[Cite as *State v. Rivera*, 2005-Ohio-623.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84686

STATE OF OHIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellant	:	OPINION
	:	
-vs-	:	
	:	
RAMON RIVERA	:	
	:	
Defendant-appellee	:	

DATE OF ANNOUNCEMENT OF DECISION:	FEBRUARY 17, 2005
CHARACTER OF PROCEEDING:	Criminal appeal from the Court of Common Pleas Case No. CR-443504
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	

APPEARANCES:

For Plaintiff-Appellant:	WILLIAM D. MASON, ESQ. CUYAHOGA COUNTY PROSECUTOR BY: GEORGE A. JENKINS, JR. 8th Floor, Justice Center 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appelleet:	MICHAEL T. FISHER, ESQ. 55 Public Square, Suite 1010 Cleveland, Ohio 44113-1901

ANN DYKE, P.J.:

{¶ 1} Pursuant to Crim.R. 12(K), the State of Ohio appeals from the order of the trial court which struck a portion of a search warrant and further determined that the remainder of the warrant did not provide probable cause for searching a residence purportedly linked to defendant Ramon Rivera. For the reasons set forth below, we affirm.

{¶ 2} On June 18, 2003, Cleveland police obtained a search warrant for the rear upstairs apartment of a dwelling located at 1338 West 65th Street. The affidavit in support of the search warrant, signed by Vice Unit Det. Michele Rivera, stated in relevant part, as follows:

{¶ 3} "1. Affiant * * * was contacted by a Confidential Informant (CI), who indicated that a male known to CI was selling heroin. Said CI indicated * * * that the male is Hispanic and uses the nickname 'Junior,' but his given name is Ramon.

{¶ 4} "2. * * * CI exited the undercover vehicle and met with Junior and then returned to affiant and handed affiant a quantity of a light brown powdery substance, purported to be heroin * * *.

{¶ 5} "4. Affiant avers that detectives then followed the male known as Junior to the above premises and watched as he entered.

{¶ 6} "* * *.

{¶ 7} "7. Affiant avers that within the past twenty-four hours, affiant again met with the same CI who * * * arranged to meet Junior at a location within the City of Cleveland.

{¶ 8} "8. Affiant avers that after that call was made, detectives were placed outside the above address and observed a Hispanic male meeting the description of Junior or Ramon, exit the above premises and travel to the prearranged location in a 1987 Toyota Camry, maroon in color, to the prearranged meeting place. This is the same vehicle that Junior traveled in on the previous controlled purchase.

{¶ 9} "9. Affiant * * * observed as CI exited the vehicle met with the same male * * * * and handed affiant a quantity of suspected heroin * * *.

{¶ 10} "10. Detectives then surveilled Junior and followed him to the above premises, which he entered.

{¶ 11} "* * *.

{¶ 12} "13. Affiant avers that she has confirmed that the 1989 maroon Toyota Camry is registered to **Naomi Perez** according to the Ohio Bureau of Motor Vehicles. Affiant avers that the Cleveland Police Department has received many domestic violence complaints involving **Naomi Perez** and Ramon Rivera at the above address.

{¶ 13} "14. Affiant avers that she confirmed that gas utility at the above premises according to Dominion East Ohio Gas Company is listed to **Naomi Perez** and advised affiant that there are two gas utilities at the above dwelling, one of which is listed as the upper, rear unit and the other which is the lower unit. There is no upper, front unit utility.

{¶ 14} "* * * *." (Emphasis added).

{¶ 15} On October 16, 2003, defendant was indicted pursuant to a four-count indictment which charged him with possession of less than five grams of cocaine, possession of more than ten but less than fifty grams of heroin, trafficking in heroin with juvenile and schoolyard specifications, and possession of criminal tools.

