[Cite as *State v. Batain*, 2009-Ohio-2582.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91502

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAFAEL BATAIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Common Pleas Court
Case No. CR-498825

BEFORE: Sweeney, J., Rocco, P.J., and McMonagle, J.

RELEASED: June 4, 2009

JOURNALIZED:
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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Rafael Batain ("defendant"), appeals his convictions for drug possession in violation of R.C. 2925.11 and possessing criminal tools in violation of R.C. 2923.24, by challenging the trial court's denial of his motions to suppress evidence. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} We first note that on March 12, 2009, this Court released *State v. Ealom*, Cuyahoga App. No. 91140, 2009-Ohio-1073. Ealom, defendant, and two other men were co-defendants in Cuyahoga County Court of Common Pleas Case No. CR-498825. Ealom and defendant filed various motions to suppress evidence, which the court denied en masse on February 15, 2008. Ealom pled no contest to the charges against him and appealed the court's denial of his motions to suppress. See *Ealom*, supra. Defendant took his case to trial, and on May 12, 2008, the jury found him guilty of possessing drugs and criminal tools. Defendant filed the instant appeal, which centers solely around the denial of the motions to suppress. For purposes of consistency, we incorporate the following facts from this Court's opinion in *Ealom*, supra, at ¶¶ 2-7:

{¶ 3} "The trial court held a two-day hearing on appellant's motions to suppress. At that hearing, Lieutenant Dennis Hill, Detectives Franklyn Lake and James Kooser, and an informant testified for the State. The defense called

Detective John Pitts to testify. Based upon the evidence presented, the trial court determined the following facts.

{¶ 4} "On July 5, 2007, Cleveland police were notified by a confidential informant that certain identified males, including appellant, had arrived in Cleveland with a shipment of marijuana. The shipment had been anticipated as a result of the Cleveland Police Department Narcotics Unit undercover operation. The police determined that the males were staying at the Cleveland Marriott Hotel on West 150th Street in rooms 325 and 327.

{¶ 5} "Lieutenant Hill met with members of the narcotics unit and formulated a plan to obtain information and secure a search warrant. The plan was for Lieutenant Hill to send the informant into the hotel room with a live wire so that he could observe the illegal drugs and record the conversations with the suspects. Lieutenant Hill was to meet the informant immediately after, review the tape, and relay the information to Detective Lake who would prepare the affidavit and search warrant. Detective Lake was then to go to the home of a Cuyahoga County common pleas judge to have the warrant signed.

{¶ 6} "The night of July 5, 2007, the informant met with Lieutenant Hill who explained the plan. Between 9:00 and 9:30 p.m., Lieutenant Hill followed the informant, who was wired, to the hotel. The informant parked his car in the hotel parking lot and was met by appellant in the lobby and taken upstairs to the rooms. Members of the narcotics unit surveillance team were in the room across the hall

monitoring the operation. The informant confirmed for the record that the marijuana was in the room, engaged in two phone calls with Lieutenant Hill, and then left, allegedly to get the money to complete the sale.

{¶ 7} "The informant met Lieutenant Hill across the street in a gas station and gave him the tape recording. After listening to the tape, Lieutenant Hill relayed the information to Detective Lake, who was sitting outside the judge's house. Between 10:00 and 10:15 p.m., Detective Lake notified Lieutenant Hill that the warrant had been signed. Lieutenant Hill notified the surveillance team that the warrant was secured, and the team executed the search warrant and entered the rooms at approximately 10:20 p.m.

{¶ 8} "Detective [Lake] proceeded immediately to the hotel where he gave Lieutenant Hill the signed search warrant. Copies were made at the front desk, after which Lieutenant Hill took the warrant upstairs and showed it to the defendants. All four defendants were subsequently arrested and, after they each refused to sign the inventory, a copy of the warrant and inventory was left in one of the hotel rooms. As a result of the search, the police seized approximately 50 pounds of marijuana and $14,000 in U.S. currency."

{¶ 9} In addition to the above facts, the record establishes that defendant was one of the four people arrested in the hotel room on July 5, 2007. Furthermore, the guest registration receipts for Marriott rooms 325 and 327 for that night showed that both rooms were registered in the name of defendant Rafael Batain.

{¶ 10} Defendant now appeals the denial of his motions to suppress, raising the following sole assignment of error for our review.

{¶ 11} "I. The trial court abused its discretion in denying appellant's motion to suppress."

{¶ 12} Specifically, defendant argues that the search warrant and supporting affidavit were created before the informant confirmed the marijuana was at the Marriott. Defendant further argues that, as a result, a substantive averment in the affidavit did not occur - namely that Detective Lake gave the informant an "amount of U.S. Currency, the serial numbers of which had been previously recorded." Further testimony revealed, and the parties do not dispute, that the police officers involved in this case did not give the informant money to make a drug buy. Officer Lake's testimony gives the following explanation:

{¶ 13} "Q. Okay. If you can move on to Subsection 5. You swore in this affidavit that the [informant] was given an amount of buy money. All right. Was that correct?

{¶ 14} "A. This one we discussed to do that at first, but at least we decided to change that. And I was doing a cutting a pasting, and that part probably didn't get cut out.

{¶ 15} "Q. So that's incorrect?

{¶ 16} "A. Yeah, that was definitely incorrect.

{¶ 17} "***

{¶ 18} "Q. Now, reviewed by previous counsel there were averments made in that search warrant that didn't occur, correct?

{¶ 19} "A. Yeah.

{¶ 20} "Q. And why did you put them in beforehand?

{¶ 21} "A. We originally decided to do it one way and then we changed our minds. I'm not computer savvy at all, so I tried to delete and copy and cut and paste, and I didn't get it all the way out so --

{¶ 22} "***

{¶ 23} "Q. With the exception of the typing mishap that you had on, I believe it was averment number 5 concerning the buy money. With regards to everything else that is found in this affidavit, it all in fact did happen?

{¶ 24} "A. Yes, everything did happen. And like I said, I'm not computer savvy and I made a mistake by not copying, cutting and getting it out of there."

{¶ 25} An appellate court's review of a ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328. In a hearing on a motion to suppress evidence, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Hopfer* (1996), 112 Ohio App.3d 521. Accordingly, "[a]n appellate court must review the trial court's findings of historical fact only for clear error, giving due weight to inferences drawn from those facts by the trial court.

The trial court's legal conclusions, however, are afforded no deference, but are reviewed de novo." *State v. Russell* (1998), 127 Ohio App.3d 414, 416.

{¶ 26} The instant case is factually similar to *State v. Taylor* (2007), 174 Ohio App.3d 477, in which the affidavit supporting the search warrant in question contained a misstatement which the affiant explained was a "clerical error," because he used a template with boilerplate language which he did not change. The First District Court of Appeals of Ohio held the following:

{¶ 27} "An affidavit supporting a search warrant enjoys a presumption of validity. To successfully attack the veracity of a facially sufficient affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement either 'intentionally or with a reckless disregard for the truth.' 'Reckless disregard' means that the affiant had serious doubts about an allegation's truth. Further, even if the affidavit 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 ***.'" *Taylor*, supra, 174 Ohio App.3d at 482, citing, inter alia, *State v. Roberts* (1980), 62 Ohio St.2d 170, 178; *Franks v. Delaware* (1978), 438 U.S. 154, 155-56; *State v. Waddy* (1992), 63 Ohio St.3d 424, 441; *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046.

{¶ 28} In the instant case, the record shows that the statement in the affidavit regarding giving the informant money was false. However, we cannot say that it was

made intentionally or with a reckless disregard for the truth. Indeed, Detective Lake testified that he made a typing error, and nothing in the record shows otherwise. See *State v. Mobley* (May 22, 1989), Warren App. No. CA88-08-063 (holding that search warrants "are often made in haste and the law does not require the information in the supporting affidavits to be perfect").

{¶ 29} Additionally, whether Detective Lake gave the informant money is not necessary to the finding of probable cause required to issue a valid search warrant, given the facts of this case. The law does not require "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. *** [A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite 'some of the underlying circumstances from which the informant concluded' that relevant evidence might be discovered ***." *Franks*, 438 U.S. at 165.

{¶ 30} The affidavit clearly states that Detective Lake and the informant met with two of the defendants to arrange the purchase of 100 pounds of marijuana from Arizona during the week of July 2, 2007. The affidavit then states that the informant recorded a conversation with at least one of the defendants establishing that the drugs were in Cleveland at the Marriott. The informant then went to the Marriott, saw

the drugs and the defendants in the same hotel room, and reported this information to Lieutenant Hill. Lieutenant Hill then called Detective Lake, who got the warrant signed. The affidavit does not aver that drugs were purchased or that money was exchanged.

{¶ 31} Accordingly, we find no error in the court's judgment denying defendant's motions to suppress and his sole assignment of error is overruled.

Judgment 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., CONCURS
CHRISTINE T. McMONAGLE, J., CONCURS
IN JUDGMENT ONLY

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