[Cite as *State v. Kadri*, 2017-Ohio-604.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DUANE A. KADRI Defendant-Appellant	JUDGES: Hon. Patricia A. Delaney, P.J. Hon. W. Scott Gwin, J. Hon. William B. Hoffman, J. Case No. 2016 AP 06 0036 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2015 CR 01 01 0016
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 1, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MICHAEL J. ERNEST Assistant Prosecuting Attorney for Tuscarawas County, Ohio 125 East High Avenue New Philadelphia, Ohio 44663	BRANDON J. HENDERSON JUSTIN M. WEATHERLY Henderson, Mokhtari & Weatherly Co., L.P.A. 3238 Lorain Avenue Cleveland, Ohio 44113

Hoffman, J.

{¶1} Defendant-appellant Duane A. Kadri appeals the March 18, 2016 Judgment Entry entered by the Tuscarawas County Court of Common Pleas denying his motion to suppress evidence. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 11, 2015, Sergeant Mike Hickman of the Uhrichsville Police Department presented a judge of the Tuscarawas County Court of Common Pleas with a search warrant affidavit attesting to alleged facts to demonstrate probable cause to enter and search the premises at 506 North 2nd Street, Dennison, Tuscarawas County, Ohio 44621. Specifically, Sgt. Hickman averred in the affidavit he executed a traffic stop on January 11, 2015. The driver was identified as Robert Whitman. Sgt. Hickman noticed a strong odor of burnt marijuana and raw marijuana emanating from the vehicle. Whitman admitted he had been smoking pot, but stated nothing else illegal was in the vehicle.

{¶3} Sgt. Hickman performed a K-9 sniff of the vehicle with his K9 unit. The K9 alerted on both the driver's side door and the front passenger door. A subsequent search of the vehicle yielded 2 ½ pounds of marijuana in a black trash bag, located on the passenger side floor board. Whitman was arrested and transported to the Uhrichsville Police Department.

{¶4} Sgt. Hickman later testified at the suppression hearing he informed Whitman, if he [Whitman] identified the source of the contraband, he [Sgt. Hickman] would speak with the prosecutor about lessening the charges.

{¶5} Whitman gave Sgt. Hickman consent to search his residence, where an additional large amount of marijuana was found, approximately 7 pounds.

{¶6} Sgt. Hickman's affidavit to secure the search warrant averred, in part:

> 8. Whitman then disclosed he buys 8 pounds of marijuana at a time from Duane Kadri, who lives at 506 N.2d St., Dennison, Ohio.
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> 9. He has been dealing with Kadri for over two years and Kadri always has large amounts of marijuana in his garage.
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> 10. Whitman picked up the marijuana that was seized as part of a deal where he picked up 8 pounds of marijuana from Kadri. Whitman was to sell the marijuana and return the proceeds to Kadri. Kadri would sell a pound of marijuana to Whitman for $1200.00 and Whitman would then resell the marijuana for $2200.00/pound.
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> 11. When Whitman picked up the 8 pounds of marijuana approximately a week ago, he witnessed many pounds of marijuana in Kadri's garage in cardboard boxes, triple beam scales, other storage containers, U.S. currency, baggies, and other drug paraphernalia in Kadri's garage;
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> 12. Additionally, Whitman indicated that these drug transactions are usually arranged via cell phone. Further, [Sgt. Hickman the undersigned] notes that Kadri has been making nearly continuous calls to Whitman since he has been in custody;

> 13. Finally, [Sgt. Hickman the undersigned] notes that law enforcement has gathered information that Duane Kadri is a major drug trafficker in the area.

{¶7} A judge of the Tuscarawas County Court of Common Pleas issued the search warrant.

{¶8} On August 20, 2015, Appellant was charged with one count of trafficking in marijuana, a felony of the third degree, in violation of R.C. 2925.03; and one count of possession of marijuana, a felony of the fifth degree, in violation of R.C. 2925.11.

