

[Cite as *State v. Richardson*, 2009-Ohio-6018.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 08CA0077
vs. : T.C. CASE NO. 08CR215
MICHAEL RICHARDSON : (Criminal Appeal from
Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 13th day of November, 2009.

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GRADY, J.:

{¶1} Defendant, Michael Richardson, appeals from his
conviction and sentence for grand theft, R.C. 2913.02(A)(1),
(B)(1), and possession of criminal tools, R.C. 2923.24(A).

{¶2} On March 4, 2008, a Honda motorcycle owned by Benjamin

Coil was stolen from a parking garage at The Greene shopping mall in Beavercreek. A video surveillance camera recorded two men loading the motorcycle into the bed of a pick-up truck and then driving off. A side mirror was shown being broken from the motorcycle when it was loaded into the truck. The truck appeared to be a white, gold, and black 1980's Chevrolet.

{¶3} Beavercreek police disseminated copies of the video to two area television stations, which broadcast the video when they reported the theft. Viewers were asked to report any information they had about the crime. Subsequently, three separate anonymous tips were received by local law enforcement agencies, identifying Defendant Richardson as one of the two thieves shown in the video.

The other man was identified as Charles Ross, Defendant's step-son.

{¶4} Police obtained a warrant to search Defendant's home. No evidence was seized, but while officers were there, Defendant's former spouse appeared on the scene and told officers that the truck used in the theft of the motorcycle was at Defendant's daughter's home in Harrison Township.

{¶5} Officers went to the Harrison Township location and found a pick-up truck matching the make and model of the truck used in the theft, except that it had recently been painted black. When officers were in Defendant's home, they had seen cans of black

spray paint. A side-mirror from a motorcycle, matching the description of one that had broken off Benjamin Coil's motorcycle when it was stolen, was found in the bed of the pick-up truck, along with a clipboard and sheaf of papers connecting Defendant to his residence address.

{¶ 6} Defendant Richardson was arrested and charged with grand theft and possession of criminal tools. He filed a motion to suppress evidence, which the trial court denied. Defendant was convicted following a jury trial. He was sentenced to consecutive prison terms of seventeen months for the grand theft offense and eleven months for possession of criminal tools. He filed a notice of appeal from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT ERRED BY ALLOWING THE STATE OF OHIO TO PROCEED ON A SEARCH WARRANT THAT WAS BASED SOLELY ON TIPSTER INFORMATION AND WITHOUT PROBABLE CAUSE IN VIOLATION OF THE OHIO AND U.S. CONSTITUTIONS AND APPLICABLE CASE LAW."

{¶ 8} The Fourth Amendment to the Constitution of the United States provides that "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."

{¶ 9} A valid search warrant may issue only upon a showing

to the issuing authority that that there is probable cause for the search. *United States v. Harris* (1977), 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723. The required showing must be made by an affidavit presented to a judge. Crim.R. 41(C). If the affidavit and any additional sworn testimony presented fails to demonstrate sufficient grounds for the probable cause finding, a search warrant issued on the affidavit and testimony is invalid.

{¶ 10} A search conducted pursuant to an invalid warrant is the equivalent of a warrantless search, which is per se unreasonable and therefore illegal. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. The fruits of an illegal search are subject to suppression by the court in which criminal charges arising from the search and seizure are filed. See, e.g., *Weeks v. United States* (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652.

However, "[w]hen police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance on the subsequently invalidated search warrant.'" *Herring v. United States* (2009), _____ U.S. _____, 129 S.Ct. 695, 701, 172 L.Ed.2d 496, 505, quoting *United States v. Leon* (1984), 468 U.S. 897, 911, 104 S.Ct. 3405, 82 L.Ed.2d 677.

{¶ 11} On review of a denial of a motion to suppress evidence, while we defer to the trial court's findings of fact if they are

supported by competent, credible evidence, we do not likewise defer to that court's decisions of law, including whether probable cause is shown from the facts the court found. However, both the trial court reviewing a motion to suppress and an appellate court reviewing an order denying the motion must give great deference to the conclusion of the judge who issued a warrant that probable cause was shown to support its issuance. *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527.

