[Cite as *State v. Kiraly*, 2009-Ohio-4714.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92181

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

PERRY KIRALY

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-482277

BEFORE: Gallagher, P.J., Kilbane, J., and Blackmon, J.

RELEASED: September 10, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: Brian S. Deckert
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Albert A. Giuliani
1540 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114

Albert J. Purola
38108 Third Street
Willoughby, Ohio 44094

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, the state of Ohio, appeals the decision of the Cuyahoga County Court of Common Pleas that granted the motion to suppress of appellee, Perry Kiraly. For the reasons stated herein, we reverse the decision of the trial court, and remand the matter for further consideration.

{¶ 2} In this case, Kiraly was indicted under an eight-count indictment with engaging in a pattern of corrupt activity, including burglary, safecracking, possession of criminal tools, and other related acts. Kiraly entered a plea of not guilty to the indictment.

{¶ 3} Kiraly filed a motion to suppress,[1] and the state filed a brief in opposition. Thereafter, the trial court held a hearing at which testimony and evidence were presented.[2]

{¶ 4} Between the hours of 11:30 p.m. on January 31, 2006, and 7:00 a.m. on February 1, 2006, an individual broke into the first floor office at the Westlake Hotel Condominiums in Rocky River. A safe and its contents were stolen. At the time, the video surveillance equipment was not operating.

---

[1] The motion was actually titled "omnibus motion for appropriate relief."

[2] The exhibits submitted at the suppression hearing, including the search warrant and affidavit, were not properly made part of the record on appeal. Therefore, our review of the record is limited and several of the challenges to the affidavit are not addressed. References made to information contained in these exhibits are derived from the trial court's findings and the transcript of proceedings. Upon remand, the parties may wish to add these documents to the record.

{¶ 5} Detective Carl Gulas of the Rocky River Police Department testified that he responded to the scene of the crime. During his investigation, Det. Gulas became aware that one of the items inside the stolen safe was an ATM card issued by U.S. Bank. He contacted U.S. Bank and learned that the card had been used on February 1, 2006, at a Charter One ATM machine located at 4220 Pearl Road in Cleveland. He was told that $200 was withdrawn around 5:00 to 5:30 a.m.

{¶ 6} Det. Gulas initially received from Charter One Bank photographs of the purported transaction taken from a camera in the ATM machine. Two or three days later, on February 9, 2006, he received a DVD disk containing video footage from the ATM machine. The still images were of poor, grainy quality.

{¶ 7} On March 2, 2006, Det. Gulas prepared a search warrant with an accompanying affidavit for Kiraly's residence. Judge Fitzsimmons of the Rocky River Municipal Court issued the warrant.

{¶ 8} In the affidavit, Det. Gulas identified Perry Kiraly as a "possible suspect" because of his resemblance to a bank security photograph and his criminal record. Det. Gulas stated that an image of a male making the $200 withdrawal was obtained. Det. Gulas later testified that he did not believe that he showed any pictures to the issuing judge.

{¶ 9} At the suppression hearing, Det. Gulas testified that in preparing the affidavit, he relied upon the initial photographs provided to him from Charter One Bank of the requested transaction and his belief that the person in those images resembled Kiraly. Det. Gulas was familiar with Kiraly from a 1991 burglary in which a safe was broken into at a Marc's discount store.

{¶ 10} Nothing on the ATM photographs indicated transactional information. Upon review of the video that was provided to Det. Gulas, it appeared that the timing on the footage was inconsistent with the time of the transactions. A review of the video, when linked to the transaction time, reflected that the image of the person purportedly resembling Kiraly related to a $60 withdrawal on a different account. The image corresponding to the $200 withdrawal on the stolen U.S. Bank card account was of an African American woman. Det. Gulas conceded that this information was on the video provided to him by Charter One Bank, but apparently his focus was on the man resembling Kiraly making a transaction in the same general time frame. With this information on the video, Det. Gulas continued to rely upon the initial image resembling Kiraly that was provided to him by the bank.

{¶ 11} Det. Gulas further stated in the affidavit that Kiraly previously was convicted of attempted murder and murder. However, Kiraly had never been convicted of either murder or attempted murder. Det. Gulas conceded that he had viewed the BCI/LEADS report, which confirms that Kiraly had

not been convicted of either. He claimed it was a "typographical error" and should have reflected that Kiraly was "arrested or convicted," not just convicted.

