[Cite as *State v. Brown*, 2006-Ohio-6749.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. Nos. 23076 & 23080
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DONALD EUGENE BROWN	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 04 12 4150(A)

DECISION AND JOURNAL ENTRY

Dated: December 20, 2006

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellant, Donald Eugene Brown, appeals the decision of the Summit County Court of Common Pleas, which overruled his motion to suppress. This Court affirms.

I.

{¶2} On November 29, 2004, Detective Matthew Hudak, a narcotics detective for the Barberton Police Department, received information from Special Agent Chuck Turner of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") that there was drug activity at appellant's home which is located at 258 Green Street. Detective Hudak also received two other tips containing information

that a truck and trailer with Georgia license plates would be at 258 Green Street to deliver drugs. Detective Hudak and Sergeant Morber of the Barberton Police Department began surveillance of appellant's home. After observing what they believed to be drug activity at appellant's home, the police obtained a search warrant for 258 Green Street based upon an affidavit by Detective Hudak. During the execution of the search warrant, six large bags of marijuana weighing over 20,000 grams and storage bags were found in appellant's garage. The police also found three guns and ammunition in appellant's home. The weapons were test fired and found to be operable.

{¶3} Appellant was indicted by the Summit County Grand Jury on one count of trafficking in marijuana in violation of R.C. 2925.03(A)(2), one count of possession of marijuana in violation of R.C. 2925.11(A), three counts of having weapons while under disability in violation of R.C. 2923.13(A)(2) and (3), one count of resisting arrest in violation of R.C. 2921.33(A), and one count of criminal trespassing in violation of R.C. 2911.21(A)(1). In a supplemental indictment, appellant was also charged with one count of receiving stolen property in violation of R.C. 2913.51(A) and one count of possession of marijuana in violation of R.C. 2925.11(A).

{¶4} Appellant initially pled not guilty to the charges in the indictment. Prior to trial, appellant filed a motion to suppress the evidence seized from his home, arguing that it was the fruit of an illegal search and seizure. The trial court

held a hearing on appellant's motion to suppress after which it denied the motion. Appellant filed a supplemental motion to suppress which the trial court also denied. The matter proceeded to a jury trial, and at the close of the State's case, appellant moved for a Crim.R. 29(A) judgment of acquittal. The trial court granted appellant's Crim.R. 29(A) motion for judgment of acquittal as to the charge of receiving stolen property and the trial resumed. At the close of all evidence, appellant again moved for a Crim.R. 29(A) judgment of acquittal. Appellant's motion for judgment of acquittal was denied. The jury found appellant guilty of the remaining charges and the trial court sentenced him to a total term of imprisonment of 11 years.

{¶5} Appellant timely appealed his convictions, setting forth four assignments of error for review.

II.

FIRST ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTIONS TO SUPPRESS EVIDENCE, BECAUSE THE AFFIDAVIT FOR THE SEARCH WARRANT DID NOT PROVIDE THE MAGISTRATE WITH A SUBSTANTIAL BASIS FOR CONCLUDING THAT PROBABLE CAUSE EXISTED."

{¶6} In his first assignment of error, appellant argues that the trial court erred in denying his motions to suppress because the affidavit used to secure the search warrant did not provide the magistrate with a substantial basis for concluding that probable cause existed. Specifically, appellant argues that the

search warrant affidavit was an insufficient basis for probable cause because it relied on information obtained from confidential informants which was not attested to be reliable by the affiant. Appellant has also argued that the affidavit failed to establish probable cause because it did not establish that evidence of a crime was presently at the location to be searched. This Court disagrees.

