[Cite as *State v. Alton*, 2007-Ohio-2109.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88079

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SEAN ALTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-467647

BEFORE: Rocco, J., Sweeney, P.J., Boyle, J.

RELEASED: May 3, 2007

JOURNALIZED:

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KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Sean Alton appeals from his convictions after a jury trial for aggravated robbery, kidnapping, and felonious assault, all with firearm specifications, together with extortion and possession of criminal tools.

{¶ 2} Alton presents four assignments of error. He claims the trial court erred in denying his motion to suppress evidence because the person who requested the search warrant was not a "law enforcement officer" as defined by the pertinent provisions of the Ohio Revised Code. Alton further claims his conviction are unsupported by either sufficient evidence or the weight of the evidence. Finally, Alton claims the trial court denied him his right to a fair trial by excluding character evidence he sought to introduce.

{¶ 3} Following a review of the record, this court agrees with none of Alton's

claims. Consequently, his convictions are affirmed.

{¶ 4} Alton's convictions result from an incident that occurred on the night of May 24, 2005. The victim, twenty-four-year-old Michael Nottrodt, testified to the events that led to the incident.

{¶ 5} Nottrodt stated he met Alton in late April, 2005 when he replied to Alton's newspaper advertisement of a room for rent in his house. Alton's house was located in Westlake. Alton owned a construction-related business. Nottrodt found the home to be a large, handsome place for which five hundred dollars a month rent seemed reasonable. He provided identification to Alton, who said he wanted to "do a criminal background check" on his potential renter.

{¶ 6} Nottrodt made his living selling tickets to sporting events, which did not provide him a consistent income, and was under indictment for committing forgery. Nevertheless, Alton accepted Nottrodt's cash as rent and permitted him to move into the house on May 1.

{¶ 7} Nottrodt often traveled, but when he was home, he occasionally socialized with Alton, Alton's visiting friends, and the other renter, Richard Foutz. On one of these occasions, Tuesday, May 17, 2005, Nottrodt mentioned to Alton that an acquaintance, Clinton Smith, whom Alton had met, worked at an appliance store, and told Nottrodt he could sell plasma televisions at a good price. Alton expressed interest, so Nottrodt accompanied Alton to the store. Alton gave Smith $2850 and

received what appeared to be a store receipt for two plasma television sets. Smith promised the sets would be delivered on Thursday morning.

{¶ 8} When no delivery occurred on the appointed morning, Alton asked Nottrodt to contact Smith. Smith indicated the delivery would be delayed until evening. However, that night, again, no delivery came.

{¶ 9} This time, when Nottrodt attempted to contact Smith, he was unsuccessful. The following morning, Friday, Nottrodt discovered the appliance store did not employ Smith. Alton became "agitated." He informed Nottrodt that he needed the $2850 to pay his workers on Saturday, and that, since he had made the deal with Smith through Nottrodt, he held Nottrodt responsible for the money. Alton "told [Nottrodt] to do whatever [he] needed to do to obtain $2850 immediately." Since Nottrodt was living in Alton's house, he did not feel in a position to argue.

{¶ 10} Nottrodt believed one of his ticket buyers would deposit money into Nottrodt's bank account that would be sufficient to cover the sum. Alton therefore agreed to take him to the bank to obtain the funds. When they arrived, Nottrodt found the customer's check had not yet cleared.

{¶ 11} The next morning, Saturday, Nottrodt awakened to a "red laser light beaming" into his eyes. Since he was aware Alton had permits to keep several guns in the house; he believed the light came from a gunsight. At that time, Alton "threatened to kill [Nottrodt] if [he] did not come back with any money" that day.

Nottrodt got dressed, and Alton drove him to the bank. Alton "carried his firearm with him."

{¶ 12} Once again, Nottrodt discovered the check had not cleared. When he informed Alton, Alton began "flipping out," and "demanded that [Nottrodt] stay with him [for] the rest of the day." Nottrodt thus was with Alton when Alton asked for and received a loan from another man, "Patrick," to pay his employees. Alton informed Nottrodt that he now owed over $5000.

{¶ 13} After they returned to the house, Nottrodt received a $500 payment from a customer for some tickets. He handed the money to Alton, who, as he took it, advised Nottrodt pay the rest by "Monday or Tuesday at the latest."