{¶9} On November 20, 2015, Appellant filed a motion to suppress evidence arguing a lack of probable cause and that the search warrant affidavit was invalid. The motion proceeded to hearing on January 7, 2016. At the suppression hearing, Sgt. Hickman testified he informed Whitman he could help himself out if he provided more information as to where he got the marijuana. Tr. at 25. Sgt. Hickman told Whitman he was facing felony charges, and Sgt. Hickman could talk to the prosecutor and possibly have his charges lowered. Tr. at 28.

{¶10} On March 18, 2016, the trial court overruled the motion to suppress.

{¶11} On June 6, 2016, Appellant entered a plea of no contest to the charges. Via Judgment Entry of the same date, the trial court found Appellant guilty of the charges in the indictment, and sentenced Appellant to one year of community control sanctions, seventy-five hours of community service and a six month driving suspension.

{¶12} Appellant appeals, assigning as error:

{¶13} I. THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS FOR AN INVALID WARRANT AFFIDAVIT.

{¶14} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning,* 1 Ohio St.3d 19 (1982); *State v. Klein,* 73 Ohio App.3d 486 (4th Dist.1991); *State v. Guysinger,* 86 Ohio App.3d 592 (4th Dist.1993). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams,* 86 Ohio App.3d 37 (4th Dist.1993). Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry,* 95 Ohio App.3d 93 (8th Dist.1994); *State v. Claytor,* 85 Ohio App.3d 623 (4th Dist.1993); *Guysinger.*

{¶15} Appellant maintains the search warrant affidavit fell short of establishing probable cause as the knowledge and veracity of the informant, Whitman, was not established, the information was stale, and based on the totality of the circumstances the State failed to establish probable cause to issue the warrant. Appellant further asserts the

affidavit contained a "bare bones," false and misleading statement, knowingly or recklessly included by Sgt. Hickman, averring Appellant was a "known drug dealer."

{¶16} Appellant argues the search warrant affidavit falls short of establishing probable cause as Sgt. Hickman did not specifically attest to Whitman's veracity or establish the basis of knowledge from past experiences with Whitman to demonstrate Whitman's reliability.

{¶17} In *State v. Haynes*, 25 Ohio St.2d 264 (1971), the Ohio Supreme Court held,

> Those cases, taken together, require that the issuing magistrate be given sufficient information to allow him, as a neutral and detached officer, to make an independent judgment that probable cause exists to warrant the belief that the contraband is on the premises sought to be searched. Where the affidavit upon which the warrant is to be issued is based upon hearsay information obtained from an informant, such affidavit, if that is all that is before the magistrate, must show two things: First, the underlying circumstances which will enable the magistrate to independently judge the validity of the informant's conclusion that the narcotics were on the premises; second, sufficient information to show that the informant was credible or his information was reliable. *Ventresca*, supra, points out, however, that in determining such matters the courts should not be hypertechnical, but should use common sense.
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> ***

> Although the fact that the informant has previously supplied reliable information carries some weight, the determination of reliability or credibility cannot be based solely upon that fact. To so hold would necessarily do away with informants since no one could ever qualify as a reliable informant the first time. In determining the reliability of the information, the magistrate must consider the facts presented to him, and if such facts would cause a reasonable man to believe there are grounds for believing that the contraband is on the premises sought to be searched, he is justified in believing in the reliability of the informant. It must be remembered that the probable cause necessary to justify the issuance or a search warrant requires less facts than are necessary for conviction, and the amount and method of proof is less strict. *Jones v. United States* (1960), 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697.
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> In this type of case, the court is concerned with probable cause, not certainty, and this extends to the determination of the reliability of the informer. It is not necessary to show uncontrovertible proof that the informer is reliable, but only that such information would cause a neutral and detached officer to believe there is sufficient substance to the statement to justify a search of the premises.

