[Cite as *State v. Riley*, 2009-Ohio-3493.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-07-1379

Appellee — Trial Court No. CR-2006-3669

v.

Vincent D. Riley — **DECISION AND JUDGMENT**

Appellant — Decided: July 17, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael E. Narges, Assistant Prosecuting Attorney, for appellee.

Nicole Khoury, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Vincent D. Riley, appeals the judgment of the Lucas County Court of Common Pleas. After a jury trial, Riley was convicted of possession of crack cocaine, a violation of R.C. 2925.11(A) and (C)(4)(e) and a felony of the first degree, and trafficking in crack cocaine, a violation of R.C. 2925.03(A)(2) and (C)(4)(f) and a felony of the first degree. He was sentenced to four years incarceration for each count, ordered

to be served concurrently. For the reasons that follow, we reverse the trial court's judgment.

{¶ 2} Riley's convictions stemmed from the following facts adduced at trial and the hearing on Riley's motion to suppress. On July 14, 2005, around 11:00 p.m., Toledo police officers executed a search warrant for Riley's apartment. Detective DeWitt participated in the search by monitoring the rear perimeter of the multi-unit apartment building. DeWitt testified that as one team of officers entered the building, he observed "an arm being pulled back into the apartment" from a window. The window was located over an alley which separated the building from another building by "two arm lengths."

{¶ 3} Riley was the only individual in the apartment at the time the warrant was executed. Once Riley's apartment had been entered and was secured, DeWitt found the apartment's bathroom window opened. Inferring that it was the same window from which he had seen an arm protrude, he looked out of the window, across the alley, and saw an object on the flat roof of the neighboring building. A search of that roof yielded a bag of what was later determined to be 45 individually wrapped pieces of crack cocaine. Crack cocaine residue was found on the top of a television set in the apartment. Riley was not charged with possession of the residue, but only with possession and trafficking for the cocaine found on the neighboring rooftop. Officers also inventoried an electric scale, five surveillance cameras, and a pellet gun.

{¶ 4} Riley was indicted for the offenses on December 7, 2006. From then until February 7, 2007, he requested two continuances, filed a motion to suppress, and two

discovery motions. On February 7, 2007, Riley's counsel requested a competency evaluation. On March 7, 2007, Riley was found incompetent to stand trial and rehabilitation was ordered. On April 5, 2007, Riley filed a motion to dismiss. On April 18, 2007, at a second competency hearing, Riley was found competent to stand trial.

{¶ 5} On May 9, 2007, Riley requested another continuance. On May 30, 2007, he requested another continuance. On June 8, 2007, a hearing was held on Riley's motion to dismiss, discovery motion, and motion to suppress. The trial court denied each motion.

{¶ 6} On June 20, 2007, Riley's counsel filed another motion for a competency evaluation; his counsel stated that he believed that Riley's mental state had deteriorated. The same day, Riley's counsel filed a motion to withdraw.

{¶ 7} New counsel was appointed on July 11, 2007. On that date, Riley requested a continuance and waived time constraints. Five days before trial, Riley's counsel filed another motion for a competency evaluation. The trial date of August 27, 2007, was continued at Riley's request and he was referred for a second competency evaluation. On September 26, 2007, at a competency hearing, Riley was found competent. The same day, his second appointed counsel withdrew and a third attorney was appointed.

{¶ 8} On October 11, 2007, Riley's third counsel filed a motion to dismiss, alleging that the state violated Riley's right to a speedy trial and that the state caused an unreasonable pre-indictment delay. As to the second ground, Riley argued that in the 17

months between the execution of the search warrant and his indictment, his apartment building was demolished, resulting in the loss of witnesses and the ability to prepare adequate photographs of the building.

{¶ 9} On October 29, 2007, the trial court denied Riley's motion to dismiss. After a jury convicted him of both offenses, Riley filed the instant appeal and now asserts two assignments of error for review:

{¶ 10} "The trial court committed prejudicial error by denying the motion to dismiss of the defendant/appellant, as the time delay in prosecution was both unreasonable and prejudicial and thus, he was denied due process as guaranteed by the Ohio and United States Constitutions.

