[Cite as *State v. Lewis*, 2011-Ohio-199.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2010 CA 00024
	:	
	:	
BOBBY LEWIS	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Stark County Court of Common Pleas Case No. 2009 CR 1712
JUDGMENT:	Affirmed In Part and Reversed Remanded In Part
DATE OF JUDGMENT ENTRY:	January 18, 2011

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P.J.

{¶1} Appellant, Bobby Lewis, appeals a judgment of the Stark County Common Pleas Court convicting him of two counts of having weapons under disability (R.C. 2923.13(A)(3)), one count of trafficking in cocaine (R.C. 2925.03(A)(2)(C)(4)(c)), and one count of possession of cocaine (R.C. 2925.11(A)(C)(4)(b)) upon a plea of no contest. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On November 17, 2009, appellant was indicted by the Stark County Grand Jury on two counts of having weapons under disability, one count of trafficking in cocaine and one count of possession of cocaine. According to the bill of particulars filed by the state, on October 19, 2009, at 915 6th Street N.W., Apartment 2, Canton, Ohio, appellant was found in possession of a .38 caliber Smith and Wesson revolver and a .9mm Highpoint semiautomatic rifle with a full magazine. Appellant had a prior felony drug conviction. The bill of particulars alleged that appellant was preparing cocaine for shipment and possessed cocaine.

{¶3} Appellant filed a motion to produce and unseal the search warrant and the affidavits in support thereof, a motion to suppress evidence found in the search of his apartment and a motion to suppress his statements to police.

{¶4} The court held a hearing on the motions on December 30, 2009. At the hearing, Vice Unit Detective Jo Ellen Hartzell testified that a confidential informant (CI) was used to purchase cocaine from appellant. The CI was searched before and after the buy, given money to purchase drugs from appellant, and observed by the vice unit during the drug buys. The CI purchased crack cocaine from appellant on October 9,

2009 and October 15, 2009. Hartzell testified that the CI had a criminal record and this was the first time police had used this CI, but she did not want to disclose the name of the CI out of concern for the CI's safety. As a result of the controlled buys, the vice unit obtained a search warrant for appellant's apartment from Judge John Poulos of the Canton Municipal Court. The search warrant was based on an affidavit signed by Det. Hartzell and sealed at the request of the Canton City Prosecutor. Upon executing the search warrant, the police found drugs, firearms and drug paraphernalia in appellant's apartment.

{¶5} Appellant was present during the execution of the warrant. He was arrested and handcuffed. He was then read his *Miranda* warnings by Sgt. Bryan McWilliams. Appellant was taken to the Canton City police station where he gave a tape-recorded statement about 20 minutes after he was read his *Miranda* warnings. He was not re-*Mirandized* at the station. In this statement appellant admitted he was selling cocaine in order to pay the rent and buy things for his children. He also admitted that he had purchased the firearms.

{¶6} Following the hearing, the court found that the municipal court had probable cause to issue the search warrant. The court overruled appellant's motion to unseal the affidavit, finding that there was no necessity to reveal the CI's identity and the state had an interest in protecting the identity of the CI. The court also overruled the motion to suppress appellant's statement, finding the *Miranda* warnings given to him 20 minutes earlier at his apartment were sufficient.

{¶7} Appellant then changed his plea to no contest and was convicted on all charges. He was sentenced to three years on each count, to be served concurrently for a total of three years. He assigns three errors on appeal:

{¶8} "I. THE TRIAL COURT ERRORED (SIC) WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION TO PRODUCE AND UNSEAL SEARCH WARRANT AND AFFIDAVITS IN SUPPORT OF APPLICATIONS FOR WARRANT TO SEACRH (SIC).

{¶9} "II. THE TRIAL COURT ERRORED (SIC) WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION TO SUPPRESS WHERE THE WARRANT WAS ISSUED WITHOUT PROABABLE (SIC) CAUSE.

{¶10} "III. THE TRIAL COURT ERRORED (SIC) WHEN IT FAILED TO SUPPRESS THE STATEMENT MADE BY DEFENDANT-APPELLANT WHEN HE WAS NOT PROPERLY ADVISED OF, NOR DID HE WAIVE, HIS *MIRANDA* RIGHTS."

I

{¶11} In his first assignment of error, appellant argues that the court erred in overruling his motion to unseal the affidavit used to procure the search warrant of his apartment.