{¶ 14} On Monday, Alton called Nottrodt many times to threaten him. Nottrodt assured Alton he would obtain the money from the bank that day. However, Nottrodt later discovered that his customer's check was returned for insufficient funds. Nottrodt decided to stop answering his cellular telephone.

{¶ 15} On Tuesday afternoon, May 24, 2005, Nottrodt's mother told him Alton stopped at her home, asking Nottrodt to call. Nottrodt decided to do so. Alton at that point seemed calm; he told Nottrodt they should "sit down like men and discuss if [he] need[ed] to make payments" on the debt. He requested Nottrodt to meet him at a men's club in Cleveland. Nottrodt agreed.

{¶ 16} Shortly after the conversation, Alton's girlfriend Kim Thomascik called

Nottrodt. She stated she was nearby, asked Nottrodt to drive over to pick her up, and indicated together they would go to the meeting with Alton.

{¶ 17} When Nottrodt and Thomascik arrived in the parking lot of the men's club, Nottrodt stopped his car near Alton's truck. Nottrodt exited his car to find Alton pointing a gun at him. Alton stated, "Get on the ground mother fucker before I kill you."

{¶ 18} Nottrodt complied; as he lay on the pavement, Alton grabbed his hands, pulled them behind his back, and placed handcuffs on him. Alton then "picked [him] up***and threw [him] in" the rear seat of Alton's truck, tearing Nottrodt's shirt in that process. Alton climbed in next to him. Upon searching Nottrodt's pockets, Alton found $1204, the money Nottrodt had earned selling tickets that day. Alton appropriated $1200, replaced $4, and, holding the gun to Nottrodt's head, ordered Thomascik to drive around.

{¶ 19} During the ride, Alton stated that for "screwing [him] over" by facilitating the transaction with Smith, he wanted Nottrodt to know "right now [he] could kill [Nottrodt] and nobody would know***." Alton suggested Nottrodt could obtain money from his mother. Nottrodt protested. At that point, Alton set his gun on the floor, and extracted a "taser gun" from the pocket behind the driver's seat. He placed the taser against Nottrodt's leg and activated it.

{¶ 20} The pain of the shock caused Nottrodt to scream. According to his

testimony, Alton activated the taser at least ten times during the ride. At one point, Alton told Thomascik to call Richard Foutz, the other housemate. When she made the call, she passed the telephone to Alton, who told Foutz that he had Nottrodt, and could collect the money Nottrodt owed Foutz on a lost bet. He activated the taser against Nottrodt so that Foutz could "hear him scream."

{¶ 21} When Nottrodt eventually agreed to obtain the money from his parents, Alton ordered Thomascik to return to Nottrodt's car. The two of them left Nottrodt there with "four dollars [and] pretty close to [an] empty gas tank."

{¶ 22} Nottrodt drove to his mother's home, informed her of what had occurred, showed her the burn marks left by the taser on his skin, and indicated he would need money. The following morning, each of Nottrodt's parents provided him with a certified check in the amount of $2500. Nottrodt took the checks to Alton's house. Alton accepted them and indicated he was satisfied. Nottrodt then took his parents' advice and proceeded to the Westlake police department.

{¶ 23} After listening to Nottrodt's story and observing the marks on his leg, police officer Charles Escalante, who was assigned to the detective bureau and held the position of "Executive Assistant" to the Chief of Police, made an application for a search warrant for Alton's house. He obtained a judge's signature and executed the warrant on the morning of May 25, 2005. During the search, police officers found, inter alia, the gun, handcuffs and taser unit Nottrodt described in his account of the

incident.

{¶ 24} Alton subsequently was indicted on two counts of aggravated robbery, two counts of felonious assault, and one count of kidnapping, all with a firearm specification, one count of extortion and one count of possession of criminal tools. Prior to trial, he filed a motion to suppress evidence. The trial court held a hearing on the motion before overruling it.

{¶ 25} During its case-in-chief, the state presented the testimony of Nottrodt, Thomascik, Foutz, Nottrodt's parents, and two police officers. The jury eventually acquitted Alton of one count of aggravated robbery and one count of felonious assault, but found him guilty of the remaining charges. The trial court ultimately sentenced him to a term of incarceration that totaled eight years.