{¶ 16} Defendant pled not guilty and moved to suppress the evidence obtained in connection with execution of the search warrant, arguing that the affidavit did not link him to that residence. The matter proceeded to an evidentiary hearing on May 5, 2004. At that time, counsel for defendant also asserted, pursuant to *Franks v. Delaware* (1978), 438 U.S. 154, 155-156, 57 L.Ed.2d 667, 98 S.Ct. 2674, that the search warrant contained errors and misstatements and that the remainder of the warrant was insufficient to establish probable cause. In support of this motion, the defense established that in the affidavit in support of the search warrant Det. Rivera incorrectly indicated: (1) that defendant drove a 1989 Toyota Camry registered to Naomi Perez; in fact he was seen in a 1987 Toyota Camry registered to Naomi Morales; (2) that defendant and Naomi Perez had been involved in domestic disputes; in fact no such records existed; (3) that gas utility service at the premises was in the name of Naomi Perez.

{¶ 17} Det. Rivera testified that she made a mistake when she marked the year of the vehicle as 1989, and that it was a 1987

Toyota Camry. A LEADS printout offered into evidence indicated, however, that Naomi Morales resides at 1838 West 65th Street, and not 1338 West 65th Street. Det. Rivera, claimed, however, that the LEADS system had listed Morales's address incorrectly. Det. Rivera further testified that gas service to one of the units was in the name of Naomi Morales. She also indicated that she inadvertently listed the owner as Naomi Perez, and that she intended to list "Naomi Morales." With regard to previous calls for assistance at the subject location, Det. Rivera testified that there were domestic violence calls, which did not result in police reports, concerning defendant and Brenda Perez. There was also a call concerning a problem with the alarm of a Honda Civic registered in the name of Brenda Perez, and the confidential informant reportedly told her that defendant frequently drove that car. The LEADS printout for Brenda Perez lists her address as 3391 West 117th Street, however.

{¶ 18} Det. Rivera also testified that other detectives observed defendant leave 1338 West 65th Street immediately prior to selling heroin to the informant in the second controlled buy. She acknowledged that this building is a multi-unit dwelling.

{¶ 19} Det. Rivera testified that there were "inconsistencies, mistakes, and typos" in the affidavit but that the mistakes were not intentional. She further explained that she had written the name "Naomi Perez" as the result of confusing the names "Naomi

Morales" and "Brenda Perez." She stated that she believed that defendant had used the apartment at 1338 West 65th Street to store drugs.

{¶ 20} The trial court determined that there were errors contained in paragraphs thirteen and fourteen of the affidavit in support of the search warrant and that these misstatements were included in reckless disregard for the truth. The court further determined that the remaining allegations were insufficient to establish probable cause.

{¶ 21} The state now appeals and assigns two errors for our review. The State of Ohio's first assignment of error states:

{¶ 22} "The trial court erred when it ruled that the misstatements contained in paragraph thirteen of the affidavit to the search warrant were Det. Rivera's reckless disregard for the truth."

{¶ 23} An appellate court "is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence." *State v. Searls* (1997), 118 Ohio App.3d 739, 741, 693 N.E.2d 1184. However, an appellate court's review of the trial court's application of law to those facts is de novo. Id.; see, also, *Ornelas v. United States* (1996), 517 U.S. 690, 699, 134 L.Ed.2d 911, 920, 116 S.Ct. 1657.

{¶ 24} The Fourth Amendment to the United States Constitution provides:

{¶ 25} "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

{¶ 26} In *Franks v. Delaware* (1978), 438 U.S. 154, 155-156, 57 L.Ed.2d 667, 98 S.Ct. 2674, the Court explained the probable cause requirement as follows:

{¶ 27} "'[When] the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing.' This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true."

{¶ 28} Id., quoting *United States v. Halsey,* 257 F.Supp. 1002, 1005 (SDNY 1966).

{¶ 29} In reliance on these principles, the *Franks* Court held that when the accused proves by a preponderance of the evidence that "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and [that] the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that * * * the fruits of the search [must be] excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id.; see, also, *State v. Waddy* (1992), 63 Ohio St.3d 424, 441, 588 N.E.2d 819.

{¶ 30} "Reckless disregard" means that the affiant had serious doubts about the truth of an allegation. Id., citing *United States v. Williams* (C.A. 7, 1984), 737 F.2d 594, 602.