{¶ 12} Defendant filed a motion and supplemental motion to suppress all evidence obtained pursuant to the warrant to search his home, arguing that the warrant was invalid because it was not issued on a showing of probable cause. (Dkt. 21, 26). The trial court conducted a hearing on the motion, and subsequently overruled Defendant's motion on a finding that the affidavit demonstrates "probable cause to believe that stolen property was in (sic) the premises which was subject to the search." (Dkt. 37).

{¶ 13} The record does not indicate that any of the physical evidence the State introduced at trial was seized in the search of Defendant's home. Neither have we been presented a transcript of the suppression hearing showing what evidence, if any, police seized from Defendant's home. Defendant's reasonable expectation of privacy in the premises notwithstanding, if his conviction was not based on any evidence police illegally seized from his home,

any invalidity in the warrant is moot, and any error in denying Defendant's motion to suppress evidence that was seized was harmless.

{¶ 14} We believe that the search did yield some evidence that the State used to convict Defendant. Officers testified that they observed several cans of black spray paint in Defendant's home.

The State offered that evidence to connect Defendant to the truck that was used to commit the theft and that had recently been painted black. Their testimony is evidence constituting fruits of the search that was performed. Therefore, the issue of the validity of the search warrant is properly before us.

{¶ 15} Defendant argues that the warrant authorizing the search of his home was invalid, being issued on an affidavit that failed to demonstrate probable cause for the search. Defendant contends that the affidavit was based wholly on hearsay from unknown sources and failed to demonstrate their veracity or the basis of their knowledge for the information they provided.

{¶ 16} The warrant to search Defendant's residence was issued on the basis of an affidavit by Detective Rodney Curd, which states:

{¶ 17} "1. The Affiant, Det. Rodney Curd, is employed by the Beavercreek Police Department and has been so for the past twenty (20) years. Detective Curd is currently assigned to the Beavercreek Police Department Investigations Division and has been

so from March 6, 2006 to present. Prior to that time Det. Curd was assigned to patrol duties. Detective Curd has attended training regarding organized crime and theft investigations. Detective Curd has also attended training seminars on apprehension of drug traffickers, and drug investigations.

{¶ 18} "Detective Curd has extensive prior experience in conducting investigations related to theft, organized crime and other related criminal offenses that has resulted in successful prosecution of persons directly and indirectly involved.

{¶ 19} "2. On March 4, 2008 a theft offense occurred in the City of Beavercreek involving a 2003 Honda CBR600 Motorcycle. The suspects involved in the theft were captured on video tape which reveals a description of the suspects and suspect vehicle used to commit the theft. This video is in color and shows two male suspects loading the stolen motorcycle in the bed of their pickup truck. The suspect's pickup truck is a white/gold and black Chevy truck. One of the suspects appears to be a b/male wearing a dark colored jacket. The second suspect appears to be a light skinned male wearing a dark colored waist length work jacket wearing a lime green colored 'hoodie,' with a dark colored stain on the back of the hood. During this initial stage of the investigation the identities of the suspects were unknown.

{¶ 20} "3. On March 10, 2008 this Affiant provided the video

footage mentioned in paragraph two and investigative facts to the media, requesting the information shown on the local television news to assist in obtaining additional information on the identity of the suspect. On March 10, 2008 the local news aired the video to the general public as requested.

{¶ 21} "4. On March 11, 2008 this Affiant received an anonymous 'tip' that the suspects involved in the theft resided on Evansville Avenue in Harrison Township. This anonymous 'tipster' will hereinafter be referred to as CC#1. CC#1 stated that the suspect's pickup used to commit the theft was parked at the suspect's residence. CC#1 phoned the Beavercreek Police Department Tip line and provided this information.

{¶ 22} "5. On March 11, 2008 this Affiant received information from Beavercreek Officer Chad Lindsey. Officer Lindsey completed a Beavercreek 'telephone tip sheet' report as a result of information Beavercreek dispatch received from the Montgomery County Sheriff's Department. The Montgomery County Sheriff's Office related information they received from an anonymous caller hereinafter referred to CC#2. CC#2 identified the motorcycle theft suspects as Michael Richardson and Charlie Roth. CC#2 further advised the suspects lived in the 3500 block of Evansville Avenue in Harrison Township. CC#2 further advised that the suspects were currently in the process of painting the vehicle.