{¶7} A court reviewing the sufficiency of probable cause in a submitted affidavit should not substitute its judgment for that of the issuing judge. *State v. Tejada*, 9th Dist. No. 20947, 2002-Ohio-5777, at ¶7, citing *State v. George* (1989), 45 Ohio St.3d 325, at paragraph two of the syllabus. Rather, the duty of a reviewing court is to determine whether the magistrate or judge had a substantial basis for concluding that probable cause existed. *George*, 45 Ohio St.3d at paragraph two of the syllabus. Great deference is to be given to the issuing judge's determination and doubtful or marginal cases are to be resolved in favor of upholding the validity of the warrant. *State v. Cash* (Mar. 14, 2001), 9th Dist. No. 20259, citing *George*, 45 Ohio St.3d at paragraph two of the syllabus.

{¶8} This Court has held the following regarding review of the sufficiency of an affidavit in support of a search warrant:

> "'In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate,

> neither a 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. (*Illinois v. Gates* (1983), 462 U.S. 213, followed.)'" *State v. Fisher*, 9th Dist. No. 22481, 2005-Ohio-5104, at ¶6, quoting *George*, 45 Ohio St.3d at paragraph two of the syllabus.

{¶9} Further, "[t]here is no need for a declaration of the reliability of an informant when the informant's information is corroborated by other information." (Quotations and citations omitted). Id. at ¶7. This Court has stated that where an affidavit sufficiently details some of the underlying circumstances, where the reason for crediting the informant is given, and where probable cause is or has been found, this Court should not rely on a hyper-technicality to invalidate a warrant. Id. Instead, the affidavit should be interpreted in a common sense manner. Id.

{¶10} "[P]robable cause is the existence of circumstances that warrant suspicion." (Quotations and citations omitted). *Tejada* at ¶8. Therefore, "the standard for probable cause does not require a prima facie showing of criminal activity; rather, the standard requires only a showing that a probability of criminal activity exists." (Quotations omitted). Id. See also, *George*, 45 Ohio St.3d at

329. Furthermore, courts view the totality of the circumstances in making probable cause determinations. *Illinois v. Gates* (1983), 462 U.S. 213, 233.

{¶11} In the present case, affiant Detective Hudak prepared a thorough affidavit, containing detailed information from three informational sources indicating that drug activity was taking place at appellant's residence. Appellant contends that the use of confidential informants was insufficient to establish probable cause. However, this Court has stated, "Declarations as to the informant's reliability may not be necessary if the statements are corroborated by extrinsic information." *State v. Thymes*, 9th Dist. No. 22480, 2005-Ohio-5505, at ¶27. (Citations omitted.) In the present matter, the information in the affidavit was corroborated by the information obtained through the officers' surveillance of appellant's residence. The counter surveillance by appellant observed by the police officers also indicated the presence of criminal activity. Additionally, the vehicles that were stopped upon leaving appellant's residence indicated that drug activity was occurring there. A vehicle registered to appellant contained marijuana and a drug dog alerted to the presence of narcotics on a truck and trailer previously seen at appellant's residence. No narcotics were found, but a large hidden compartment was found in the trailer. Detective Hudak stated that based upon his training and experience, people trafficking in drugs often utilize hidden storage compartments to transport narcotics and currency.

{¶12} Based upon the foregoing, this Court finds that it was unnecessary for the affidavit to include an attestation regarding the informants' reliability. Viewing the totality of the circumstances, this Court finds that sufficient information existed to corroborate the informants' information. Consequently, we find that the trial court had a substantial basis to suspect that a "probability of criminal activity" existed at appellant's residence. See *Tejada* at ¶8. Appellant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTIONS TO SUPPRESS EVIDENCE, BECAUSE THE SEARCH WARRANT COULD REASONABLY HAVE DESCRIBED THE ITEMS TO BE SEIZED MORE PRECISELY."

{¶13} In his second assignment of error, appellant argues that the trial court erred in denying his motions to suppress because the search warrant did not specifically describe the items to be seized. Specifically, he asserts that the warrant should have been limited to marijuana and not other drugs. This Court disagrees.

