[Cite as *State v. Cole*, 2009-Ohio-6131.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23058
Plaintiff-Appellee	:	
	:	Trial Court No. 2007-CR-3997/2
v.	:	
	:	(Criminal Appeal from
TIFFANY COLE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 20th day of November, 2009.

. . . . . .

MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ANTHONY S. VANNOY, Atty. Reg. #0067052, 130 West Second Street, Suite 1600, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant Tiffany Cole appeals from her conviction and sentence, following a no-contest plea, to one count of Having a Weapon Under a Disability. Cole contends that the trial court erred when it overruled her motion to suppress evidence obtained as a result of the search of her apartment, pursuant to a

search warrant.

{¶ 2} We agree with Cole and the trial court that the fact that an individual – not Cole – was found driving a vehicle containing illegal drugs, and that there was evidence that this individual was a resident in her apartment, without more, is insufficient to establish probable cause to believe that evidence of criminal activity might be found within Cole's apartment. But we agree with the State and the trial court that the closeness of this issue, and its novelty in Ohio, results in the searching police officers having relied, in good faith, upon the search warrant issued by a neutral and detached magistrate, who had been advised of the facts.

{¶ 3} Consequently, the trial court correctly determined that the evidence should not be excluded, under the good-faith-exception doctrine established in *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, ___ L.Ed.2d___, and the judgment of the trial court is Affirmed.

I

{¶ 4} Dayton Police Officer Dan Zweisler stopped a vehicle being driven by Daniel Jackson for a minor traffic violation while on patrol one evening in September, 2007. Zweisler noticed a strong odor of marijuana coming from the vehicle. Zweisler's drug-sniffing dog, Zorn, alerted to the driver's side door of the vehicle. A search of the vehicle resulted in the seizure of substantial quantities of marijuana, and drug paraphernalia.

{¶ 5} Also found in the vehicle were: a Vectren and Dayton Power and Light bill for 9941 White Court Apt. K, in Miamisburg, Ohio; a Northtown furniture receipt

made out to Daniel Jackson with a delivery address of 9441 White Pine Court Apt. K; a Time Warner Cable bill showing 9441 White Pine Court Apt. K as the address; and Montgomery County Assistance paperwork in the name of Tiffany Cole, residing at 9941 White Pine Court Apt. K.[1]

{¶ 6} Detective Rodney Barrett prepared an affidavit for a warrant to search 9441 White Pine Court Apt. K, in Miamisburg, for evidence of sales of illegal drugs, and submitted it to Miamisburg Municipal Court Judge Robert Messham. Judge Messham signed the warrant, which was executed the same day as the stop of Jackson. The apartment was later determined to have been in Cole's name. The search resulted in the seizure of a handgun, several digital scales, two bags of marijuana, three large plastic bags with marijuana residue, a vacuum sealer with marijuana residue on it, a plastic cup and a bowl with marijuana residue on them, and substantial cash.

{¶ 7} Cole was arrested and charged with Having a Weapon While Under a Disability and Possession of Drug Paraphernalia.

{¶ 8} Cole moved to suppress the evidence, contending that it was obtained as the result of an unlawful search of her apartment. Following a hearing, the trial court overruled Cole's motion to suppress. Thereafter, Cole pled no contest to the charge of Having a Weapon While Under a Disability, and the Possession of Drug Paraphernalia charge was dismissed. Cole was found guilty, and was sentenced

[1]The record contains no explanation of the discrepancies in the street numbers in the addresses. Specifically, there is nothing to indicate whether these may represent errors in the documents themselves, or errors in Barrett's affidavit, or whether there may be some other reason for the discrepancies.

accordingly.

{¶ 9} From her conviction and sentence, Cole appeals.

II

{¶ 10} Cole's sole assignment of error is as follows:

{¶ 11} "THE TRIAL COURT ERRED IN FINDING THAT THE SEARCH OF 9441 WHITE PINE COURT WAS SUPPORTED BY THE 'GOOD FAITH' EXCEPTION TO THE EXCLUSIONARY RULE."

{¶ 12} The trial court, in the person of the Honorable Michael L. Tucker, analyzed the issues as follows:

{¶ 13} "**Probable Cause Standard**

{¶ 14} "The determination of probable cause under the Fourth Amendment is a fluid, common-sense, and non-technical process. *Brinegar v. U.S.* (1949), 338 U.S. 16, 69 S.Ct. 1302. This concept was conveyed by the *Brinegar* Court as follows:

> "In dealing with probable cause . . ., as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar* at 175.

