

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24636

Appellant

v.

DAVID J. RICHARDSON

Appellee

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2008-07-2363

DECISION AND JOURNAL ENTRY

Dated: October 28, 2009

BELFANCE, Judge.

{¶1} Appellant, the State of Ohio, appeals from the judgment of the Summit County Court of Common Pleas granting the motion to suppress filed by Appellee, David Richardson. This Court affirms.

I.

{¶2} A search warrant was issued for Richardson’s residence, 276 Silver Street, Akron, Ohio, on July 15, 2008. As a result of the evidence seized upon execution of the warrant, Richardson was charged with multiple drug and other offenses. The facts giving rise to the search warrant are discussed below.

{¶3} Nicole Laslo called the Akron Police to inform them of the whereabouts of her ex-boyfriend and father of her child, Rodney Thompson, because he had an outstanding felony non-support warrant issued for his arrest. On June 3, 2008, the Akron Police arrested Thompson after a traffic stop. Thompson had a poster for the music group known as “Da Kennel” in his car

at the time of his arrest. The poster included pictures of the group's members. The police were aware that some of the members shown on the poster were associated with a local gang. The police seized the poster and questioned Laslo as to Thompson's affiliation with the gang.

{¶4} Laslo told the police that Thompson lived at 276 Silver Street. She identified some of the people depicted in the poster and stated that the group records at the Silver Street address. She said that she had been to the home on various occasions, including the week before Thompson was arrested. According to Laslo, she had seen drugs and prostitutes at the house, as well as pit bull fighting in the past.

{¶5} Based on the information gathered from Laslo, an officer of the Akron Police Department made an affidavit in support of a search warrant for 276 Silver Street. He recited the information concerning illegal activity relayed by Laslo and stated that several of the music group's members were also gang members. The officer averred that he had good cause to believe that gang items would be found at the residence. The affidavit was presented to an Akron Municipal Court judge who signed the warrant.

{¶6} On August 25, 2008, Richardson filed a motion to suppress arguing that the warrant was not supported by probable cause. After a two-day hearing on the motion, the trial court ruled that the warrant was not supported by sufficient probable cause and granted Richardson's motion to suppress. The State filed a notice of appeal.

II.

{¶7} In its sole assignment of error, the State argues that the trial court erred in granting Richardson's motion to suppress.

THE AFFIDAVIT

{¶8} Ordinarily, review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. Thus, we defer to the trial court’s findings of fact if they are supported by competent, credible evidence and review the trial court’s application of the law to the facts de novo. *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶6. However, the issue presented in this appeal is whether the affidavit in support of the search warrant provided sufficient probable cause for the judge to issue the warrant. The Supreme Court of Ohio has held that a different standard of review applies to such questions. *State v. George* (1989), 45 Ohio St.3d 325, paragraph two of the syllabus.

{¶9} In our review, we must determine whether the affidavit provided the judge who issued the warrant with a substantial basis from which to conclude that probable cause existed. *Id.* See, also, *State v. Fisher*, 9th Dist. No. 22481, 2005-Ohio-5104, at ¶6. We may not conduct a de novo review of the sufficiency of the affidavit and substitute our judgment for that of the issuing judge. *George*, 45 Ohio St.3d at paragraph two of the syllabus. In determining whether to sign the warrant, the issuing judge must “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.” *Id.* at paragraph one of the syllabus, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238.

{¶10} Probable cause has been defined as “‘a reasonable ground for belief of guilt.’” *State v. Moore* (2000), 90 Ohio St.3d 47, 49, quoting *Carroll v. United States* (1925), 267 U.S. 132, 161. It means “more than bare suspicion: Probable cause exists where ‘the facts and circumstances within their (the officers’) knowledge and of which they had reasonably

trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.” *Brinegar v. United States* (1949), 338 U.S. 160, 175-176, quoting *Carroll*, 267 U.S. at 162. “Only information included in the affidavit submitted in support of the request for a search warrant may be considered in determining whether it was issued based upon probable cause.” *State v. Armstead*, 9th Dist. No. 06CA0050-M, 2007-Ohio-1898, at ¶16.

{¶11} In the case at bar, the information that led the police to suspect that criminal activity occurred at 276 Silver Street was the information obtained from Nicole Laslo. If the affidavit in support of the warrant is based on hearsay, as here, Ohio Rule of Criminal Procedure 41(C) provides:

“The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce.”

Additionally, courts are to consider the totality of the circumstances when evaluating whether an informant’s tip supports a finding of probable cause. *State v. Tejada*, 9th Dist. No. 20947, 2002-Ohio-5777, at ¶9.