{¶12} On December 3, 2009, appellant filed a motion to produce and unseal the search warrant affidavits in support of the warrants, arguing that based on *Franks v. Delaware* (1978), 438 U.S. 154, he is entitled to attack the validity of the affidavit supporting a search warrant, and in order to attack the warrant he necessarily needed to know the contents of the affidavit. The State argued at the hearing on the motion that

the affidavit should remain sealed to protect the identity of the confidential informant. The State presented the following testimony of Det. Hartzell in support of its claim:

{¶13} "Q. And you have concerns about releasing information about the CI due to his or her safety?

{¶14} "A. That's correct.

{¶15} "Q. And that's based on your experience and other experiences of the officers?

{¶16} "A. Yes." Tr. 9.

{¶17} Ultimately the court overruled the motion, finding on the record at the hearing and later incorporated by reference into the written judgment entry overruling the motion:

{¶18} "Based on the representations of the State and what the Court has heard here today the Court is satisfied that there is no basis for divulging the indentify of the confidential informant, that he is not needed for purposes of the - - determining whether probable cause existed for the issuance of the search warrant and is not needed for certainly subsequent what was obtained as a result of the search." Tr. 22.

{¶19} The State argues that the identify of an informant must only be revealed to a criminal defendant when the testimony of the informant is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to a criminal charge. *State v. Williams* (1983), 4 Ohio St. 3d 74, 75, 446 N.E.2d 779, syllabus. The State argues that disclosure of the CI's name was not necessary for preparation for a suppression hearing, particularly when disclosure would put the informant in harm's way. It appears from the findings of the trial court that the

court reviewed appellant's motion to unseal the affidavit under the standard set forth in *Williams* for release of the identity of the confidential informant.

{¶20} However, appellant's motion did not seek the identity of the informant, but solely asked for the affidavit and the warrant to be unsealed. Federal courts have found a Fourth Amendment right to examine the affidavit that supports a warrant:

{¶21} "The Court believes that the Fourth Amendment right to be free of unreasonable searches and seizures includes the right to examine the affidavit that supports a warrant after the search has been conducted and a return has been filed with the Clerk of Court pursuant to Fed.R.Crim.P. 41. It is not, however, an unqualified right. As is true with other constitutional rights it may be overridden when it is shown that precluding access is 'essential to preserve higher values and is narrowly tailored to serve that interest.' *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984). Thus, the right of access may be denied only where the government shows (1) that a compelling governmental interest requires the materials be kept under seal and (2) there is no less restrictive means, such as redaction, available. Clearly, the fact that there is an on-going criminal investigation could provide a compelling governmental interest. Cf. *Baltimore Sun*, 886 F.2d at 64. Other examples of compelling governmental interests which might, in an appropriate case, justify the extraordinary act of sealing warrant materials after the underlying search has been conducted include the presence of information in a supporting affidavit gleaned from a court ordered wire-tap that has yet to be terminated, or information that could reveal the identity of confidential informants whose lives would be endangered. Sealing may be appropriate under such circumstances if redaction is not feasible." *In re*

Search Warrants Issued August 29, 1994(S.D. Ohio 1995), 889 F. Supp. 296, 299. Accord, *In re Search Warrants Issued on April, 26, 2004*(D. Maryland 2004), 353 F. Supp.2d 584; United States v. Oliver (4th Cir. 2000), 208 F.3d 211.

{¶22} In the instant case, the trial court did not consider whether the state had a compelling governmental interest in protecting the identity of the CI sufficient to override appellant's right to the affidavit. Further, the trial court did not consider less restrictive means, such as redacting the name of the CI, despite the state's representation at the hearing that redaction was a possibility:

{¶23} "However, if the Court feels that in the interest of justice that portions should be unsealed, we would ask at least we redact the portions that would allow anyone to determine who that confidential informant is. I think that specific details regarding the buy still allow defense counsel to argue regarding probable cause but that would still protect the CI's identity." Tr. 19.

{¶24} The trial court erred in denying the motion to unseal the affidavit on the basis that appellant had not demonstrated a need for the identity of the CI rather than determining whether the State had shown a compelling interest in protecting the identity of the CI. We cannot find as a matter of law that the State has shown a compelling interest in protecting the identity of the CI, as the record reflects merely a general statement that police are concerned about the safety of the CI without any specific details underlying that concern from which we can determine whether such concern rises to the level of a compelling state interest. Further, without the affidavit we cannot determine if redaction of information which could lead to disclosure of the identity of the CI is possible.

{¶25} The first assignment of error is sustained.