{¶ 26} Alton challenges his convictions with the following assignments of error:

{¶ 27} "I. The trial court erred in denying Appellant's motion to suppress evidence where the affiant officer was not a legally and duly sworn police officer for the law enforcement agency which effected the search of Appellant's home.

{¶ 28} "II. The trial court erred in denying Appellant's Criminal Rule 29 motion (sic) for acquittal when there was insufficient evidence to prove the elements of aggravated robbery, felonious assault, kidnaping (sic) and extortion.

{¶ 29} "III. Appellant's convictions were against the manifest weight of the evidence.

{¶ 30} "IV. The trial court erred in excluding evidence offered by Appellant, in violation of Appellant's constitutional right to a fair trial."

{¶ 31} In his first assignment of error, Alton argues that the search warrant pursuant to which the police discovered his guns, the handcuffs, and the taser unit that Nottrodt identified as the ones Alton used during the incident was invalid.

{¶ 32} He contends that evidence should have been suppressed on the ground that Escalante was not a "law enforcement officer" as defined in R.C. 109.71-77 and R.C. Chapter 124. Alton thus claims that, since Escalante was appointed to his position without taking a civil service examination, he was not qualified to seek a search warrant. This claim ignores the testimony provided to the trial court at the hearing on Alton's motion to suppress evidence.[1]

{¶ 33} Westlake's chief of police testified that Escalante "started as a part-time patrol officer assigned to the detective bureau" in 1999, that Escalante was "a sworn police officer" with "current certifications as an Ohio peace officer," and had attended training in order "to maintain that status." The chief testified that as his

[1]Even if this court were to find Alton's claim supported in the record, the decision in *United States v. Freeman* (8th Cir. 1990), 897 F.2d 346 would render his argument unpersuasive. Using the analysis set forth in *Freeman*, a violation of the state "procedural requirements" which govern the application for a search warrant generally would not trigger the exclusionary rule unless: 1) the search either might not have occurred or would not have been so abrasive if the requirements had been followed, or 2) there is evidence of an intentional disregard of the requirements. The testimony adduced at the hearing established neither of those exceptions. See also, *United States v. Luk* (9th Cir. 1987), 859 F.2d 667.

executive assistant, Escalante continued to work in the detective bureau "in charge of vice and narcotics" investigations. The chief considered Escalante his department's "expert on preparing affidavits in support of criminal***seizure warrants."

{¶ 34} Indeed, Alton's argument also ignores the concession made by his attorney at the conclusion of the hearing. When the trial court explained that a sworn police officer who was "able to be an affiant on a search warrant" could at the same time hold a city position that exempted him from the civil service, defense counsel stated that he was unaware of that, and that he was under the impression the two roles were "mutually exclusionary." Further cross-examination of the chief of police caused counsel to abandon his argument and to concede "for the record" that, by virtue of his appointed position as executive assistant, Escalante "can act as a police officer in the City of Westlake without taking a civil service exam."

{¶ 35} For the foregoing reason, Alton's first assignment of error is overruled.

{¶ 36} Alton next argues in his second and third assignments of error that his convictions are unsupported by either sufficient evidence or the weight of the evidence. In making these arguments, Alton essentially asserts Nottrodt's testimony was too conflicting to constitute proof of the offenses of aggravated robbery, kidnapping and felonious assault with a firearm, in addition to extortion and possession of criminal tools. This court disagrees.

{¶ 37} In considering a claim of insufficient evidence, this court is required to view the evidence adduced at trial, both direct and circumstantial, in a light most favorable to the prosecution to determine if a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372; *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶ 38} With regard to an appellate court's function in reviewing the weight of the evidence, this court is required to consider the entire record and determine whether in resolving any conflicts in the evidence, the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 39} The record in this case leads to the conclusion that Alton's convictions are supported by both sufficient evidence and the weight of the evidence. Contrary to Alton's assertion, Nottrodt's testimony was logical, coherent, and compelling.

{¶ 40} Nottrodt stated that Alton confronted him with a gun, that he recognized the gun as one for which Alton had obtained a permit, that Alton handcuffed him, then took over a thousand dollars from him, and that Alton kept him captive, subjecting him to numerous electric shocks from the taser, which caused severe pain and burned his skin, before releasing him upon a promise to bring more money from his parents, money which Alton accepted the following day.

{¶ 41} From this testimony, a rational trier of fact could determine Alton knowingly committed aggravated robbery and kidnapping and felonious assault with a firearm, together with extortion and possession of criminal tools. *State v. Dorsey*, Cuyahoga App. No. 87580, 2006-Ohio-5918; *State v. Jackson*, Cuyahoga App. No. 86542, 2006-Ohio-1938; *State v. Martin* (Oct. 28, 1999), Cuyahoga App. No. 73456; *State v. Suber*, 154 Ohio App.3d 681, 2003-Ohio-5210.

{¶ 42} Nottrodt's testimony was corroborated by the testimony of Thomascik, Foutz, and his parents. It found further corroboration in the physical evidence; the photographs displayed Nottrodt's injuries, and Nottrodt's parents identified two certified bank checks they caused to be made out to Alton, each dated May 25, 2005 and each in the amount of $2500. Therefore, this court cannot find that the jury clearly lost its way in resolving any evidentiary conflicts. *State v. Dorsey*, supra.

{¶ 43} Under these circumstances, Alton's convictions are supported by both sufficient evidence and the manifest weight of the evidence. Accordingly, his second and third assignments of error also are overruled.

{¶ 44} Alton argues in his fourth assignment of error that the trial court's decision to prevent him from offering evidence of his nonagressive character compromised his right to a fair trial. This argument is unpersuasive in light of the record.

{¶ 45} Evid.R. 404(A)(1) permits the accused in a criminal prosecution to offer

appropriate evidence supporting his good character in order to establish that he acted in conformity with that good character on the particular occasion of the crime charged, and therefore did not commit the crime. *State v. Nobles* (1995), 106 Ohio App.3d 246. Nevertheless, the exclusion of such evidence does not always constitute reversible error; instead, it may be harmless error. *In the matter of Definbaugh*, Tuscarawas App. No. 2003AP03-0021, 2003-Ohio-6138.

{¶ 46} The record in this case demonstrates that the evidence which the trial court prevented Alton from introducing during his case-in-chief already had been elicited on cross-examination of two of the state's witnesses. Thomascik testified Alton had licenses to own his guns, she had never before seen him use them improperly, and she thought of him as a successful businessman. Similarly, Foutz stated that in his experience living in Alton's house, he believed Alton to be a reliable person and a responsible gun owner whom he had never seen to be violent or hurtful to anyone.

{¶ 47} Under these circumstances, the jury was cognizant of Alton's general character. In light of the overwhelming evidence of his guilt of the offenses in this case, therefore, the trial court's refusal to permit additional character evidence must be deemed harmless error. Id.; *State v. Williams* (1983), 6 Ohio St.3d 281, paragraph six of the syllabus.

{¶ 48} Alton's fourth assignment of error, therefore, also is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, P.J. CONCURS
MARY J. BOYLE, J. DISSENTS
(See attached dissenting opinion.)

BOYLE, M.J., J.:

{¶ 49} While I agree with the majority opinion regarding Alton's second, third, and fourth assignments of error, I respectfully dissent with respect to Alton's first assignment of error.

{¶ 50} In his first assignment, Alton argues that the trial court erred when it denied his motion to suppress because the "affiant officer [Escalante] was not a legally and duly sworn police officer" for the city of Westlake.

{¶ 51} The majority summarizes Alton's argument, and then without any reference to this court's standard of review on a motion to suppress, states: "[t]his

claim ignores the testimony provided to the trial court at the hearing on Alton's motion to suppress evidence." The majority then simply recites the testimony of Westlake's chief of police that Escalante was "a sworn police officer" with "current certifications as an Ohio peace officer." With all due respect, it is this writer's opinion that the majority did not address the issue presented.

{¶ 52} At the outset, this court must set forth an appellate court's standard of review on a motion to suppress. In *State v. Burnside*, 100 Ohio St.3d 152, at ¶8, the Supreme Court of Ohio stated:

{¶ 53} "[a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366 ***. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19 ***. *** Accepting these facts as true, the appellate court must then independently determine, [as a matter of a law], without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706 ***."

{¶ 54} Alton is not arguing here, nor did he claim so in the lower court, that Escalante is not a "sworn police officer" without "current certifications" in Ohio.

Rather, Alton argues that Escalante is not an officer -- at all -- for the city of Westlake. Alton contends that Westlake bypassed its own civil service laws when it hired Escalante as a law enforcement official. Therefore, Alton maintains that Escalante is not properly employed as a law enforcement officer by the city, regardless of what his title is. Without lawful employment, Alton maintains that Escalante could not be an affiant on a search warrant and thus, the warrant would be invalid.

{¶ 55} The state does not contend that Escalante is a "police officer" or other law enforcement officer. Instead, it argues that Escalante was a proper affiant to obtain a search warrant under R.C. 2901.01(A)(11)(b), because Escalante was "employed by the city of Westlake" with "the authority to arrest." For the following reasons, this writer disagrees with the state's argument.

{¶ 56} The "Affidavit for Search Warrant" begins, "[b]efore me being first duly sworn appears Executive Assistant Charles Escalante of the Westlake Police Department." It then details Escalante's years of experience as a police officer, first for Avon Lake, and then for the city of Cleveland. The affidavit is signed "Charles Escalante."

{¶ 57} The "Search Warrant" provides: "[t]o Chief of Police of the Westlake Police Department and/or Detective Charles Escalante of the Westlake Police Department, and/or any law enforcement officer as authorized."

{¶ 58} The "Order Sealing Affidavit" states: "[t]he Court finds that Detective Charles Escalante of the Westlake Police Department, has made an application for a search warrant to be executed by officers of the Westlake Police Department ***." Charles Escalante also signed the "Search Warrant Inventory List" as the Inventory Officer.

{¶ 59} Section Fourteen, Article I, of the Ohio Constitution provides that:

{¶ 60} "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person(s) and things to be seized."

{¶ 61} Crim.R. 41 and Chapter 2933 of the Ohio Revised Code govern the requirements for search warrants in the state of Ohio. *State v. Williams* (1991), 57 Ohio St.3d 24, 25.

{¶ 62} R.C. 2933.22 states: "[a] warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized." R.C. 2933.24 mandates that the warrant be issued to "the proper law enforcement officer ***."

{¶ 63} Crim.R. 41(A) provides that "[a] search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located

within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer."

{¶ 64} A "law enforcement officer" is defined in R.C. 2901.01(A)(11). It provides in pertinent part that "law enforcement officer" is:

{¶ 65} "(a) A sheriff, deputy sheriff, constable, police officer of a township or joint township police district, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing authority ***, or state highway patrol trooper;

{¶ 66} "(b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority ***."

{¶ 67} Crim.R. 2(J) also defines "law enforcement officer." It essentially mirrors the relevant portions of R.C. 2901.01(A)(11).

{¶ 68} Escalante was not an "employee of the state" with statutorily conferred "authority to arrest" as the state argues. No where in the statute is "authority to arrest" conferred upon an executive assistant to the chief of police. If Escalante had authority to arrest, it was because he was employed as a law enforcement officer for the city of Westake. However, whether Escalante was properly employed was not established, despite Alton's counsel attempting to do so.

{¶ 69} After reciting the testimony of the chief of police, Richard Wallings, the majority states "Alton's argument also ignores the concession made by his attorney at the conclusion of the hearing[,]" that "Escalante 'can act as a police officer in the [c]ity of Westlake without taking a civil service exam.'" However, the reason Alton's attorney concluded his line of questioning, which ultimately ended the motion to suppress hearing, is because the trial court interrupted him and would not permit him to continue. It is my view that Alton's attorney did not concede anything to the trial court.

{¶ 70} On cross-examination, Alton's attorney asked the chief of police, "[s]o if I wanted to be a police officer in the city of Westlake, the job would have to be classified and I would have to take the civil service exam?" Before Wallings could answer, the trial court interrupted Alton's attorney, and stated:

{¶ 71} "THE COURT: Excuse me. Mr. Peterson, you are the one that's mixing the vernacular. The executive assistant is considered under the law to be a confidential employee exempt from a bargaining unit. Civil service has certain protections similar to what would be existing in a bargaining unit.

{¶ 72} "The classification of an officer as an executive assistant is a classification done to exempt them specifically from this protection of civil service. It makes it at-will employment. So you are the one that is mixing an apple with an orange."

{¶ 73} "MR. PETERSON: Your honor, I am not sure I am mixing apples and oranges.

{¶ 74} "THE COURT: You are.

{¶ 75} "MR. PETERSON: There is a specific reason.

{¶ 76} "THE COURT: You can be a sworn police officer and be an executive assistant. What it does is, as I said, is exempt from the rule of civil service for purposes of your employment.

{¶ 77} "So I don't want you to think that because he is an executive assistant that he can't function as somebody able to be an affiant on a search warrant. The two are not mutually exclusive.

{¶ 78} "MR. PETERSON: I don't have that information, your Honor. I thought they were mutually exclusive.

{¶ 79} "THE COURT: You need to research civil service and research at-will employment. The distinction is done to avoid the protection of civil service and makes the person an at-will employee. It removes actually a number of their employment protections."

{¶ 80} After reviewing the record, it is apparent that the trial court precluded Alton from resolving the issue of whether Escalante was properly hired as a law enforcement official under Westlake's civil service laws. The trial court stated that Escalante was an at-will employee, without the protections of the civil service

system. However, the purpose of the civil service system was not simply to distinguish between classified and unclassified employees. Its origin and purpose are set forth in the following paragraphs.

{¶ 81} The Ohio civil service system originates from Section 10, Article XV, of the Ohio Constitution. It provides:

{¶ 82} "[a]ppointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

{¶ 83} In *Zavison v. Loveland* (1989), 44 Ohio St.3d 158, 161, the Supreme Court of Ohio described the system and its purpose aptly: "[t]he purpose of the civil service system is to provide a 'stable framework of public offices upon which a workable civil service system may be constructed' while 'avoiding the traditional spoils system *** and *** providing a method of fair employee selection and promotion based upon merit and fitness.'" Further, the civil service laws "safeguard appointees against unjust charges of misconduct and inefficiency, and from being unjustly discriminated against for religious or political reasons or affiliations." *Curtis v. State ex rel. Morgan* (1923), 108 Ohio St. 292, paragraph four of the syllabus.

{¶ 84} Chapter 124 of the Revised Code sets forth a comprehensive statutory plan for civil service in the state of Ohio. *Ohio Assn. of Pub. School Employees,*

Chapter No. 471 v. Twinsburg (1988), 36 Ohio St.3d 180, 187. However, under the Home Rule Amendment of the Ohio Constitution, "[m]unicipalities exercise the powers of local self-government to the fullest by adopting a charter ***."[2] *State ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St.3d 106, 108.

{¶ 85} "It is well-settled in Ohio that regulation of city civil service is within the powers of local self-government." *Ohio Assn. of Pub. School Employees* at 182-183. Moreover, "[t]he appointment of officers within a city's police force is an exercise of 'local self-government' within the meaning of those words as used in the Ohio Constitution. *** The general rule is that in matters of local self-government, if there is a conflict between a charter provision and a statute, the charter provision prevails. ***." (Citations omitted.) *State ex rel. Bardo* at 108-109.

{¶ 86} In the case sub judice, Wallings testified that the city of Westlake has a city charter which governs its civil service system. Wallings said that he requested the mayor to appoint Escalante as Executive Assistant to the Chief of Police. Westlake City Council then passed two ordinances, essentially creating the position for Escalante and funding it. Wallings indicated that Escalante began as a part-time patrol officer in the detective bureau on March 15, 1999. He was made full-time Executive Assistant to the Chief of Police on January 10, 2000. As an executive

[2]Section 3, Article XVIII, of the Ohio Constitution provides "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as

assistant, Wallings stated that Escalante is a fully credentialed police officer in charge of "vice and narcotics."

{¶ 87} Alton was attempting to establish that the two ordinances, creating Escalante's position and funding it, violated Westlake's civil service system set forth in the Westlake Charter. However, the trial court interrupted Alton's counsel's line of questioning, before he could resolve the issue. Alton's counsel never conceded that he was wrong. In fact, he respectfully disagreed with the trial court several times, before the judge informed him that he just needed to "research civil service and research at-will employment," effectively concluding the motion to suppress hearing.