{¶14} In determining whether a warrant is specific enough, the key inquiry is whether the warrant could reasonably have described the items more precisely. *State v. Benner* (1988), 40 Ohio St.3d 301, 307. It is important to note that the prohibition against general warrants will not prevent the issuance of a broad or generic listing of items to be seized if the circumstances do not allow for greater

specificity and detail. *State v. Dalpiaz*, 151 Ohio App.3d 257, 2002-Ohio-7346, ¶27, citing *United States v. Wicks* (C.A.10, 1993), 995 F.2d 964, 973.

{¶15} In the present matter, the search warrant indicated that the police were to seize "[a]ny and all narcotics including but not limited to marijuana, a schedule 1 controlled substance." The information provided by the informants indicated drug activity at appellant's residence. However, the type or types of drugs involved were not known. Further, appellant's counter surveillance would be consistent with any type of drug activity, not just marijuana. Additionally, when the officers stopped the truck and trailer that had been observed at appellant's residence, the drug dog alerted to the presence of narcotics, not the smell of marijuana. Finally, the secret compartment found in the trailer could have been used to conceal any type of drugs, not just marijuana. This Court finds that in this case the search warrant was not overly broad when specifying that the police were to search for any and all narcotics. Appellant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTIONS TO SUPPRESS EVIDENCE, BECAUSE THE SEARCH MAY NOT BE UPHELD BASED UPON THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE."

{¶16} Appellant argues in his third assignment of error that the search of his residence may not be upheld based upon the good faith exception to the

exclusionary rule. Based upon this Court's resolution of appellant's first and second assignments of error, this assignment of error is moot and we decline to address it. See App.R. 12(A)(1)(c).

FOURTH ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL, BECAUSE THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT, AND IN SO DOING, DENIED THE APPELLANT DUE PROCESS OF LAW."

{¶17} In his fourth assignment of error, appellant argues that without the evidence obtained from the execution of the search warrant, the remaining evidence is insufficient to support his convictions and that his motion for judgment of acquittal should have been granted. Having found that the trial court did not err in denying appellant's motions to suppress, this Court will now examine whether the trial court erred in denying his motion for judgment of acquittal pursuant to Crim.R. 29.

{¶18} Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense or offenses." This Court has held that "[a] trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates 'that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.'" *State v. Simmons*, 9th Dist. No. 22221, 2005-Ohio-1469, at ¶6, quoting *State v. Wolfe*

(1988), 51 Ohio App.3d 215, 216. In making this determination, all evidence must be construed in a light most favorable to the prosecution. Id. Essentially, "sufficiency is a test of adequacy." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶19} Detective Matthew Hudak testified on behalf of the State at appellant's trial. Detective Hudak said that he received a phone call from Special Agent Chuck Turner of the ATF. According to Detective Hudak, Special Agent Turner had received a tip from another ATF agent about some possible drug activity occurring at 258 Green Street. Detective Hudak testified that he also received a tip from an FBI agent that there was alleged drug activity going on at 258 Green Street. In addition, Detective Hudak stated that he received a tip from an individual who wished to remain anonymous alleging drug activity at 258 Green Street. Detective Hudak further testified that he was given a description of a truck and trailer that would be at 258 Green Street. Detective Hudak stated that after receiving the tips, he determined that the house belonged to appellant. Detective Hudak testified that he, Detective Shannon Davis, Sergeant Vince Morber, and Special Agent Turner conducted surveillance using unmarked vehicles at 258 Green Street on November 29, 2004. Detective Hudak stated that they contacted the owner of a home under construction near appellant's home and obtained permission to set up surveillance on appellant's home from there. Based upon what Detective Hudak observed during the surveillance of appellant's home,

he concluded that the individuals at appellant's home were conducting counter surveillance. Detective Hudak stated that during the surveillance, appellant was arrested for criminal trespassing and resisting arrest by Sergeant Morber. Detective Hudak testified that after appellant was arrested, he resumed surveillance of appellant's home. Detective Hudak stated that he contacted a legal advisor for the sheriff's office and was advised that he had enough probable cause to obtain a warrant. Detective Hudak testified that upon obtaining and executing the search warrant, six bags containing marijuana and weighing just over 360 pounds were found in appellant's garage.