II

{¶26} In his second assignment of error, appellant argues that the court erred in finding probable cause to issue the warrant for the search of his apartment. Based on our ruling in assignment of error one that the court erred in overruling the motion to unseal the affidavit without consideration of the factors discussed above, the second assignment of error is premature. In the event the trial court gives appellant access in whole or in part to the affidavit, appellant's motion to suppress may need to be reconsidered, as appellant could then raise an attack to the sufficiency of the affidavit which he was prevented from doing by the court's ruling.

III

{¶27} In his third assignment of error, appellant argues the court erred in overruling the motion to suppress his statement to police. Appellant does not dispute the fact that a *Miranda* warning was given at his apartment. However, he argues that because of the lapse of time of 20 minutes and the change in location to the police station, his *Miranda* warnings had become stale.

{¶28} In order for an accused's statement to be admissible at trial, police must have given the accused a *Miranda* warning if there was a custodial interrogation. *Miranda v. Arizona* (1966), 384 U.S. 436, 471, 86 S.Ct. 1602. If that condition is established, the court can proceed to consider whether there has been an express or implied waiver of *Miranda* rights. *Id.,* at 476, 86 S.Ct. 1602.

{¶29} In *Berghuis v. Thompkins* (2010), 130 S.Ct. 2250, the U.S. Supreme Court found no *Miranda* violation where the suspect made a statement nearly three hours after receiving his Miranda warning:

{¶30} "If Thompkins wanted to remain silent, he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to rewarn suspects from time to time. Thompkins' answer to Helgert's question about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver." Id. at 2263.

{¶31} Appellant argues that the change in location rendered the Miranda warnings stale, relying on *State v. Roberts* (1987), 32 Ohio St.3d 225. In *Roberts*, the Ohio Supreme Court applied a totality of the circumstances test and found that the warnings given earlier had gone stale at the time the defendant made incriminating statements:

{¶32} "The totality of the circumstances test is explained by the Supreme Court of North Carolina in *State v. McZorn* (1975), 288 N.C. 417, 219 S.E.2d 201. The following criteria are set forth:

{¶33} "* * * (1) [T]he length of time between the giving of the first warnings and subsequent interrogation, * * * (2) whether the warnings and the subsequent interrogation were given in the same or different places, * * * (3) whether the warnings were given and the subsequent interrogation conducted by the same or different

officers, * * * (4) the extent to which the subsequent statement differed from any previous statements; * * * [and] (5) the apparent intellectual and emotional state of the suspect. * * *" (Citations omitted.) *Id.* at 434, 219 S.E.2d at 212. See, also, *State v. Myers* (Me.1975), 345 A.2d 500; *State v. Artis* (1981), 304 N.C. 378, 283 S.E.2d 522.

{¶34} "Applying these standards to the case *sub judice,* we note that Roberts was given warnings at the time of arrest (approximately two hours prior to talking to Fuqua), and that the record does not establish whether those warnings were given in the context of interrogation. Second, the prior warnings were given at Roberts' girlfriend's home while the subsequent interrogation took place at the county jail. Third, the warnings were given by police officers, whereas the interrogation was conducted by a probation officer (having a prior relationship with the defendant Roberts). Thus, the warnings given at the time of arrest fail on the criteria necessary to satisfy the totality-of-circumstances test." Id. at 232-233.

{¶35} In the instant case, the time of arrest was only 20 minutes prior to appellant's statement to police. While the subsequent interrogation was at a different location than the place where the warnings were given, appellant was in wrist restraints at the time the warnings were given. The interrogation at the station was conducted by Det. Hartzell, not by a probation officer or other person having a prior relationship with appellant. The trial court did not err in finding that under the totality of the circumstances, appellant's *Miranda* warnings had not gone stale due to the 20 minute time delay and change in location from appellant's apartment to the police station.

{¶36} The third assignment of error is overruled.

{¶37} The judgment of the Stark County Common Pleas Court is affirmed as to the judgment overruling the motion to suppress appellant's statement to police. The judgment overruling appellant's motion to unseal the affidavit is reversed. This cause is remanded to the trial court with instructions to reconsider the motion to unseal the affidavit under the legal standard as set forth in this opinion, and in the event the trial court finds a compelling interest in protecting the identity of the confidential informant used in this case, whether redaction is an appropriate less restrictive means than sealing the affidavit to protect appellant's Fourth Amendment right to access to the affidavit.

By: Edwards, P.J.

Gwin, J. and

Wise, J. concur

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JUDGES

JAE/r0907

[Cite as *State v. Lewis*, 2011-Ohio-199.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BOBBY LEWIS	:	
Defendant-Appellant	:	CASE NO. 2010 CA 00024

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed in part and reversed and remanded in part. Costs assessed 50% to appellee and 50% to appellant.

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JUDGES