{¶ 31} In this matter, the affiant indicated that defendant had driven a 1987 Toyota Camry, registered to "Naomi Perez," that "Naomi Perez" resided in the rear, upstairs unit of 1338 West 65th Street, and that there had been domestic violence calls concerning defendant and "Naomi Perez." In actuality, no one named "Naomi Perez" had any connection to this case. Defendant allegedly drove a car registered to "Naomi Morales" but the LEADS printout did not indicate that she resided at 1338 West 65th Street, and no documentary evidence was offered to link her to this address. Det. Rivera also testified that there were domestic violence calls concerning defendant and "Brenda Perez," but the LEADS printout

likewise fails to demonstrate that she resided at 1338 West 65th Street. In accordance with the foregoing, we conclude that competent, credible evidence supports the trial court's conclusion that there are false statements in paragraphs thirteen and fourteen of the affidavit and that they were made in reckless disregard of the truth. We further conclude that the trial court applied the correct law to this matter. In accordance with the foregoing, the first assignment of error is without merit.

{¶ 32} The State of Ohio's second assignment of error states:

{¶ 33} "After excising paragraph thirteen of the affidavit to the search warrant the trial court erred when it ruled that there was an insufficient nexus between the appellee and the residence located at 1338 W. 65th Street, up, to justify search of this residence."

{¶ 34} As noted previously, even if the affidavit in support of a search warrant contains false statements made intentionally or recklessly, a warrant based on the affidavit is still valid unless, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause * * *." *Franks v. Delaware,* supra, 438 U.S. at 156, 98 S.Ct. at 2676, 57 L.Ed.2d at 672.

{¶ 35} In *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph one of the syllabus, established the standard for

appeal of a magistrate's determination that probable cause existed to issue a search warrant:

{¶ 36} "In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither the trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant."

{¶ 37} Similarly, in *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 76 L.Ed.2d 527, 103 S.Ct. 2317, the Supreme Court held that, in order to issue a search warrant, the task of the magistrate is:

{¶ 38} "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 * * * [concluding] that probable cause existed.'"

{¶ 39} In *State v. Hunt* (1984), 22 Ohio App.3d 43, 488 N.E.2d 901, this court noted that if a search warrant contains deliberate falsehoods and/or reckless misstatements and such falsehoods or misstatements are material to the finding of probable cause, the warrant will be invalidated.

{¶ 40} In this case, the challenged statements were material to the finding of probable cause as they established the links from defendant to the car and to the apartment. Apart from these paragraphs, the affidavit established only that defendant went to the multi-family unit after the first drug sale and came from the apartment building immediately before the second drug sale. This alone is insufficient to establish probable cause to search any particular unit in the building. *State v. Gales* (2001), 143 Ohio App.3d 55, 757 N.E.2d 390.

{¶ 41} The second assignment of error is without merit.

{¶ 42} The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, J., CONCURS.

SEAN C. GALLAGHER, J., CONCURS IN PART AND DISSENTS IN PART (SEE ATTACHED CONCURRING AND DISSENTING OPINION

ANN DYKE
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84686

STATE OF OHIO	:	
	:	CONCURRING
Plaintiff-Appellee	:	

vs.	:	AND
RAMON RIVERA	:	DISSENTING
Defendant-Appellant	:	OPINION

DATE: FEBRUARY 17, 2005

SEAN C. GALLAGHER, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 43} I respectfully dissent from the majority decision affirming the trial court's suppression of the search. Although I concur with the majority decision on the first assignment of error upholding the decision to excise paragraphs thirteen and fourteen of the affidavit, I nevertheless believe the remaining portions of the affidavit contained sufficient probable cause to justify the search. In addition, I do not believe the defendant demonstrated standing to challenge the warrant.

{¶ 44} The majority relies on *State v. Gales*, supra, to support the holding in the second assignment of error that there was insufficient probable cause in the remaining affidavit to search the residence. Although I find *Gales* relevant, I believe the facts in the present case are clearly distinguishable.

{¶ 45} In *Gales*, as here, two "buys" took place in predetermined locations away from the residence that was the target of the search. The *Gales* decision focused on the "staleness" of the information involving the first buy in that affidavit. The first

Gales "buy" was identified in the affidavit as having taken place "several months ago," prior to the issuance of the warrant. In the second *Gales* "buy," the affidavit did not indicate that anyone followed Gales either to, or from, the residence immediately before or after the buy. The only reference linking the second buy in *Gales* to the residence was the officer's reference in the affidavit to the fact that the officer "[w]ithin the past seventy-two (72) hours * * * observed Gales going in and out of the above described premises." And that the officer "* * * observed this vehicle [the one used in the buy], in the driveway of the above described premises."