{¶12} The affidavit the officer presented to the signing judge related the information gathered by him and other police officers when they interviewed Laslo concerning the poster for “Da Kennel” after Thompson’s arrest. The affidavit states that Thompson resides at 276 Silver Street, but that the owner of the home is a man with the last name of Richardson. Based on Laslo’s description and prior police calls to the address, the man was identified as the Appellee, David Richardson. The police also averred that Laslo stated that she had been in the house in the past, including within the past week. While there on various occasions, she observed money and

baggies of crack and/or cocaine. She told officers that prostitutes also frequented the home. The officers asked Laslo if pit bull fighting took place at the home. She said that she was not aware of any fights within the past two years, but when they did occur, they were held in the basement. She also mentioned that there is a recording studio on the second floor of the house.

{¶13} The officer's affidavit did not include any statements as to the veracity or reliability of Laslo. No information as to whether or not Laslo herself had a criminal record was supplied to the judge asked to issue the warrant. The affidavit did not state that Laslo initially contacted the police in order to have Thompson arrested, information which could indicate a possible bias. In fact, Thompson was arrested the same day that Laslo called the police and Laslo was present during Thompson's arrest. It also did not include a statement that the information given by Laslo was corroborated or that any attempt to corroborate the information was undertaken by the police. Although outside of our probable cause review because it is not contained in the "four corners" of the affidavit, we note that the merit briefs filed by the parties state that the police attempted to corroborate the information supplied by Laslo, but were unable to confirm her statements through other sources. In addition, Paragraph 7 of the affidavit stated that a report of the investigation of the activities of the Hilltop Gang was attached to the affidavit, however, said report was not in fact attached to the certified copy of the affidavit made part of the record in this case. The trial court found that the reports were not presented to the signing judge.

{¶14} Our precedent indicates that "[r]ecital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has

found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner.” *Fisher* at ¶7, quoting *State v. Karr* (1975), 44 Ohio St.2d 163, 167. Additionally, if the information supplied by the informant, here Laslo, is corroborated by another source, the affidavit need not include a statement as to the informant’s reliability. *Fisher* at ¶7, quoting *United States v. Lancaster* (C.A.6, 2005), 145 Fed.Appx. 508, 511, quoting *United States v. Sturmoski* (C.A.10, 1992), 971 F.2d 452, 457.

{¶15} In the case at bar, the affidavit contained neither corroborating information nor a statement of reliability. The affidavit did not detail Laslo’s criminal history, if any. The trial court found that in light of the lack of certain information such as Laslo’s bias and the inability of police to corroborate her story, the judge who signed the search warrant did not have adequate facts before him from which to independently determine whether probable cause existed. Based on the record before us and in light of the absence of either corroboration or a statement of reliability, we cannot conclude that the trial court erred when it determined that the affidavit in support of the search warrant did not provide a substantial basis from which the issuing judge could conclude that a probability of criminal activity existed at 276 Silver Street.

“GOOD FAITH EXCEPTION”

{¶16} The determination that the affidavit was insufficient does not end our analysis. We must next determine whether evidence obtained by the officers’ executing the search warrant should not have been suppressed pursuant to the “good faith exception” established in *United States v. Leon* (1984), 468 U.S. 897.

{¶17} Pursuant to *Leon*’s “good faith exception,” evidence seized under the authority of a warrant that a court later finds was not supported by probable cause will not be suppressed if it can be demonstrated that the officer reasonably relied on the decision of a detached and neutral

magistrate. *Id.* at 920-922. “At the heart of the ‘good faith[] exception[]’ is the fact that the mistake that invalidated the warrant was solely on the part of the judge who issued the warrant. The police officers, on the other hand, merely executed a warrant they thought was valid. The rationale for not excluding evidence seized in such a situation focuses on the inability of the exclusionary rule to fulfill its purpose of deterring police negligence and misconduct.” *State v. Simon* (1997), 119 Ohio App.3d 484, 487. However, suppression will still be the appropriate remedy if the affidavit presented to the signing judge in support of the warrant is “‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” *George*, 45 Ohio St.3d at 331, quoting *Leon*, 468 U.S. at 923.

{¶18} As discussed above, the officer’s affidavit did not contain sufficient facts for the Akron Municipal Court judge to conclude that probable cause existed to search the Silver Street residence. A substantial amount of pertinent information was not furnished to the judge asked to sign the search warrant. The affidavit did not contain corroboration of Laslo’s statements and omitted reference to the fact that the police attempted, but were unable to secure corroboration. Investigatory reports detailing information obtained by the police as to gang activity referenced in the affidavit that may have supported probable cause were not presented to the signing judge. The affidavit also omitted any statements with respect to Laslo’s veracity, reliability, potential bias, and criminal history. In light of the information the officer chose not to include in his affidavit, the affidavit lacked the indicia of probable cause that would justify police reliance on the judge’s determination of probable cause. See *Leon*, 468 U.S. at 923. Accordingly, the trial court did not commit reversible error when it found that the “good faith exception” to the exclusionary rule was not applicable.

{¶19} The trial court properly granted Richardson’s motion to suppress. The State’s sole assignment of error is overruled.

CONCLUSION

{¶20} We affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

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.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellant.

DONALD J. MALARCIK, Attorney at Law, for Appellee.