{¶18} In this case, Whitman provided his name, address and relationship to Appellant. Appellant notes Whitman had a motive to fabricate information in exchange for the lessening of his charges. However, Whitman made inculpatory statements regarding

his own role as a drug trafficker. Whitman informed Sgt. Hickman he has been purchasing marijuana from Appellant for two years, and Appellant often kept large quantities of marijuana at the location. He stated he had been at the location approximately one week prior purchasing eight pounds of marijuana. If Whitman's information to Sgt. Hickman proved false, it would likely have proved detrimental to resolving his own charges. Therefore, while Whitman may well have had a motivation to provide information, a neutral and detached magistrate could find the motivation was to provide accurate information supporting a finding of reliability sufficient to justify a search pursuant to the standard set forth in *Haynes*, supra.

{¶19} In the search warrant affidavit, Sgt. Hickman avers, "law enforcement has gathered information that Defendant is a major drug trafficker in the area."

{¶20} At the suppression hearing, Sgt. Hickman testified,

> A. How his name became associated with it? I don't know. And again, I'm the drug guy at Uhrichsville, I have a K9, I keep in touch with a lot of LEAD Task Force members, different drug officers through the agencies and over the course of the 16 years I've been in law enforcement again Mr. Kadri's name is not new. How they've developed that information, sir, I don't know, but I can tell you I've heard his name multiple times throughout the years as being a major drug trafficker. Again, I don't know how they developed that information.

Tr. at 42.

{¶21} The Ohio Supreme Court held in *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989):

> The totality-of-the-circumstances test of *Illinois v. Gates, supra,* is concisely set forth in that decision at 238–239, 103 S.Ct. at 2332:
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> " * * * 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. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for * * * conclud[ing]' that probable cause existed. *Jones v. United States,* 362 U.S. at 271[, 80 S.Ct. 725, 736, 4 L.Ed.2d 697]. * * * "
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> The *Gates* decision provides considerable elaboration as to the "fair probability" standard applicable to the magistrate's probable cause determination. We find the following passage particularly instructive:
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> " * * * '[T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation * * *. It imports a seizure made under circumstances which warrant suspicion' [quoting from *Locke v. United States* (1813), 11 U.S. (7 Cranch) 339, 348, 3 L.Ed. 364]. More recently, we said that 'the *quanta* * * * of proof' appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar,* 338 U.S., at 173, 69 S.Ct. at 1309. Finely tuned standards such

as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. * * * [I]t is clear that '*only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.*' *Spinelli,* 393 U.S., at 419[, 89 S.Ct. at 590–591]. See Model Code of Pre–Arraignment Procedure § 210.1(7) (Prop. Off. Draft 1972); 1 W. LaFave, Search and Seizure § 3.2(e) (1978)." (Emphasis added.) *Illinois v. Gates, supra,* at 235, 103 S.Ct. at 2330.

It is also important to note that the totality-of-the-circumstances analysis of *Gates* not only addresses the original probable cause determination of the magistrate but carefully limits the role of a reviewing court as well to that of simply " * * * ensur[ing] that the magistrate had a 'substantial ** basis for * * * concluding' that probable cause existed. * * *" *Id.* at 238–239, 103 S.Ct. at 2332. In this regard, we find the following language especially pertinent to the case before us:

"* * * [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' *Spinelli, supra,* at 419[, 89 S.Ct. at 591]. * * *" *Gates, supra,* at 236, 103 S.Ct. at 2331.

George, supra.

{¶22} In *State v. Taylor,* 174 Ohio App.3d 477, 882 N.E.2d 945, 2007-Ohio-7066, the First District Court of Appeals held where there is not competent credible testimony demonstrating the officer made a false or intentionally misleading statement with a reckless disregard for the truth, the misstatement does not render the warrant affidavit invalid. Id.