{¶ 23} "6. On March 11, 2008 this Affiant contacted Detective Sollenberger from the Montgomery County Sheriff's Office. Detective Sollenberger indicated he was familiar with Michael Richardson as being involved in prior theft offenses. Detective Sollenberger provided this Affiant with identifying information for Michael Richardson's including his social security number and date of birth. Detective Sollenberger was not familiar with Charlie Roth, however, he did indicate that Michael Richardson did have a son by the name of Charlie Ross. Detective Sollenberger provided this Affiant with identifying information for Charlie Ross including but not limited to his social security number and date of birth.

{¶ 24} "7. On March 11, 2008 this Affiant checked Michael Richardson and Charlie Ross through LEADS (Law Enforcement Automated Data System). The LEADS information indicates an address for Michael Richardson as 3545 Evansville Ross as 3553 Evansville Avenue Dayton, Ohio. The LEADS information indicates that Charlie Ross has a prior Breaking and Entering arrest and conviction from June 2007. The LEADS information indicates Michael Richardson has a prior arrest for receiving stolen property from September 2007. This Affiant checked the Montgomery County Criminal Justice Information System and learned that Michael Richard was convicted of receiving stolen property in Montgomery

County on January 30, 2008 and is currently on probation.

{¶ 25} "8. On March 12, 2008 this Affiant and Detective Craig Polston conducted surveillance at 3545 and 3553 Evansville Avenue Harrison Township. Initially no vehicles were observed in the driveway at 3545 Evansville Avenue, however, while conducting surveillance this Affiant observed a grey Chevy Celebrity bearing Ohio registration EFX-5343 pull into the driveway. This Affiant observed the occupants exit the vehicle and entered the residence of 3545 Evansville. One of the occupants observed by this Affiant matched the description of Charlie Ross. This Affiant checked Ohio registration EFX-5343 through LEADS and learned the registration is under the name of Brandy Richardson. Affiant received information indicating Brandy is the daughter of Michael Richardson.

{¶ 26} "9. On March 13, 2008 this Affiant received additional anonymous information from the Beavercreek Police Department 'tip line.' This anonymous caller will hereinafter be referred to as CC#3. CC#3 indicated that they observed the local media coverage and could positively identify the motorcycle theft suspects as Michael Richardson and Charlie Ross. CC#3 indicated they were an acquaintance of the suspects and knew Michael Richardson resided at 3545 Evansville Avenue and Charlie Ross resided at 3553 Evansville Avenue in Harrison Township. CC#3 further indicated

that the suspect's truck used to steal the motorcycle was owned by Michael Richardson and was located at his residence. CC#3 indicated that the stolen motorcycle was currently located in the kitchen at 3553 Evansville Avenue. CC#3 advised that the suspects had recently repainted their pickup truck an unknown color. CC#3 indicated these suspects have previously been involved in similar theft offenses.

{¶ 27} "10. Affiant knows from his prior training and experience that theft suspects commonly repaint vehicles used to commit theft offenses to help conceal their identities from law enforcement.

{¶ 28} "11. On January 11, 2007 Detective Craig Polston obtained a subpoena for Dayton Power and Light subscriber information at 3545 and 3553 Evansville Avenue. These records indicate the DP&L subscriber for 3545 Evansville Avenue is Terri L. Ross further showing the account was activated on March 4, 1996.

The DP&L information provided indicates that Carole Arnett has the bill information for this address forwarded to 111 Worman Drive Union, Ohio.

{¶ 29} "12. This Affiant knows from his training and experience that individuals commonly use the names of family members, landlords and other associates to apply for DP&L service."

{¶ 30} Defendant argues that Detective Curd's affidavit is

insufficient to demonstrate probable cause because it relied on unverified hearsay, preventing the issuing magistrate from making an independent conclusion that the information the three tipsters provided was credible.