{¶ 11} "The trial court committed prejudicial error by denying the motion to suppress of the defendant/appellant, as the evidence seized by the officers and/or agents of the Toledo Police Department was a result of a warranted search [sic] violative of the rights guaranteed the Defendant by the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Section 14 of the Ohio Constitution."

I.

{¶ 12} On appeal, Riley has abandoned his argument regarding the statutory violation of his right to a speedy trial. Rather, in his first assignment of error, he focuses entirely on the 17-month pre-indictment delay.

{¶ 13} "An unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a

violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." *State v. Luck* (1984), 15 Ohio St.3d 150, paragraph two of the syllabus.

{¶ 14} "To warrant dismissal on the basis of preindictment delay, a defendant must present evidence establishing substantial prejudice. Once the defendant fulfills that burden, the state has the burden of producing evidence of a justifiable reason for the delay. *State v. Whiting* (1998), 84 Ohio St.3d 215, 217. Thus, 'the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.' *United States v. Lovasco* (1977), 431 U.S. 783, 790.

{¶ 15} "The determination of 'actual prejudice' involves 'a delicate judgment based on the circumstances of each case.' *United States v. Marion* (1971), 404 U.S. 307, 325. In making this assessment, courts are to consider the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay. *State v. Luck* (1984), 15 Ohio St.3d 150, 154, citing *Marion*, 404 U.S. at 326." *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶ 51-52.

{¶ 16} In arguments before the trial court, the state did not assert a justifiable reason for the pre-indictment delay. Instead, the state focused on whether Riley could demonstrate prejudice resulting from the delay. Below, and on appeal, Riley argues that the demolition of his apartment building deprived him of the ability to locate witnesses and the ability to measure and photograph the distance between his bathroom window and the neighboring rooftop. He argues that such measurements and photographs would

aid him in demonstrating that he could not have thrown a bag of crack cocaine from his bathroom window.

{¶ 17} Lost evidence due to a delay is relevant to determining whether the delay prejudiced the defendant. However, prejudice usually exists only when the lost evidence has a clear exculpatory value which is irreplaceable, such as destroyed tape recordings or the death of witnesses.

{¶ 18} We find no prejudice to Riley resulted from the demolition of his apartment building. The state submitted six photographs, from different angles, of the apartment building. Riley did not object to the photographs' admission. Three of those photographs show the distance from the side of Riley's apartment building to the rooftop of the neighboring building where the bag of crack cocaine was found. Also, Riley did not, in his motions to dismiss, identify which witnesses could not be located due to the building's demolition, nor did he specify what those witnesses would have testified to. Despite the apartment building's demolition, adequate evidence of the building's condition was submitted. Riley has not pointed to the loss or destruction of exculpatory evidence or evidence which was irreplaceable. The first assignment of error is not well-taken.

II.

{¶ 19} Next, Riley challenges the trial court's denial of his motion to suppress. He argues that the search warrant for his apartment was improperly granted as the supporting affidavit did not establish probable cause to search. He also argues that the bag of crack

cocaine found on the neighboring rooftop should be suppressed as fruits of the illegal search, citing *Wong Sun v. U.S.* (1963), 371 U.S. 471.

{¶ 20} A police officer must present probable cause for a search warrant through an affidavit. Crim.R. 41(C). A judicial officer properly issues a search warrant based on a police officer's affidavit if the totality of the circumstances establishes a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates* (1983), 462 U.S. 213, 238.

{¶ 21} "[T]he role of the reviewing court is to determine whether or not the affidavit provided the issuing magistrate with a substantial basis for determining the existence of probable cause." *State v. Rodriguez* (1983), 64 Ohio App.3d 183, 187, citing *Illinois v. Gates*, 462 U.S. at 239. See, also, *State v. George* (1989), 45 Ohio St.3d 325, 329. "[I]n assessing the legal sufficiency of a challenged affidavit for a search warrant the reviewing court may draw reasonable, commonsense inferences from the allegations therein, but such inferences may only be drawn from the facts actually set forth in the affidavit." *Rodriguez*, supra, citing *State v. OK Sun Bean* (1983), 13 Ohio App.3d 69. In short, our review of the search warrant's validity is "limited to facts alleged within the 'four corners' of the affidavit." *State v. OK Sun Bean*, supra, at 71, citing *Whitely v. Warden* (1971), 401 U.S. 560, 565, fn 8. See, also, *State v. Yanowitz* (1980), 67 Ohio App.3d 141, 144.

{¶ 22} Warrants must be particularized – that is, they must particularly describe the "things to be seized." *Groh v. Ramirez* (2004), 540 U.S. 551, 557; see also, *State v.*

Hollis (1994), 98 Ohio App.3d 549, 556, citing *Lo-Ji Sales, Inc. v. New York* (1979), 442 U.S. 319. Likewise, the judicial officer issuing a warrant must determine whether the affidavit provides "a fair probability that contraband or evidence of a crime will be found *in a particular place*." *State v. George*, 45 Ohio St.3d at 329, quoting *Illinois v. Gates*, 462 U.S. at 238. (Emphasis added.)

{¶ 23} Here, the challenged affidavit stated that the "Toledo Police Vice Narcotics Unit" received information from an anonymous informant that the occupant of apartment #36 at 2801 Monroe Street was "selling a large amount of crack cocaine from the apartment." The affiant stated that he conducted surveillance of the apartment building and found "several people coming and going and only staying a short period of time," which, he averred, indicated drug activity. The affiant also stated that "members of the Directed Patrol Unit" informed him that apartment #36 was "equipped with surveillance cameras," which was "an indicator for drug trafficking."

{¶ 24} The affidavit went on to describe a controlled buy of crack cocaine using a confidential informant ("CI"). The affiant watched the CI enter the apartment building's front door and return with crack cocaine. The CI told the affiant that he or she "bought the crack from a black male." Neither the affiant nor the CI, however, stated the particular apartment from which the CI purchased the crack cocaine. The affiant stated only that he observed the CI enter the multi-unit apartment building's front door; the affiant did not observe the CI enter a particular apartment. The controlled buy was conducted two days prior to the issuance of the search warrant.

{¶ 25} Riley renews arguments made below that the affidavit lacks probable cause to search his particular apartment because the affidavit only indicates that the CI entered the multi-unit apartment building and that the CI exited the building with drugs purchased from an unspecified location in the building. Additionally, the affidavit only states that the apartment building, not a particular apartment, was known to the Toledo Police as a "residence for drug activity." The only facts particularized to Riley's apartment are (1) the initial information from an anonymous informant given to the Toledo Police Vice Narcotics office; (2) the presence of surveillance cameras.

{¶ 26} In *Rodriguez*, we found an affidavit lacking in probable cause where it only stated that "the department" received information from "Crimestopper" that the defendant was holding an amount of cocaine at his residence and that "Crimestopper" had provided good information in the past. *State v. Rodriguez*, 64 Ohio App.3d at 188. This court further found that the "good faith exception" was inapplicable, since the "bare bones" affidavit contained only conclusory allegations and "no corroboration of the information through independent investigation by the police department." Id.

{¶ 27} Similarly, in *State v. Martinez* (Dec. 3, 1999), 6th Dist. No. L-99-1171, we held that an affidavit contained only "conclusory assertions without supporting facts to constitute probable cause" where the affiant provided no information about his relationship to the unknown informant and "no details" of the defendant's alleged drug trafficking, such as participation in a controlled drug buy.

{¶ 28} In contrast, in *State v. Dominique* (Jan. 26, 2001), 6th Dist. No. L-00-1125, we found the affidavit to contain sufficient facts constituting probable cause. The defendant relied upon *Rodriguez, OK Sun Bean*, and *Martinez*, supra. However, in *Dominique*, the affidavit provided information that the defendant had been receiving deliveries of cocaine to his residence every Friday between 6:00 and 6:30 p.m. This information was corroborated by independent police investigation, consisting of surveillance of the defendant's residence; the investigators saw three different vehicles on three consecutive Fridays making quick stops at the defendant's residence. After the surveillance, the informant again told police that the informant saw the defendant with a large quantity of cocaine and that deliveries were still being made on Fridays. Thus, because the informant's veracity was not only sworn to, but was also corroborated by independent investigation, a sufficient factual basis for probable cause particular to the defendant existed.

{¶ 29} To reiterate, here, the only facts in the affidavit particularized to Riley's residence within the apartment complex were: (1) the initial information from an anonymous informant given to the Toledo Police Vice Narcotics office; and (2) the presence of surveillance cameras.

{¶ 30} Certainly, "reviewing courts may not substitute their own judgment for that of the issuing magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which the reviewing court would issue the search warrant." *State v. George* (1989), 45 Ohio St.3d 325, 330. Rather, the

reviewing court is limited to determining whether the affidavit provided the issuing judicial officer with a "substantial basis for concluding that probable cause existed." Id. at 329, citing *Illinois v. Gates*, 462 U.S. at 238-239.

{¶ 31} As in *Rodriguez*, this affidavit provides no substantial basis for a conclusion that, with fair probability, contraband would be found in Riley's apartment. While the affidavit provides much information relating to Riley's multi-unit apartment *building* as a whole, the facts particularized to Riley's apartment do not provide a substantial basis for probable cause. Information from an anonymous source given to a group of law enforcement officers as a whole does not raise a fair probability that evidence of a crime will be found. This conclusory fact is essentially identical to that found to be a "bare bones" statement in *Rodriguez*, supra. The additional fact of the presence of surveillance cameras – innocuous items used by many innocent people – cannot, without more, transform a "bare bones" affidavit into one with a "substantial basis" for probable cause.

{¶ 32} Next, we must determine the applicability of the exclusionary rule's "good faith exception." *U.S. v. Leon* (1984), 468 U.S. 897; *State v. Wilmoth* (1986), 22 Ohio St.3d 251. The exclusionary rule does not bar the use of evidence obtained by officers acting in "objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *State v. George*, 45 Ohio St.3d at 330, citing *U.S. v. Leon*, 468 U.S. at 918-923. The officer's

reliance on the judicial officer's probable cause determination must be objectively reasonable. Id. at 331, citing *Leon*, 468 U.S. at 922.

{¶ 33} The good faith exception does not apply where (1) the judicial officer was "misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) the judicial officer "wholly abandoned his judicial role"; (3) the law enforcement officer relies upon a "warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; or (4) a warrant is "so facially deficient * * * that the executing officers cannot reasonably presume it to be valid." Id., quoting *Leon*, 468 U.S. at 923. If any one of the above applies, then suppression is still an appropriate remedy. Id. See, also, *State v. Williams*, 173 Ohio App.3d 119, 2007-Ohio-4472, ¶ 26.

{¶ 34} "[E]ither there are enough facts made out [in the affidavit] to furnish probable cause for issuing the warrant or there are not. If there are not, * * * then the 'judge had no business issuing [the] warrant' in the first place." *State v. OK Sun Bean* (1983), 13 Ohio App.3d 69, 74, quoting *Illinois v. Gates*, 462 U.S. at 264 (J. White, concurring). The only facts contained in the affidavit which were particularized to Riley's apartment – rather than the multi-unit building as a whole – are "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *State v. Williams*, 2007-Ohio-4472, ¶ 27, quoting *Brown v. Illinois*, (1975), 422 U.S. 590. Because the affidavit does not provide probable cause to search a particular place – rather than an entire multi-unit apartment building – official belief that

probable cause existed to search one particular apartment in the building was unreasonable. Therefore, the good faith exception to the exclusionary rule does not apply in this instance.

{¶ 35} To reiterate, information from anonymous sources alone, given to the "police" as a group entity, was found insufficient to constitute probable cause in *Rodriguez*, supra, and *Martinez*, supra. In subsequent cases, where we have rejected the application of *Rodriguez* and *Martinez*, credible and reliable information, particularized to the person or place to be searched, was given. *State v. Dominique*, supra; *State v Taylor* (1992), 82 Ohio App.3d 434. Because the affidavit contained only "bare bones" conclusory facts which were particularized to Riley's apartment – rather than the multi-unit apartment building as a whole – the good faith exception to the exclusionary rule does not apply.

{¶ 36} Accordingly, Riley's second assignment of error is well-taken. The judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to that court for further proceedings. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

_____
JUDGE

Arlene Singer, J.

_____
JUDGE

Thomas J. Osowik, J.
CONCUR.

_____
JUDGE