{¶ 12} In his affidavit, Det. Gulas also indicated that search permission was sought for a 1981 Chevrolet Corvette. However, the search warrant identified a 1985 Buick as a vehicle to be searched. Again, Gulas asserted this was also due to a "typographical error." He claimed both vehicles existed and the Buick was mistakenly left out of the affidavit. He asserted that four cars in total were listed between the affidavit and the search warrant.

{¶ 13} During the investigation, Det. Gulas discovered that Kiraly was arrested for shoplifting camcorder batteries at a Target store in Rocky River on February 18, 2006. At the time Det. Gulas executed the search warrant at Kiraly's residence, he also executed arrest warrants on the petty theft charge. Det. Gulas testified that once the police gained entry to the unit, they served the search and arrest warrants, and then conducted a search. He stated that incriminating evidence was observed in plain view in the bedroom. The police then obtained a second warrant because new items were found.

{¶ 14} The trial court found that the only evidence to link Kiraly to the crime in the instant case was a "grainy, low-quality black and white photo from the ATM machine." The court recognized that Det. Gulas "stated he was told by the bank the photo was of the individual using the ATM card

stolen from the office." However, "a bank representative testified she didn't give the officer the picture." The court also found that "a review of the actual [ATM] video, when linked to the time, showed the card being used by an African American female." The court stated that "neither the video nor the photo were [sic] shown to the magistrate that issued the search warrant." Upon these conclusions, the trial court determined that it "cannot conclude that the independent magistrate had enough evidence before her to render an independent opinion." Therefore, the court ordered the evidence suppressed.

{¶ 15} The state has appealed the trial court's decision. It has raised three assignments of error for our review. In reviewing a ruling on a motion to suppress evidence, "an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *State v. Burnside*, 100 Ohio St.3d 152, 155, 2003-Ohio-5372. However, an appellate court's review of the trial court's application of law to those facts is de novo. Id.

{¶ 16} The state's first assignment of error provides as follows: "1. The trial court erred in determining that a search warrant was invalid where the issuing magistrate had a substantial basis for concluding that probable cause existed."

{¶ 17} Under the Fourth Amendment to the United States Constitution, probable cause must support a search warrant. A police officer establishes

probable cause for a search warrant through an affidavit. Crim.R. 41(C). When determining whether an affidavit submitted in support of a search warrant contains probable cause, the issuing magistrate should simply "'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, 329, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238.

{¶ 18} "Reviewing courts may not substitute their own judgment for that of the issuing magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which the reviewing court would issue the search warrant. On the contrary, reviewing 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." *George*, 45 Ohio St.3d at 330 (internal citations omitted). "The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Id. at paragraph two of the syllabus, following *Illinois*, 462 U.S. 213.

{¶ 19} As an initial matter, the state argues that the trial court considered evidence outside the four corners of the affidavit and incorrectly conducted a de novo review. Although great deference is accorded to a magistrate's probable cause determination, a reviewing court is not precluded from inquiring into whether the magistrate was misled by knowing or reckless falsity in the affidavit, and the court must also insist that the magistrate purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police. *United States v. Leon* (1984), 468 U.S. 897, 914-915.

{¶ 20} In this case, the trial court concluded that the issuing judge did not have enough information to render an independent opinion. We recognize that there is a presumption of validity with respect to an affidavit supporting a search warrant. *Franks v. Delaware* (1978), 438 U.S. 154, 171. Nevertheless, sufficient facts must be set forth in the affidavit accompanying the search warrant so that the reviewing magistrate can make an independent determination that probable cause exists for the search. *State v. Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-6380, citing *Illinois*, 462 U.S. at 239. "There must be sufficient information within the affidavit, in the form of facts rather than conclusions, in order for an issuing judge to make a probable cause determination. *Illinois v. Gates*, 462 U.S. at 239. An issuing judge may not merely ratify the 'bare conclusions of others.' Id. If an

affidavit is 'framed solely in conclusory terms [it] is deficient in that it prevents a magistrate from exercising independent review and robs the Fourth Amendment of its essence.' *State v. Goddard* (Oct. 2, 1998), Washington App. No. 97CA23, 1998 WL 716662 at *4, citing Katz, Ohio Arrest, Search & Seizure (1998 Ed.), Section 3.03(A)." *Harry*, supra.