{¶ 31} No formalized showing of credibility is required where the magistrate can conclude from the information provided, in its totality, that a fair probability exists that contraband will be found in the place to be searched. *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527. In deciding that question, "the 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." *State v. George* (1989), 45 Ohio St.3d 325, paragraph one of the syllabus.

{¶ 32} A tipster's basis of knowledge concerning the crime he reports comes into question when he reports facts about the crime that implicate a suspect. The first two tipsters did not report facts about the crime. They instead reported that Defendant Richardson was one of the two men shown in the video committing the crime, and that he lived in Harrison Township in Montgomery County. The second tipster also identified the other man shown

in the video as Charlie Ross, who was identified as Richardson's son by Detective Sollenberger. The third tipster also identified both men from the video and reported their addresses, and said that the stolen motorcycle was in the kitchen at Richardson's home.

All three tipsters connected Richardson to the truck shown in the video, and two of them said it had recently been repainted.

{¶ 33} The basis of knowledge of the three tipsters was the video that each saw, from which they identified Defendant Richardson. From that, it is reasonable to infer that each knew Richardson. The fact that Richardson is shown in the video connects him directly with the theft of the motorcycle. The third tipster also connected Richardson to the theft of the motorcycle more specifically, stating that the motorcycle was in Defendant's kitchen. Police verified that Richardson lived at that location.

The other suspect two of the tipsters identified, Charles Ross, was seen entering Richardson's house. Police also learned that both Richardson and Ross had criminal records related to theft offenses.

{¶ 34} Reviewing courts are directed to give great deference to an issuing magistrate's finding of probable cause. *Illinois v. Gates*. From the totality of the evidence before her, we believe that the judge who signed the warrant could find a fair probability that evidence of the theft of the motorcycle would be found in

Richardson's house. Therefore, the trial court did not err when it denied Defendant's motion to suppress evidence.

{¶ 35} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 36} "APPELLANT'S CONVICTION AND SENTENCING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 37} A weight of the evidence argument challenges the believability of the evidence; which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 10 Ohio App.3d 172, 175:

{¶ 38} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 39} Defendant argues that his convictions are against the manifest weight of the evidence because police surveillance of his residence failed to indicate that the stolen motorcycle or the gold, black and white pick-up truck used to steal it was at

Defendant's residence or in his possession. Furthermore, Brandy Richardson, Defendant's daughter, testified that from the end of January or beginning of February 2008 until March 14, 2008, the gold, black and white pick-up truck was always in her possession and no one else drove it. However, on cross-examination, Brandy Richardson admitted that from the end of February 2008 until March 14, 2008, the pick-up truck was at her aunt's house to be tuned up and painted, and she did not see it or have it in her possession during that period of time. The offenses in this case occurred on March 4, 2008.

{¶ 40} The evidence presented at trial demonstrates that on January 10, 2008, Kenneth Hisle sold his Chevy pick-up truck to Defendant. This truck was distinctive in that it was gold, black and white, and had a missing gas cap cover. On March 4, 2008, Benjamin Coil's motorcycle was stolen from a parking garage at the Greene shopping mall. The theft was captured by a video surveillance camera and shows two men loading the motorcycle into the bed of a gold, black and white pick-up truck that was missing a gas cap cover. During the theft one of the motorcycle's mirrors was broken off as the motorcycle was lifted into the truck bed.

{¶ 41} Robert Bowman, Perry Township Police Chief and Director of Security at the Greene shopping Mall, issued a BOLO alert to neighboring police agencies regarding the stolen motorcycle and

the distinctive pick-up truck used to steal it. On March 10, 2008, Lieutenant John Huber of the Dayton Police Department saw a pick-up truck that matched Bowman's description in the parking lot of an IGA store at Prescott and North Gettysburg streets in Dayton. When Huber ran the plates, he learned that the truck was registered to Defendant's daughter, Brandy Richardson. Huber also saw a man with the truck whom he later identified as Defendant.

