brief in which it argued the good faith exception applied; it then filed a supplemental brief in which it argued that even if the search warrant was void, the search was nevertheless authorized without a warrant under R.C. 2933.33 (titled "exigent circumstances authorizing warrantless search of premises used for illegal manufacture of methamphetamine").

{¶12} By entry filed on June 1, 2009, the trial court granted Commins' motion to suppress. The trial court found that (1) Magistrate Rowlands was not legally authorized under Ohio law to issue search warrants; as a result, the search warrant used in the case at bar was void ab initio; (2) the good faith exception did not apply "when legal advice from the prosecuting attorney's office triggered the issuance of the void search warrant;" (3) there was probable cause to issue the search warrant as there was "a substantial basis for the magistrate's conclusion that there was a fair probability that contraband would be found on the premises;" and (4) R.C. 2933.33 did not apply as there were no exigent circumstances presented justifying a warrantless entry into the residence.

{¶13} The state timely appeals, raising one assignment of error:

{¶14} "THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE."

{¶15} The state argues that the trial court erred in granting Commins' motion to suppress because the search warrant was not void, the good faith exception applied, and R.C. 2933.33 applied.

{¶16} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio

App.3d 329, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact, and therefore, is in the best position to resolve factual questions and evaluate witness credibility. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. A reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Bryson* (2001), 142 Ohio App.3d 397, 402. The appellate court then determines, as a matter of law, and without deferring to the trial court's conclusion, whether the trial court applied the appropriate legal standard. Id.

{¶17} The state first challenges the trial court's finding the search warrant was void because it was signed by a magistrate. The state asserts that for a search warrant to be void ab initio, it must lack any signature at all. Because the search warrant was signed by Magistrate Rowlands, it was not void. We disagree.

{¶18} In *State v. Williams* (1991), 57 Ohio St.3d 24, the Ohio Supreme Court held that a search warrant was void ab initio if not signed by a judge prior to a search. Id. at 25. In *State v. Carpenter*, Butler App. No. CA2005-11-494, 2007-Ohio-5790, we likewise held that a search warrant unsigned by a judge was void ab initio. Id. at ¶12. Both *Williams* and *Carpenter* involved an unsigned search warrant. In the case at bar, the search warrant was signed but by a magistrate.

{¶19} As relevant to this appeal, search warrants are issued pursuant to the authority found in R.C. 2933.21 through 2933.25 and Crim.R. 41. R.C. 2933.25 dictates the form to be used for a search warrant and clearly indicates that a judge is to sign it. Likewise, R.C. 2933.21 and Crim.R. 41 both govern search warrants and clearly state that "a judge of a court of record" may issue a search warrant. Neither

provision refers to a magistrate.

{¶20} By contrast, R.C. 2933.23, which governs search warrant affidavits, refers to both a judge and a magistrate: "A search warrant shall not be issued until there is filed with the judge or magistrate an affidavit[.] *** The judge or magistrate may demand other and further evidence before issuing the warrant. If the judge or magistrate is satisfied that grounds for the issuance of the warrant exist or that there is probable cause to believe that they exist, he shall issue the warrant[.]" Likewise, R.C. 2933.231 refers to the act of issuing a search warrant by a judge or magistrate. See, also, R.C. 2933.24 and 2933.241 (both referring to "a judge or magistrate").

{¶21} For purposes of R.C. Chapter 2933, R.C. 2931.01(A) defines "magistrate" as "county court judges, police justices, mayors of municipal corporation[s], and judges of other courts inferior to the court of common pleas." See R.C. 2933.01. In turn, Crim.R. 2 defines "judge" as "judge of the court of common pleas, juvenile court, municipal court, or county court, or the mayor or mayor's court magistrate of a municipal corporation having a mayor's court;" and "magistrate" as "any person appointed by a court pursuant to Crim.R. 19. *'Magistrate' does not include an official included within the definition of magistrate contained in [R.C.] 2931.01*." Crim.R. 2(E), (F). (Emphasis added.)