{¶20} Special Agent Turner also testified on behalf of the State at the trial. Special Agent Turner stated that he participated in searching inside appellant's home as well as the garage. Special Agent Turner testified that he found six rounds of .44 caliber ammunition in a wicker basket in the basement area of appellant's home. Special Agent Turner also testified that he found storage bags in the garage which indicated to him that the marijuana was being broken down into one pound packages to sell. Special Agent Turner stated that he requested ATF gun traces on firearms that were found inside appellant's residence and determined that a Mossburg 12-gauge shotgun was stolen. Special Agent Turner testified that after following up with the Brimfield Township Police Department, he discovered the owner of the shotgun was Cary Ballenger.

{¶21} The State also called Detective Shannon Davis of the Barberton Police Department to testify at the trial. Detective Davis testified that she responded when Detective Hudak asked for assistance on November 29, 2004. Detective Davis stated that it was her duty to conduct perimeter surveillance. Detective Davis testified that appellant pulled up beside her vehicle and stated: "This isn't a game. Why are you watching my house, bitch." Detective Davis stated that she then left the area for awhile, but returned to 258 Green Street and resumed surveillance after appellant was arrested. Detective Davis testified that when the search warrant was executed, she was the inventory officer.

{¶22} Sergeant Vincent Gregory Morber of the Barberton Police Department also testified at the trial. Sergeant Morber corroborated Detective Hudak's testimony regarding the surveillance of appellant's home. Sergeant Morber also testified as to the specifics of appellant's arrest. Sergeant Morber testified that he assisted in the execution of the search warrant at appellant's home by searching the attic. Sergeant Morber stated that he found an operable gun and some ammunition in a case in the attic which he gave to the inventory officer.

{¶23} Lieutenant William R. Pfeiffer of the Barberton Police Department also testified on behalf of the State at trial. Lieutenant Pfeiffer testified that he searched the garage area at 258 Green Street on November 29, 2004, and photographed the entire house. Lieutenant Pfeiffer corroborated the testimony of Detective Hudak and Sergeant Morber and testified as to where and how the locks

were removed from the bags found in the garage. Lieutenant Pfeiffer also identified the weapon that was recovered in the attic of appellant's home by Sergeant Morber.

{¶24} Officer Thomas E. Wycoff also testified on behalf of the State. Officer Wycoff testified that he assisted in the execution of the search warrant at appellant's home on November 29, 2004. Officer Wycoff stated that he searched the kitchen area of appellant's home. Officer Wycoff testified that he found marijuana in a trash can in the kitchen.

{¶25} The State also called Detective Keith Lavery to testify on behalf of the State. Detective Lavery testified that he searched the master bedroom in appellant's home. Detective Lavery stated that he found a plastic bag containing multiple rounds of handgun ammunition on a TV stand in the master bedroom.

{¶26} Detective Robert Scalise also testified on behalf of the State at trial. Detective Scalise testified that he assisted in the execution of the search warrant at appellant's home by conducting surveillance and searching the basement and garage. Detective Scalise identified the bags that he found in the garage, a digital scale, handgun, and a shotgun that he recovered from the basement crawl space. Detective Scalise also identified another black canvas bag and a gun holster that he recovered from the basement area of appellant's residence.

{¶27} After reviewing the record and construing the evidence in the light most favorable to the prosecution, this Court finds that the trial court did not err in

overruling appellant's motion for judgment of acquittal. Appellant's fourth assignment of error is overruled.

III.

{¶28} Appellant's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

DONNA J. CARR
FOR THE COURT

SLABY, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

WILLIAM L. SUMMERS and EDWIN J. VARGAS, Attorneys at Law, for appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, for appellee.