

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

State of Ohio

Court of Appeals No. L-09-1142

Appellee

Trial Court No. CR0200803104

v.

Hector Alvarado, Jr.

DECISION AND JUDGMENT

Appellant

Decided: May 7, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Louis E. Kountouris, Jr., Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the order of the Lucas County Court of Common Pleas, denying his motion to suppress evidence antecedent to his no contest plea to cocaine possession. For the reasons that follow, we affirm.

{¶ 2} On July 25, 2008, FBI agents, Toledo Police and members of the Metro Drug Task Force executed a federal search warrant on four locations in Lucas County. At one of these locations, 752 Orchard Street in Toledo, officers found appellant, Hector Alvarado, Jr., in a bedroom. In the same bedroom, police found appellant's wallet and identification. They also found two packages: one containing 34.43 grams of cocaine and the other containing 3.61 grams of cocaine.

{¶ 3} Appellant was arrested and later indicted by a Lucas County Grand Jury for cocaine possession and trafficking in cocaine. He pled not guilty and moved to suppress the evidence seized on the ground that the search warrant that permitted police entry into 752 Orchard Street was based on stale information. When the trial court denied suppression, appellant agreed to change his plea to no contest on the possession charge. The trafficking charge was dismissed.

{¶ 4} Following a plea colloquy, the trial court accepted appellant's plea, found him guilty and sentenced him to a mandatory three-year period of incarceration.

{¶ 5} From this judgment of conviction, appellant now brings this appeal. Appellant sets forth a single assignment of error:

{¶ 6} "The trial court erred in denying defendant's motion to suppress."

{¶ 7} The totality of the circumstances must be examined to determine whether probable cause existed for a search warrant. *Illinois v. Gates* (1983), 462 U.S. 213, 238-239. "The Supreme Court of Ohio embraced the *Gates* totality of the circumstances test in [*State v. George* (1989), 45 Ohio St. 3d 325] at paragraph one of the syllabus:

{¶ 8} "In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, "[t]he 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 for 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."

{¶ 9} "It is fundamental 'that [an] affidavit must contain something affirmatively indicating that there is probable cause at or about the time the search warrant is applied for.' *Coyne v. Watson* (1967), 282 F.Supp. 235, 237.

{¶ 10} "A search warrant must present timely information because 'it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.' *State v. Jones* (1991), 72 Ohio App.3d 522, 526, quoting *Sgro v. United States* (1932), 287 U.S. 206, 210. The *Jones* court further stated that 'while there is no arbitrary time limit on how old information can be, the alleged facts must justify the conclusion that the subject contraband is probably on the premises to be searched.' *Jones* at 526." *State v. Schmitz* (Mar. 1, 1996), 6th Dist. No. S-95-031.

{¶ 11} In the trial court and here, appellant insists that, since drug trafficking involves the constant movement of drugs, evidence to show that drugs will be at a place at a particular time must be current. The affidavit supporting the July 25, 2008 search

was filed on July 24, 2008, but, appellant contends, the affidavit was based on information last current on July 17, 2008. Such a lapse of time, appellant argues, was too great to support a conclusion that drugs would be where predicted eight days later.

{¶ 12} The application for this warrant was submitted to a federal magistrate and was supported by a 21 page probable cause affidavit detailing information provided by five separate confidential informants and police agencies in two states. It was thorough and well documented. We could not say that the information contained therein was insufficient to convince a neutral magistrate there was probable cause that drugs would be found in the locations enumerated during the window provided for service of the warrant. Moreover, although the statement in the affidavit relating to appellant's presence at 752 Orchard Street was from July 17, 2008, other averments in the affidavit from a different confidential informant, made on July 22, 2008, reveals the expectation of a drug shipment "in the next day or two."

{¶ 13} In either event, there is nothing of record to support appellant's assertion that the information in the search warrant was stale. Accordingly, appellant's single assignment of error is not well-taken.

{¶ 14} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay court 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.

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
