[Cite as *State v. Bernhard*, 2005-Ohio-1052.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2004 CA 66
v.	:	T.C. NO. 03 CR 479
MICHAEL L. BERNHARD	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 11th day of March, 2005.

. . . . . .

JEFFREY D. HUNTER, Atty. Reg. No. 0061364 and ROBERT K. HENDRIX, Atty. Reg. No. 0037351, 61 Greene Street, Xenia, Ohio 45385
Attorneys for Plaintiff-Appellee

DAVID C. GREER, Atty. Reg. No. 0009090 and JAMES P. FLEISHER, Atty. Reg. No. 0059509, 400 National City Center, 6 North Main Street, Dayton, Ohio 45402

and

MARTIN S. PINALES, Atty. Reg. No. 0024570, 105 West Fourth Street, Suite 920, Cincinnati, Ohio 45202
Attorneys for Defendant-Appellant

. . . . . .

DONOVAN, J.

{¶ 1} Appellant, Michael Bernhard, appeals from the May 26, 2004, final

judgment of the Greene County Common Pleas Court sentencing Bernhard to five years imprisonment for committing the third degree felony of Attempted Possession of Marijuana. The trial court also sentenced Bernhard to 11 months on each of the three fifth degree felonies of Possession of Cocaine and 17 months on the fourth degree felony of Possession of Cocaine, with said sentences to be served concurrently with the 5 year sentence for Attempted Possession of Marijuana.

{¶ 2} Bernhard has filed this appeal, raising the following three assignments of error:

{¶ 3} "(1) THE TRIAL COURT ERRED IN OVERRULING BERNHARD'S MOTION TO SUPPRESS BECAUSE THE AFFIDAVIT SUBMITTED BY DETECTIVE TIDD IN SUPPORT OF THE ISSUANCE OF THE WARRANT CONTAINED STALE INFORMATION AND FURTHER FAILED TO INFORM JUDGE GOLDIE OF THE UNDERLYING CIRCUMSTANCES UPON WHICH DETECTIVE TIDD CONCLUDED THAT THE CONFIDENTIAL INFORMANT WAS CREDIBLE AND THAT THE INFORMATION PROVIDED WAS RELIABLE.

{¶ 4} "(2) TRIAL COURT IMPERMISSIBLY MADE ADDITIONAL FINDINGS TO SUPPORT ITS DEVIATION FROM THE STATUTORY SENTENCING GUIDELINE AND EXCEEDING THE MAXIMUM SENTENCE FOR A FIRST TIME OFFENDER, RUNNING AFOUL OF THE HOLDING OF THE UNITED STATES SUPREME COURT IN *BLAKELY V. WASHINGTON*, 159 L.ED.2D 403 (2004).

{¶ 5} "(3) THE TRIAL COURT'S IMPOSITION OF THE MAXIMUM FIVE YEAR TERM OF IMPRISONMENT FOR THE COMMISSION OF THE THIRD DEGREE FELONY DRUG POSSESSION WAS AGAINST THE MANIFEST WEIGHT OF THE

EVIDENCE AND CONTRARY TO THE DICTATES OF R.C. 2929.11 AND 2929.14(C)."

{¶ 6} On Wednesday, July 17, 2002, the Greene County ACE Task Forced raided the house of Bernhard and discovered various amounts of cocaine in four different places and also discovered 118 pounds of marijuana. The operation was headed up by Detective David Tidd who had obtained a warrant to search Bernhard's residence after obtaining confirmation from a confidential source that there was cocaine and marijuana in the residence.

{¶ 7} On September 12, 2003, Bernhard filed a motion to suppress the evidence obtained in the raid of his property, claiming that the search warrant failed to set forth adequate probable cause for the search. The trial court denied the motion on December 15, 2003. On February 26, 2004, Bernhard entered a plea of no contest to five counts of the indictment and the remaining counts were dismissed. Bernhard was sentenced on May 26, 2004, and now appeals.

Appellant's first assignment of error:

{¶ 8} Bernhard argues that the affidavit in support of the search warrant, which permitted the raid of his house, lacked adequate probable cause. We disagree.

{¶ 9} In assessing the adequacy of an affidavit offered to support a request for a search warrant, the role of the magistrate is to make a "practical, common-sense decision whether, given all of 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." *State v. George* (1989), 45 Ohio St.3d 325, paragraph one of the syllabus, citing *Illinois v. Gates* (1983), 462 U.S. 213. This approach is called the

"totality of the circumstances" test. *Id*. In reviewing an affidavit after-the-fact, "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." *George,* 45 Ohio St.3d 325, paragraph two of the syllabus, citing *Gates*, 462 U.S. 213.