{¶ 46} Here both "buys" took place close in time to the underlying search. The search actually occurred within 24 hours of the second "buy." In addition, the affidavit clearly states, and Rivera did not dispute, that immediately after the first "buy" officers followed Rivera back to the residence at 1338 West 65th Street.[1] Further, both prior to and after the second "buy," surveillance officers watched Rivera leave and return to the targeted residence. The relevant non-excised portions of the affidavit state:

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[1] This residence was specifically identified as a two-family residential dwelling. The warrant was specific in describing the area to be searched as "1338 West 65th, up, rear * * * the upper level of a two-family residential dwelling.

"4. Affiant avers that detectives then followed the male known as Junior[2] to the above premises and watched as he entered."

"8. Affiant avers that after the call was made, detectives were placed outside the above address and observed a Hispanic male matching the description of Junior or Ramon, exit the above premises and travel to the pre-arranged location in a 1987 Toyota Camry, maroon in color, to the pre-arranged meeting place. This is the same vehicle that Junior travelled in on the previous controlled purchase."

"10. Detectives then surveilled Junior and followed him to the above premises, which he entered."

{¶ 47} Unlike in *Gales*, there is nothing here to demonstrate the information in the affidavit was stale. Further, although the *Gales* court stated: "[W]hile the affiant avers that he observed Gales going in and coming out of 15801 Invermere within a 72-hour period, nothing connects this with ongoing criminal activity." Here we have specific criminal activity on two distinct dates directly related to the "buys" traced directly back to this residence.

{¶ 48} To suggest that no probable cause exists in such instances implies that police may never be able to search a residence unless they have a "buy" directly from that location. Further, such a position also suggests that unless the suspect's "residency" is established at the target location, a search based on an "off site" "buy" might not be authorized. Such positions are

[2] "Junior" was later identified as the defendant Ramon Rivera.

inconsistent with the realities of the drug trade. It is common knowledge that many "buys" occur at remote locations and that many dealers use third-party residences to avoid telegraphing to authorities their primary base of operations.

{¶ 49} The dissent in the original *Gales* decision pointed out the problems with creating a standard that ignores the conventional realities of circumstantial evidence.

> **"The majority opinion would also seem to require that magistrates presented with an affidavit in support of a search warrant disregard circumstantial evidence in determining the existence of probable cause. Under the majority's new standard, if the appellant had merely pulled out of his driveway and driven to the end of the street to sell heroin (rather than driving a few extra blocks) and returned home immediately thereafter, all the while under police surveillance, there still would have been an insufficient link to the possible presence of heroin at his home address to justify a search warrant. As observed in *State v. Jenks* (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492, 'circumstantial evidence and direct evidence inherently possess the same probative value.'"**

{¶ 50} Further, in support of the motion to suppress, Rivera's counsel argued, "There's no evidence that Ramon Rivera lives there. There is no connection to him to any particular apartment there."

{¶ 51} I question, given this assertion, whether Rivera ever had standing to challenge this search. As this court recently stated: "Where a defendant denies any interest in a residence and/or the evidence seized therefrom, he does not have standing to challenge the search of the residence." *State v. Hines*, Cuyahoga App. No. 83485, 2004-Ohio-5206 Ohio.

{¶ 52} Here, the central issue is whether, given all the circumstances, there was a fair probability that contraband would be found at the location designated to be searched.

> **"When determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '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.' *State v. George* (1989), 45 Ohio St. 3d 325; 544 N.E.2d 640, paragraph one of the**

syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S. Ct. 2317, 76 L. Ed. 2d 527."

{¶ 53} I am cognizant that this was, at best, a warrant drafted with multiple errors as outlined by the majority in the first assignment of error. Nevertheless, I would find there is a sufficient nexus between the residence in question and the probable cause outlined in the remaining affidavit to support the search of the residence. On that basis, I would reverse the decision of the trial court granting the motion to suppress and remand the case for further proceedings.