{¶ 42} On March 14, 2008, police conducted a search of Defendant's residence at 3545 Evansville Avenue in Harrison Township. They discovered several cans of black spray paint. As police were concluding their search of Defendant's residence, Defendant's ex-wife, Kim Cassel, stopped by to check on her children. She told police the pick-up truck in question was at 7564 Welbaum Road in Clay Township, Brandy Richardson's residence, and had been repainted black. Police went to that location and found the truck there. It had been painted black, and the missing gas cap cover had been replaced. The mirror broken off Coil's motorcycle was found in the bed of the truck.

{¶ 43} The day after police searched Defendant's residence, Defendant contacted Robert Bowman by phone. When informed that he had been caught on video surveillance stealing the motorcycle with his truck and that police now had that truck, Defendant did not deny involvement in the theft. Instead, he left the impression

that he would return the motorcycle.

{¶ 44} One of Defendant's friends, James Hodges, testified that in April 2008, after he had posted bail for Defendant and Defendant was released from jail, Defendant admitted to Hodges that he stole the motorcycle to raise money to get his tow truck out of impound.

{¶ 45} Marion Alexander testified at trial that in March of 2008, Defendant's son, Charles Ross, worked at Dayton Automotive Service. In early March of 2008, Ross brought in a motorcycle with a tampered and broken locking mechanism. Ross asked Alexander if he knew how to get an anti-tamper screw out of an emission lock cylinder in order to make a new key. Alexander questioned Ross to learn whether the motorcycle was stolen. Ross replied that the motorcycle was not from around there. When Ross did not deny that the motorcycle was stolen, Alexander ordered him to remove it from the premises. Alexander confirmed that the clothing worn by one of the men in the surveillance video matched the uniform Ross wore in his employment with Dayton Automotive Service.

{¶ 46} Circumstantial evidence and direct evidence possess the same probative value. *State v. Jenks* (1991), 61 Ohio St.3d 259.

From the combination of circumstantial and direct evidence presented at trial, the jury could reasonably conclude that Defendant committed the offenses charged. The jury did not lose its way in choosing to believe the State's version of these events,

which it had a right to do. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶ 47} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the jury lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice occurred. Defendant's conviction for theft of a motor vehicle and possession of criminal tools is not against the manifest weight of the evidence.

{¶ 48} Defendant's second assignment of error is overruled. The judgment of the trial court will be affirmed.

FROELICH, J., concurs separately.

WOLFF, J., concurs.

(Hon. William H. Wolff, Jr., retired from the Second District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

FROELICH, J., concurring:

{¶ 49} The affidavit for the search warrant related that two unknown callers said that the defendant and another individual committed the thefts and lived on Evansville, a fact that was then verified by a computer check; LEADS also reflected a prior criminal

record. A third anonymous tip said the stolen motorcycle was at the residence on Evansville.

{¶ 50} Who were these callers (assuming they were not the same person)? How did they know that the defendant committed the theft or where the motorcycle was located?

{¶ 51} The former requirement was that a search warrant's affidavit contain averments from which the judge could conclude that the informants are credible and the information is reliable, *Aguilar v. Texas* (1964), 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 732; *Spinelli v. United States* (1969), 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637. This was modified by *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527. In *Gates*, the court held that police corroboration of the tip, together with the substance of the tip, presented the "fair probability" of criminal activity at the location to be searched that probable cause requires.

{¶ 52} For example, in *State v. Lane*, Greene App. No. 07 CA 14, 2008-Ohio-1605, the police received anonymous information concerning a methamphetamine lab; an investigator went to the public property next to the suspected location and observed equipment that in his experience is used in the manufacture of methamphetamine. We affirmed the denial of the motion to suppress based on the totality of circumstances. Here there was no

corroboration of criminal involvement, merely that the two individuals who the tipster(s) said resided on a particular street apparently did live there, and in one situation (CC#2) the information went from a call to the Montgomery County Sheriff's Office to the Beavercreek dispatcher to Officer Lindsey and then to the affiant, Detective Curd and misnamed one of the suspects.

{¶ 53} I would find that there was insufficient probable cause for the issuance of the warrant, but that testimony concerning the spray cans was admissible based on the good faith exception.

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