{¶ 88} It is this writer's opinion that Alton's argument may have merit. In *Gallagher v. Cleveland* (1983), 10 Ohio App.3d 77, this court held that "[w]here an ordinance is in conflict with a charter provision, the charter prevails." Id. at paragraph one of the syllabus. We further held: "[a]n ordinance establishing the position of deputy chief of police is invalid and cannot be given effect where it creates a position which did not meet the requirements set forth in the city charter for a classified or unclassified civil service position." Id. at paragraph two of the syllabus.

{¶ 89} In *Gallagher*, eleven police officers and taxpayers of the city of Cleveland initiated an action against the city, the mayor, and the Cleveland Civil

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are not in conflict with general laws."

Service Commission. Plaintiffs sought a declaration that an ordinance, establishing the position of deputy chief of police, was null and void because it violated several provisions of Cleveland's civil service system in the Cleveland City Charter. Id. at 77. Plaintiffs further argued that two police officers had been "promoted" to the position of deputy chief within the meaning the city charter and that the appointment procedure followed did not meet the requirements set forth in the charter. Specifically, they maintained that civil service examinations had not been given and appointment had not been made from a list of eligible officers certified by the Cleveland Civil Service Commission.

{¶ 90} This court concluded that, "the Cleveland City Council could not, consistent with *** the charter, create the position of deputy chief as an unclassified position." Id. at 79. Therefore, since the ordinance violated the city charter, it was invalid.

{¶ 91} In the case sub judice, the state argues, "[a]ppellant's attempts to attack the merits of the detective's hiring does not vitiate his certification or his ability to effect arrests." I disagree. If Escalante is not a valid law enforcement officer, because he is not legitimately employed by the city of Westlake pursuant to its own charter, then he cannot be an affiant on a search warrant.

{¶ 92} The state further contends that even if Escalante is not a law enforcement officer, the evidence should not be excluded since it is a violation of

state law, and not a constitutional error. This argument is also without merit. In the case cited by the state in support of its argument, the court held that there was no constitutional error because a date was omitted from a search warrant. *State v. Remy*, 4th Dist. No. 03CA2731, 2004-Ohio-3630. This writer agrees that technical errors on a search warrant are not constitutional errors, and as such, would not justify the exclusion of evidence. However, this writer disagrees that the error here was a mere technicality.

{¶ 93} In *State v. Martins Ferry Eagles* (C.P. 1979), 62 Ohio Misc. 3, 6, the court held that "[a] secret service officer appointed by the prosecuting attorney does not have statutory authority to arrest and thus is not a law enforcement officer under Crim.R. 2 for the purpose of receiving and executing a search warrant under Crim.R. 41. Therefore, physical evidence seized under the authority of such a warrant was improperly obtained and must be suppressed."

{¶ 94} Thus, it is my view that the trial court erred by not permitting Alton's counsel to complete his line of questioning. I would reverse and remand this case to allow Alton to finish the motion to suppress hearing. If Alton establishes that Westlake did indeed violate its own civil service laws, then the ordinance creating the position of Executive Assistant to the Chief of Police would have no effect, and Escalante would not be a law enforcement officer within the meaning of Crim.R. 41, R.C. 2901.01(11), and Crim.R. 2(J).

{¶ 95} Moreover, the trial court did not make any findings of fact or conclusions of law. It simply stated in its Journal Entry, "Motion to suppress heard and denied. Case called for trial. Jury empaneled [sic.] and sworn." Crim.R. 12(F) requires that "where factual issues are involved in determining a motion, the court shall state its essential findings on the record." This court has reversed and remanded a trial court's granting of a motion to suppress where factual issues were left unresolved by the trial court see, e.g., *Cleveland v. Benjamin*, 8th Dist. No. 81108, 2002-Ohio-6826, at ¶7-10.

{¶ 96} In the case sub judice, there are factual issues that the trial court must resolve, including whether Escalante was properly hired according to Westlake's civil service laws, which would permit him to be a proper affiant on a search warrant.

{¶ 97} Therefore, I would conclude that Alton's first assignment of error has merit. Accordingly, I would reverse and remand the judgment of the Cuyahoga County Court of Common Pleas. Upon remand, I would instruct the trial court to make findings of fact pursuant to Crim.R. 12(F).