{¶ 21} Here, the affidavit was not a "bare bones" affidavit containing only conclusions. The affidavit provided specific facts regarding the stolen safe and its contents, the ATM transaction using the stolen bank card, the time frame of events, the photograph obtained by the officer of the purported transaction, the officer's belief that the image resembled Kiraly, and Kiraly's criminal record, as well as other information. Because the affidavit provided the issuing judge with a substantial basis for concluding that probable cause existed for the search warrant, the trial court erred with respect to its legal conclusion.

{¶ 22} Because the trial court decided the motion on the above grounds, the trial court never determined the issue of whether the warrant process was compromised by false statements or omissions in the warrant affidavit. Where knowing falsity or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set aside, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the

search excluded. *Franks*, 438 U.S. at 156. "Reckless disregard" means that the affiant had serious doubts of an allegation's truth. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046. Omissions count as false statements if "designed to mislead, or * * * made in reckless disregard of whether they would mislead, the magistrate." *United States v. Colkley* (C.A. 4, 1990), 899 F.2d 297, 301.

{¶ 23} The trial court recognized that Det. Gulas was investigating the U.S. Bank card withdrawal and was provided photographs that depicted an image of a man resembling Kiraly making a withdrawal. Det. Gulas was also supplied with video footage that, although it contained the image of the man resembling Kiraly at the ATM machine, linked a different individual to the subject transaction. The trial court also recognized that Det. Gulas viewed the BCI/LEADS report on Kiraly's criminal record and Det. Gulas represented that Kiraly had been convicted of murder and attempted murder. In fact, Kiraly had never been convicted of either offense. However, the trial court never specifically ruled whether the affiant made any knowingly, intentionally false statements, or made false statements with reckless disregard for the truth, and if so, whether the affidavit's remaining content is sufficient to establish probable cause.

{¶ 24} Accordingly, we reverse the decision of the trial court and remand the matter to the trial court for these determinations.

{¶ 25} The state's second assignment of error provides as follows: "2. The trial court erred in suppressing evidence obtained by officers who were acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate."

{¶ 26} According to the "exclusionary rule," "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp v. Ohio* (1961), 367 U.S. 643, 655. The "purpose of the exclusionary rule is to deter unlawful police conduct * * *." *United States v. Peltier* (1975), 422 U.S. 531, 542. However, there are exceptions to the exclusionary rule, including the "good faith exception," which is outlined in *Leon,* 468 U.S. 897.

{¶ 27} Pursuant to the "good faith exception," the exclusionary rule should not apply "when an officer acting with objective good faith has obtained a search warrant and acted within its scope." Id. at 920. However, where the officer himself supplied the information with "knowing or reckless falsity," the good faith exception does not apply. See id. at 923; United *States v. Baxter* (C.A. 6, 1990), 889 F.2d 731.

{¶ 28} Whether the good faith exception applies in this matter should be addressed upon remand to the trial court.

{¶ 29} The state's third assignment of error provides as follows: "3. The trial court erred in suppressing evidence seized during the course of a search

of defendant-appellee's residence pursuant to a search warrant when [the] police were also executing an arrest warrant and the items seized were in plain view."

{¶ 30} The state argues that even if the search warrant is invalid, the police were also executing lawful arrest warrants when they observed incriminating evidence in plain view. The state claims the evidence was lawfully seized when the police obtained a second search warrant.

{¶ 31} In its brief in opposition to Kiraly's motion to suppress, the state never argued alternatively that the evidence was lawfully obtained through the execution of the arrest warrants. Testimony from Det. Gulas established that once the police gained entry to the unit, they served the search warrant and arrest warrants, and then conducted a search. Incriminating evidence was observed in the bedroom. There is nothing in the record suggesting that the evidence was observed in the scope of a search incident to the arrest. The trial court sustained an objection to further inquiry pertaining to items observed in the course of the search.

{¶ 32} The trial court was never asked to rule on whether any justification, other than the search warrant, might support the search or seizure of evidence. This is another issue that may be addressed upon remand to the trial court.

{¶ 33} Judgment reversed, case remanded.

It is ordered that appellant recover from appellee 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR