[Cite as *State v. Anderson*, 2010-Ohio-1886.]

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

State of Ohio — Court of Appeals No. L-09-1055

Appellee — Trial Court No. CR0200802047

v.

Ernest M. Anderson, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: April 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Edward J. Fisher, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which convicted defendant-appellant, Ernest Anderson, of one count of possession of crack cocaine, a third degree felony, after he entered a plea of no contest to a lesser

included offense of first degree possession of crack cocaine. Also pending in this case, is the state's motion to strike Anderson's affidavit which he attached to his reply brief.

{¶ 2} On May 7, 2008, appellant was indicted and charged with six drug-related offenses: possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(e), a first degree felony (Count 1); trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(f), a first degree felony (Count 2); two counts of aggravated possession of drugs in violation of R.C. 2925.11(A) and (C)(1)(b), both third degree felonies (Counts 3 and 4); aggravated possession of drugs in violation of R.C. 2925.11(A) and (C)(1)(a), a fifth degree felony (Count 5); and possession of drugs in violation of R.C. 2925.11(A) and (C)(2)(b), a fourth degree felony (Count 6). The indictment resulted from a search of appellant's home on March 6, 2008, conducted pursuant to a search warrant issued that same day.

{¶ 3} On November 20, 2008, appellant filed a motion to suppress all evidence obtained as a result of the search of his residence. Appellant asserted the search was illegal because the warrant authorizing the search had not been issued prior to the search of the address. The lower court held a hearing on the motion to suppress at which two officers who were involved in the search of appellant's residence testified.

{¶ 4} Officer Michael E. Moore, an officer with the vice-narcotics unit, and the individual who obtained the search warrant, testified first. Moore explained the standard procedure he follows when obtaining a search warrant. Moore stated that when he is the affiant, he types up the request for the warrant and takes it to a judge, who then signs the

warrant either from the bench or in chambers. From that point, Moore stated, he has three days to execute the warrant. In the present case, Moore stated that in the morning or early afternoon of March 6, 2008, he took his affidavit for a search warrant to Judge Goulding of the Toledo Municipal Court. The judge asked him about the circumstances surrounding the search warrant and his request, and then granted the request by signing the search warrant. Moore could not remember the exact time that he obtained the warrant and the Toledo Municipal Court does not time-stamp warrants.

{¶ 5} Moore stated that in addition to himself, the directed patrol, four other detectives and an acting sergeant assisted in executing the search warrant. Moore testified that he arrived to execute the warrant at approximately 2:00 p.m. on March 6, at which point appellant and his wife were arrested and transported to the Safety Building. Prior to appellant's being removed from the scene, he asked to see a copy of the warrant. Moore told him he would get a copy. Moore further testified that his normal procedure is to leave a copy of the warrant at the location being searched. In this case, however, the search uncovered thousands of dollars in cash and the inventory could not be completed until the cash was accurately counted, which was done at the Safety Building.

{¶ 6} Upon direct examination by appellant's counsel, Moore testified there was no question in his mind that the warrant in this case was issued prior to the search of appellant's home. He further stated that the directed patrol, or SWAT team, which conducts entry operations prior to the search of a premises, will not execute a search unless they have a search warrant in hand. In the present case, Moore stated that in

addition to himself, Sergeant Amanski of the directed patrol had a copy of the search warrant.

{¶ 7} Sergeant Randy Amanski of the directed patrol, also testified at the hearing below. Amanski too testified that the directed patrol does not show up to conduct an operation unless they have a search warrant. In reviewing his file, Amanski testified that his notes indicate that the directed patrol "hit the door" at approximately 1:30 p.m. on March 6, 2008. Because a copy of the warrant was in his file, Amanski believed that he was handed the warrant prior to its execution, consistent with standard operating procedure. However, because he had no independent recollection of receiving the warrant, Amanski could not say with absolute certainty that the warrant was given to him prior to the execution of the search.

{¶ 8} Upon consideration, the trial judge ruled from the bench and found there was clear and undisputed evidence that the police did have a search warrant signed by Judge Goulding before they searched appellant's home. Therefore, the court denied the motion to suppress.

{¶ 9} Subsequently, appellant withdrew his prior not guilty plea to all charges and entered a plea of no contest to the lesser included offense of possession of crack cocaine (Count 1), in violation of R.C. 2925.11(A) and (C)(4)(c), a third degree felony. In exchange for appellant's plea, the state agreed to no longer prosecute the remaining charges. Thereafter, appellant was sentenced to a mandatory term of three years in prison. Appellant now appeals, challenging the court's ruling on his motion to suppress.

{¶ 10} Initially, we will address the state's motion to strike appellant's affidavit attached to his reply brief. In that affidavit, appellant makes legal arguments regarding the reliability of the confidential informant, sets forth his memory of the timing of the search of his house, and basically challenges the testimony of Officers Moore and Amanski. It is well-settled that "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. The affidavit at issue was signed on December 22, 2009, and was clearly not before the trial court. It is further not a matter that can properly be added to an appellate record pursuant to App.R. 9(E). Accordingly, appellee's motion to strike is well-taken. The affidavit attached to appellant's reply brief is hereby ordered stricken from the record. Any references to that affidavit contained in the reply brief will not be considered by the court.

{¶ 11} We will now address appellant's assignment of error in which he asserts:

{¶ 12} "The trial court ruled in error on the appellant's motion to suppress evidence obtained via search warrant."

{¶ 13} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Davis* (1999), 133 Ohio App.3d 114, 117. The trial court's findings of fact must be accepted as true if supported by competent, credible evidence. *State v. Kobi* (1997), 122 Ohio App.3d 160, 167-168. In this vein, a reviewing court must keep in mind that weighing the evidence and determining the credibility of

witnesses are functions for the trier of fact. *State v. DePew* (1988), 38 Ohio St.3d 275, 277. An appellate court must then independently determine, without deferring to a trial court's conclusions, whether, as a matter of law, the facts meet the applicable standard. *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 14} The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Searches and seizures conducted outside of the judicial process, without a warrant based on probable cause, are per se unreasonable, subject to several specific established exceptions. *Scknecklоth v. Bustamonte* (1973), 412 U.S. 218, 219.

{¶ 15} The present case is unusual in that appellant does not challenge the trial court's application of an exception to the warrant requirement or the court's application of the law to the facts. Rather, appellant contends that at the time officers searched his residence, a warrant had not been issued. Accordingly, appellant challenges the trial court's determination of the facts themselves.

{¶ 16} As set forth above, the testimony of Officer Moore and Officer Amanski at the hearing on the motion to suppress constituted competent, credible evidence that the warrant was issued before the search was conducted. Moreover, appellant did not present any evidence to contradict the testimony and records of the officers. Accordingly, the lower court did not err in denying the motion to suppress and the sole assignment of error is not well-taken.

{¶ 17} On consideration whereof, the court finds appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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, P.J. _____
CONCUR.
JUDGE