{¶ 10} Appellant asserts two arguments in support of his proposition that the search warrant lacked probable cause. First, the appellant asserts that the facts contained in paragraph 2 of Detective Tidd's affidavit were stale and thus insufficient to support a finding of probable cause to search his residence. Specifically, paragraph 2 of the affidavit refers to the possible criminal drug activity of the appellant in 1999. As the trial court noted, and we agree, the facts in paragraph 2 standing alone would be insufficient to provide probable cause to search the premises on July 17, 2002. However, the Magistrate was justified in considering them under the "totality of the circumstances" in determining that there was probable cause of present ongoing criminal activity and that a search of the premises was justified.

{¶ 11} Appellant also asserts that Detective Tidd's affidavit was defective because it failed to demonstrate the confidential informant's reliability and veracity. The appellant compares the present situation with that in the case of *State v. Klosterman*, which was decided by this court. (May 24, 1995) 1995 WL 324624. In *Klosterman*, we held that the single affidavit from the Detective in the case failed to support probable cause required to permit a search of the residence under investigation. *Id*. at *3. Specifically, we found that the affidavit was defective because it lacked information about whether the confidential informant who had observed the illegal criminal activity

had provided reliable information in the past. *Id*. at *2. However, in *Klosterman*, we further stated that if two paragraphs of the affidavit could be attributed to the same confidential informant, one describing an informant as "reliable and credible" and the other stating that a confidential informant has observed criminal activity, then the requirements of particularity and reliability would be met. *Id*. at *3. However, the language of the affidavit in *Klosterman* was too vague to permit the inference that the informant who was described as having provided reliable information in the past was the same informant who had witnessed the criminal activity for which a search warrant was being obtained.

{¶ 12} In the present case, however, we find that there is sufficient reliable and particular information to support the magistrate's decision finding probable cause to search the appellant's residence. In Detective Tidd's affidavit it is clear that the confidential source who observed illegal narcotics in the appellant's residence on the day the search warrant was issued, is the same confidential source that the Greene County ACE Task Force has used for the "past several years" and from which they have received "credible and reliable information" which "has been verified as truthful." (Tidd Aff. p. 4-5). Unlike in *Klosterman*, in the present case the affidavit contained information that the confidential source who had observed the drugs was also a reliable source of information about criminal activity in the past. Therefore, we find that the affidavit provided adequate probable cause for the magistrate to issue a warrant to search the appellant's residence. Consequently, the trial court properly denied appellant's motion to suppress the evidence seized in the search and appellant's first assignment of error is overruled.

Appellant's second assignment of error:

{¶ 13} Bernhard argues that the statutory maximum sentence of five years which he received was in violation of the United States Supreme Court's decision in *Blakely v. Washington*. Because this issue was not raised below we find this argument moot.

{¶ 14} Although the issue of the applicability of the *Blakely* decision to Ohio sentencing law is currently the subject of much debate in the Ohio appellate courts, this particular case does not allow for a discussion of whether the *Blakely* decision is applicable to Ohio law. Because the appellant failed to raise this constitutional challenge in the trial court, he is prevented from doing so now for the first time on appeal. *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Although the constitutional waiver doctrine is discretionary, we find plain error was not committed in this case and that consideration of the constitutional challenge in this case is not warranted by the rights and interests of the parties involved in the case. *See In re: M.D.* (1988), 38 Ohio St.3d 149. Accordingly, appellant's second assignment of error is without merit and is overruled.

Appellant's third assignment of error:

{¶ 15} Bernhard argues that the imposition of the statutory maximum sentence of five years was against the manifest weight of the evidence. We disagree.

{¶ 16} An argument that a trial court's decision is against the "manifest weight of the evidence" requires "[t]he court, reviewing the entire record, [to] weigh[] the evidence and all reasonable inferences, consider[] the credibility of witnesses and determine[] whether in resolving conflicts in the evidence, the jury clearly lost its way." *State v. Tompkins* (1997), 78 Ohio St.3d 380, 388, quoting *State v. Martin* (1983), 20 Ohio

App.3d 172, 175. As the appellant in this case entered a plea of no contest the only issue is whether the judge clearly lost his way in sentencing the appellant to the maximum five year term provided for by statute.

{¶ 17} In this particular case the appellant has failed to file with this court the transcripts of the plea and sentencing hearings. As a result, they are not part of the record on appeal and we must presume the regularity of the lower court proceedings. *See State v. Hamlett* (Jan. 7, 2004), 2004 WL 35538. As there is no record for this court to review and the trial court properly complied with the dictates of R.C. 2929.14(B) and made a finding that the "shortest prison term will demean the seriousness of the defendant's conduct" and "will not adequately protect the public from future crime" we can find no error in the trial court's decision. Therefore, appellant's third assignment of error is overruled.

{¶ 18} In sum, all three of appellant's assignments of error are overruled and the judgment of the trial court will be AFFIRMED.

. . . . . .

FAIN, J. and GRADY, J., concur.

Copies mailed to:

Jeffrey D. Hunter
Robert K. Hendrix
David C. Greer
James P. Fleisher
Martin S. Pinales
Hon. Stephen A. Wolaver