{¶23} We find the statement made by Sgt. Hickman that law enforcement had "gathered information" Appellant was a major drug trafficker in the area was misleading. Sgt. Hickman's testimony at the suppression hearing fails to demonstrate information had been gathered, but merely that Appellant's name was repeatedly mentioned as being a major drug trafficker. However, even if the statement was false and misleading, we find there was sufficient information apart from the statement provided in the search warrant affidavit to demonstrate probable cause. Whitman disclosed to Sgt. Hickman he buys 8 pounds of marijuana from Appellant at a time, and provided Appellant's address. Whitman disclosed he has been dealing with Appellant for over two years, and Appellant always has large amounts of marijuana and other paraphernalia in his garage. Whitman told Sgt. Hickman he picked up 8 pounds of marijuana, less than a week prior, from Appellant and was to return to Appellant with the proceeds. Whitman stated, when he picked up the marijuana, less than a week prior Appellant had "many pounds of marijuana in [his] garage in cardboard boxes, triple beam scales, other storage containers, US currency, baggies and other drug paraphernalia" in the garage. Sgt. Hickman also noted Appellant made continuous calls to Whitman, while Whitman was in custody, and Whitman stated he and Appellant arranged their transactions via cell phone.

{¶24} In determining whether probable cause exists, the proper test is the "totality of the circumstances." *Illinois v. Gates*, 462 U.S.213, (1983). Probable cause exists when there is a fair probability, given the totality of the circumstances, contraband or evidence of a crime will be found in a particular place. Id.

{¶25} In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978), the Supreme Court held,

> (a) To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. The allegation of deliberate falsehood or of reckless disregard must point out specifically with supporting reasons the portion of the warrant affidavit that is claimed to be false. It also must be accompanied by an offer of proof, including affidavits or sworn or otherwise reliable statements of witnesses, or a satisfactory explanation of their absence. (reference omitted.)
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> (b) If these requirements as to allegations and offer of proof are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required, but if the remaining content is insufficient, the defendant is entitled under the Fourth and Fourteenth Amendments to a hearing. (reference omitted.)
>
> (c) If, after a hearing, a defendant establishes by a preponderance of the evidence that the false statement was included in the affidavit by the

> affiant knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit. (reference omitted.)

{¶26} If the misleading statement is excluded, we find there is sufficient other information in the search warrant to conclude probable cause existed to issue the warrant.

{¶27} Finally, Appellant maintains the information provided by Sgt. Hickman in the affidavit was "stale."

{¶28} In *State v. Ingold,* the Tenth District held,

> An affidavit in support of a search warrant must present timely information and include facts so closely related to the time of issuing the warrant as to justify a finding of probable cause at that time. *State v. Hollis* (1994), 98 Ohio App.3d 549, 554, 649 N.E.2d 11, citing *State v. Jones* (1991), 72 Ohio App.3d 522, 526, 595 N.E.2d 485. "'Whether the proof meets this test must be determined by the circumstances of each case.'" *Id.,* quoting *Coyne v. Watson* (S.D.Ohio 1967), 17 Ohio Misc. 47, 282 F.Supp. 235, 237. There is no arbitrary time limit that dictates when information becomes stale. *Id.* The test for staleness is whether the alleged facts justify the conclusion contraband is probably on the person or premises to be searched at the time the warrant issues. *State v. Prater,*

> Warren App. No. CA2001–12–114, at ¶ 12, citing *State v. Floyd* (Mar. 29, 1996), Darke App. No. 139787. If a substantial period of time has elapsed between the commission of the crime and the search, the affidavit must contain facts that would lead the judge to believe the evidence or contraband are still on the premises before the judge may issue a warrant. *Yanowitz,* supra, at 147, 426 N.E.2d 190.

10th Dist. No. 07AP-648, 2008-Ohio-2303.

{¶29} We find the information contained in the affidavit was not stale as the informant purchased marijuana from Appellant at the residence routinely for over two years. The information was less than a week old, and there was a fair probability contraband would still be present on the premises.

{¶30} Appellant's assignment of error is overruled.

{¶31} The March 18, 2016 Judgment Entry entered by the Tuscarawas County Court of Common Pleas is affirmed.

By: Hoffman, J.

Delaney, P.J. and

Gwin, J. concur