{¶ 15} "This practical, common-sense determination is based upon the totality of circumstances, and, in the end, the decision is premised upon whether there is a fair probability contraband or other evidence of a crime will be discovered in the place to be searched. *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317; *State v. George* (1983), 45 Ohio St.3d 325, 544 N.E.2d 640. A fair probability, it is noted, is not to be confused with the greater weight of the evidence or any other mathematical

formulation. *Illinois v. Gates*, supra.

{¶ 16} "The initial important factor in this case is whether, based upon the totality of circumstances presented to Judge Messham, there was a fair probability evidence of the crimes of drug trafficking and/or drug possession would, on September 20, 2007, be found at 9144 [sic] White Pine Court, Apartment K. *Sgro v. U.S.* (1932), 287 U.S. 206, 53 S.Ct. 138. This Court has not found any Ohio cases which discuss the specific issue presented, but two non-Ohio cases are helpful in the analysis of this quite interesting issue.

{¶ 17} "The first case is *State* [of] *Washington v. Thein* (1999), 138 Wn.2d 133, 977 P.2d 582. In this case the Washington Supreme Court reviewed whether probable cause to search a defendant's home was present when the supporting affidavit, in essence, outlined how the facts were consistent with how drug dealers normally operate. The affidavit also included the statements that 'it is a common practice for drug traffickers to store at least a portion of their drug inventory . . . in their . . . residences.' *Thein* at 139. The affidavit further indicated drug traffickers also routinely maintain records relating to drug trafficking in their homes.

{¶ 18} "The *Thein* court, though noting there is a dissenting view (citing *United States v. Pitts* (9th Cir., 1993), 6 F.3d 1366, 1369, where the Court stated 'in the case of drug dealers evidence is likely to be found where the dealers live[.]'), ruled the generalizations contained in the affidavit were not sufficient to allow the issuing judge to conclude there was a fair probability evidence of drug trafficking would be discovered in the defendant's home. The *Thein* court, instead, concluded the material presented to a judge must establish a specific factual basis (as opposed to

generalities) from which the judge is able to conclude there is a fair probability that evidence of the suspected illegal activity will be discovered. Without such a factual basis, the necessary 'reasonable nexus is not established . . . .' Id. at 147. The *Thein* Court, without discussion of the good faith exception, ordered suppression.

{¶ 19} "The second case, *State of Arkansas v. Yancey*, generated an intermediate appellate decision (71 Ark. App. 280, 30 S.W.3d 117) and an Arkansas Supreme Court decision (345 Ark. 103, 44 S.W.3d 315). The facts in *Yancey* are close to the facts presented in this case, and the analysis of each court, though reaching different results, is helpful. In this case an Arkansas Game and Fish Officer observed the defendants (Mr. Cloud and Mr. Yancey) in a remote, wooded area watering suspected marijuana plants. The officer followed the individuals back to the highway and observed the individuals drive away in a Jeep. The officer followed the Jeep, and, ultimately, stopped the Jeep in front of Cloud's home. Cloud and Yancey told the officer they had been frogging, but the officer's observations (no frogging equipment – whatever such equipment may be – dry hip boots, and the presence of what appeared to be watering jugs) were inconsistent with a frogging expedition. The officer, at this point, allowed Cloud and Yancey to proceed.

{¶ 20} "The officer, the next day and with the help of the local Sheriff's department, traveled to the location where the officer had observed Cloud and Yancey's watering activity. Three marijuana plants were removed, with surveillance being maintained on the remaining plants. When, in three days, no one appeared, the remaining plants were harvested. The Fish and Game officer, thereafter, prepared an affidavit in order to obtain a search warrant for each defendant's home.

The affidavit chronicled the above indicated facts, and, additionally, noted that Mr. Cloud, over a several year period, had been convicted for possession of 'controlled substances.' 71 Ark. App. 285 (quoting affidavit). A municipal judge, with this information, issued a search warrant for each defendant's home. Marijuana was found at each home triggering, of course, the indictments which brought the case to the courts for review.

{¶ 21} "The intermediate appellate court (71 Ark. App. 280) ruled that probable cause to search the homes existed. The court's rationale for this conclusion is summarized as follows:

> "We are persuaded by the reasoning set forth in cases from the Ninth Circuit cited by the State. In *U.S. v. Pitts*, 6 F.3d 1366 (9th Cir. 1993), the court of appeals held that a 'reasonable nexus' does not require direct evidence that the items listed as the objects of the search are on the premises to be searched. The magistrate must only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit. 6 F.3d. at 1369. A magistrate may 'draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense,' *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9tdh Cir. 1986), and the magistrate may also rely on the conclusions of experienced law-enforcement officers regarding where evidence of a crime is likely to be found. *U.S. v. Terry*, 911 F.3d 272 (9th Cir. 1990). In the case of drug dealers, 'evidence is likely to be found where the dealers live.' Id. at 275; *United States v. Angulo-Lopez*, supra.
>
> "Other circuits have followed the Ninth Circuit's reasoning. In *United States v. Feliz*, 182 F.3d 82 (1st Cir. 1999), cert. denied, 528 U.S. 1119, 120 S.Ct. 942, 145 L.Ed.2d. 819 (2000), the First Circuit held that there was a sufficient showing of probable cause to issue a search warrant for the appellant's residence based upon drug sales made away from the residence. In so holding, the court stated:
>
> "The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather 'can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime] . . . '

> "182 F.3d. at 88, citing *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979).
>
> "Likewise, the Seventh Circuit has held that warrants may be issued even in the absence of direct evidence linking criminal objects to a particular site. See *U.S. v. Lamon*, 930 F.2d. 1183 (7th Cir. 1991); *U.S. v. Malin*, 908 F.2d. 163 (7th Cir. 1990), abrogation on other grounds recognized in *United States v. Monroe*, 73 F.3d 129 (7th Cir. 1995). In *Lamon*, the court of appeals upheld a search warrant for appellant's principal residence for drugs and drug-related items, even though there was no evidence that appellant had ever sold drugs out of that location. In *Malin*, the search warrant for appellant's house was upheld based upon the fact that marijuana was seen growing in the appellant's yard. In finding probable cause to search the house, the *Malin* Court held that probable cause deals in probabilities that are the 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Malin*, 908 F.2d. at 165-66 (quoting *Brinegar v. United States*, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949), reh'g denied, 338 U.S. 839, 94 L.Ed. 513, 70 S.Ct. 31 (1949)). 71 Ark. App. 286-287.

{¶ 22} "The Arkansas Supreme Courtd (345 Ark. 103) took the opportunity to review the intermediate appellate court's decision. This review triggered, at least from the defendants' perspective, a 'bitter-sweet' conclusion. The Arkansas Supreme Court concluded the search warrant for each defendant's home was not supported by probable cause, but, under the good faith exception, suppression of the marijuana was not appropriate.

{¶ 23} "The Arkansas Supreme Court, after discounting any reliance upon Mr. Cloud's criminal drug history, summarized its probable cause conclusion as follows:

> "The critical element in a reasonable search is not that the owner of the property is suspected of a crime but that there is reasonable cause to believe that specific things to be searched for and seized are located on the property to which entry is sought. *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d. 525 (1978). Accord *Gates v. Illinois*, 462 U.S. at 238 (a fair probability that contraband or evidence of a crime will be found in a particular place). See also *United States v. Malin*, 908 F.2d 163 (7th Cir. 1990). The affidavit must provide facts by direct or circumstantial evidence that there is reasonable cause to believe the specific things sought are located on the

property to which entry is sought.

> "Here, one might argue it is reasonable to infer that persons who are watering marijuana plants in amounts allowing a statutory inference of intent to deliver must be processing it somewhere, and from that inference it might seem reasonable to then infer that their homes are the most likely place for processing. General experience of law enforcement would likely bear out this deduction. However, the test is not whether it is reasonable to believe items to be seized might be found in the place to be searched, but rather whether there is evidence presented to support reasonable cause to believe the items to be seized would likely be found in the place to be searched. There is nothing in Evan's affidavit [the Fish and Game Officer] as to the maturity of the marijuana plants or whether the plants were ready to be harvested for processing. This case is further complicated because there is no direct evidence that there is any marijuana beyond that seized in the woods. The eighteen marijuana plants were seized and removed to the sheriff's office prior to the affidavit and the search warrant being issued. Thus, how may one then infer where marijuana or other evidence of crime might reasonably be kept if there is no evidence in the beginning to infer any exists?
>
> " . . .
>
> "The State is asking the court to hold that a conclusory allegation in an affidavit for a search warrant that an individual sells drugs would be probable cause to issue a search warrant for that individual's home because drugs are likely to be found where drug dealers live. *See U.S. v. Pitts*, supra. The rule the State proposes would expand our court's opinions and rule that probable cause to search a certain location must be based on a factual nexus between the evidence sought and the place to be searched. This we will not do.
>
> "We hold that the affidavit fails to supply sufficient evidence to satisfy Rule 13.1 and our case law. This state requires 'probable cause to believe that the place to be searched contains evidence of the crime.' *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996) (citing *Johnson v. State*, 270 Ark. 247, 604 S.W.2d 927 (1980), cert. denied, 450 U.S. 981, 67 L.Ed. 816, 101 S.Ct. 1517 (1981)). 345 Ark. at 116-117.