{¶22} In light of the definition of a magistrate under R.C. 2933.01 and Crim.R. 2(F), it is clear that when used in R.C. 2933.21 through 2933.25, the term "magistrate" exclusively and specifically refers to elected officials who act in a judicial capacity, such as the trial judge here, and not to an appointed official, such as Magistrate Rowlands. It follows that to be valid, a search warrant must be signed by

a judge, and can only be signed by a judge, prior to the search.

{¶23} In the case at bar, the search warrant was signed by Magistrate Rowlands, not by the trial judge. It was therefore void and the trial court properly found it was void.

{¶24} The state next challenges the trial court's finding that the good faith exception did not apply.

{¶25} "The fact that a Fourth Amendment violation occurred – i.e., that a search or arrest was unreasonable – does not necessarily mean that the exclusionary rule applies." *Herrings v. United States* (2009), __ U.S. __, 129 S.Ct. 695, 700. The United States Supreme Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." Id. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Id. at 702.

{¶26} The good faith exception to the exclusionary rule was first recognized by the United States Supreme Court in *Leon*, 468 U.S. 897. The Ohio Supreme Court adopted the exception two years later in *State v. Wilmoth* (1986), 22 Ohio St.3d 251:

{¶27} "The exclusionary rule should not be applied to suppress evidence obtained by police officers acting in objectively reasonable, good faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.

{¶28} "Where the officer's conduct in the course of a search and seizure is

objectively reasonable and executed in good faith, excluding the evidence because the search warrant is found to be constitutionally invalid will not further the ends of the exclusionary rule in any appreciable way." Id. at paragraphs one and two of the syllabus.

{¶29} At its core, the good faith exception recognizes that the purpose of the exclusionary rule, to deter unlawful police conduct, cannot be furthered by excluding evidence seized by an officer who had reasonable grounds to believe the search warrant was properly issued. See *Leon* at 919, 923. Thus, "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Herrings*, 129 S.Ct. at 701; *Leon*, 468 U.S. at 919.

{¶30} We find the trial court improperly declined to apply the good faith exception on the ground the issuance of the search warrant was triggered by the prosecutor's erroneous legal advice. Under *Leon*, the test for the application of the good faith exception to the exclusionary rule is "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon* at 922-923, fn. 23.

{¶31} The trial court's analysis wrongly focused on the prosecutor's legal advice rather than on the police conduct. Detective Eastes testified he never contacted or talked to the prosecutor's office regarding Magistrate Rowlands' authority to issue search warrants; until Magistrate Rowlands' authority to issue a search warrant became an issue in the case at bar, he never questioned her authority to issue search warrants; in fact, he believed she had the authority to issue

search warrants, including the search warrant in the case at bar; and based upon that belief, he executed that search warrant in good faith. The error committed here was not on the part of Detective Eastes (or of the police conducting the search), but rather was an error on the part of Magistrate Rowlands in issuing the search warrant believing she had the authority to do so. See *Wilmoth*, 22 Ohio St.3d at 266, quoting *United States v. Sheppard* (1984), 468 U.S. 981, 990, 104 S.Ct. 3429 (an error of constitutional magnitude may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. The exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of judges). The trial court, therefore, erred in finding that the good faith exception did not apply. See, contra, *United States v. Scott* (C.A.6, 2001), 260 F.3d 512.

{¶32} Finally, the state challenges the trial court's determination that R.C. 2933.33 did not apply. The state asserts that even if the search warrant was invalid, the police officers did not need a search warrant under R.C. 2933.33. In light of our holding regarding the good faith exception, we decline to discuss the applicability of R.C. 2933.33. See App.R. 12(A)(1)(c).

{¶33} In light of the foregoing, we find that the trial court erred in granting Commins' motion to suppress evidence. The state's assignment of error is sustained in part and overruled in part.

{¶34} Judgment affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion and in accordance with the law.

RINGLAND and HENDRICKSON, JJ., concur.