{¶ 24} "The defendants, accordingly, won the probable cause battle, but, as indicated, lost, under the good faith exception, the suppression war. The Arkansas Supreme Court, that is, ultimately concluded that while probable cause was lacking to sanction the search of either defendant's home, the officers relied in objective good faith upon the issuing judge's probable cause determination making

suppression inappropriate.

{¶ 25} "**Application of Probable Cause Standard**

{¶ 26} "This court, based upon the above discussion and in the absence of Ohio case law, binding or otherwise, must decide which probable cause model is appropriate. It is concluded the better approach is the approach articulated by the Washington and Arkansas Supreme Courts. This Court, that is, concludes probable cause to search an individual's home for evidence of drug trafficking is not present based solely upon evidence of the individual's possession of a significant quantity of drugs or other evidence of drug trafficking. Instead, in order to conclude there is a fair probability that drugs or other evidence of drug trafficking is located in the individual's home, there must exist some additional evidentiary link between the suspected drug activity and the suspect's home before the probable cause determination may be made.

{¶ 27} "The contrary approach, if taken to its logical conclusion, would allow a probable cause determination allowing a search of a person's home in virtually every situation where there is evidence the individual had engaged in drug trafficking. This, in this writer's opinion, is neither appropriate nor tenable.

{¶ 28} "It is, therefore, concluded the search warrant issued to search 9441 White Pine Court Apartment K was issued on less than probable cause evidence of drug possession or drug trafficking would be discovered in the apartment. Detective Barrett's Affidavit is simply not sufficient to create the necessary evidentiary link between Mr. Jackson's possession of marijuana in excess of 200 grams and a fair probability that evidence of drug possession or trafficking was located at Mr.

Jackson's probable home, 944 [sic] White Pine Court Apartment K. This conclusion, however, does not end the analysis because there must still be a determination of whether the officers relied in objective good faith upon Judge Messham's issuance of the search warrant.

{¶ 29} "**Good Faith Exception**

{¶ 30} "The good faith exception is triggered when an officer objectively and reasonably relies upon a search warrant issued by a reviewing judge although it is, ultimately, determined the warrant was issued on less than probable cause. If the good faith exception is triggered, the evidence discovered as a result of the authorized search will not be suppressed. *U.S. v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405. The rationale for the good faith exception to suppression is that the exclusionary rule is designed to deter unlawful police behavior, and the deterrence goal is not advanced when the police objectively and in good faith rely upon a judge's probable cause determination. Id. Ohio, of course, has adopted the good faith exception within the context of a search warrant issued on less than probable cause. *State v. George* (1989), 45 Ohio St.3d. 325, 544 N.E.2d 640.

{¶ 31} "Objective, good faith reliance by a presumably reasonably trained police officer is the key to whether the exception is triggered. The good faith inquiry is, generally, to be confined to a determination of whether, based upon the four corners of the affidavit, the 'officer's reliance [upon the judge's probable cause determination] was objectively reasonable.' *State v. Klosterman* (1996, Greene App.), 114 Ohio App.3d 327, 333, 683 N.E.2d. 1000. The *Klosterman* Court was faced with a search warrant issued to search a defendant's apartment based upon

the defendant's fifteen year old marijuana trafficking conviction and additionally upon hearsay information provided by informants without any indication of the informants' reliability. The *Klosterman* Court concluded, under these facts, that 'a reasonably well-trained officer would have known that the information contained in [the] affidavit did not establish probable cause and could not have formed an objectively reasonable belief that it did.' Id. at 334. The *Klosterman* Court, accordingly, determined the good faith exception was not triggered.

{¶ 32} "It is concluded, turning to the facts of this case, that the officers objectively and in good faith relied upon Judge Messham's probable cause determination. This conclusion is reached because one cannot expect a reasonably well trained police officer to realize the information contained in Detective Barrett's Affidavit did not support a probable cause determination where, as here, the courts, under similar facts, are divided upon the probable cause decision. It is, accordingly, concluded that suppression, though the search warrant was issued on less than probable cause, is not subject to suppression." (Brackets in original.)

{¶ 33} We agree with both Judge Tucker's analysis and his conclusions. Furthermore, we cannot readily find any way to improve upon them. Therefore, we adopt them as the opinion of this court. Cole's sole assignment of error is overruled.

III

{¶ 34} Cole's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

GRADY and FROELICH, JJ., concur.

Copies mailed to:

Mathias H. Heck
Johnna M. Shia
Anthony S. Vannoy
Hon. Michael Tucker