[Cite as *State v. Myers*, 2015-Ohio-2135.]

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

STATE OF OHIO Appellant v. TIMOTHY P. MYERS Appellee	C.A. No. 27576 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2014-06-1679

DECISION AND JOURNAL ENTRY

Dated: June 3, 2015

SCHAFER, Judge.

{¶1} The State of Ohio appeals the judgment of the Summit County Court of Common Pleas suppressing evidence obtained after police executed a search warrant at the home of Defendant-Appellee, Timothy Myers. On appeal, the State contends that the search warrant was properly supported by probable cause and that the resulting search passes constitutional muster. For the reasons that follow, we reverse.

I

{¶2} Myers was indicted on one count of trafficking in marijuana with a forfeiture specification and one count of marijuana possession. The indictment arose from a June 5, 2014 search and seizure of property located at Myers' residence at 548 Alaho Street in Akron, Ohio. The search was executed pursuant to a warrant issued on June 3, 2014 and it led to the discovery of Ziploc bags containing marijuana, a smoking device, and $2,065.00 cash.

{¶3} Detective James Palmer of the Akron Police Department executed an affidavit in support of the request for a search warrant. In the affidavit, Detective Palmer outlines his extensive law enforcement career of 22 years in which he has been involved in "numerous" drug cases. Based on his experience and resulting knowledge of typical drug trafficking practices, Detective Palmer averred that it is "common" for drug traffickers to keep records of their activities and contraband in their residences.

{¶4} The affidavit reveals that Detective Palmer was investigating Myers for drug trafficking since January 2014, the preceding six months before the request for a search warrant. During that investigation, Detective Palmer learned from a confidential source that "within the past few months, [Myers] was distributing multiple ounces of Marijuana in the Akron, Ohio area." The confidential source was involved in a controlled buy in which he or she purchased marijuana from Myers. During the buy, law enforcement was engaged in "constant audio and visual surveillance of the [confidential source] before, during, and after the transaction."

{¶5} After describing the nature of controlled buys and their associated surveillance, Detective Palmer attested as follows: "Your affiant had a fourth buy scheduled using the same [confidential source, who] spoke with MYERS and arranged to purchase a quantity of marijuana from MYERS. The transaction was to take place at MYERS['] residence located at 548 Alaho Street Akron, Ohio 44305 on May 28, 2014." There is no explicit indication in the affidavit where or when the controlled buys occurred or whether the fourth scheduled buy even occurred. Nevertheless, Detective Palmer stated that based on the information in the affidavit, as well as his experience with other similar narcotics investigations, "that there are controlled substances, in particular Marijuana, computers, documents, ledgers, books, photographs, indicia of

occupancy, receipts, and U.S. Currency, etc. located within 548 Alaho Street, Akron, Ohio, which will reflect and document the magnitude of Timothy P. MYERS[’] illicit drug activity."

{¶6} Myers filed a motion to suppress alleging that the warrant was improperly issued since it was not based on probable cause. A hearing was conducted on the motion to suppress, but no evidence was received as the parties stipulated that the trial court was restrained to only reviewing the affidavit and warrant itself when ruling on the motion to suppress. The trial court granted the motion and suppressed the materials found during the June 5, 2014 search and seizure. In doing so, the trial court found that there was "a substantial basis for concluding that there was probable cause to believe that [Myers] sold marijuana to [the confidential source]." Nevertheless, it found that "[t]here was not a shred of evidence that there was long term scheme or endeavor by [Myers] and absolutely no information was presented in the affidavit to suggest that the Alaho address was used for illicit purposes." Accordingly, the trial court concluded that the search warrant was not based on probable cause. It additionally determined that the good faith exception to the warrant requirement did not apply since Detective Palmer "should have known that this affidavit was not sufficient."

{¶7} The State has appealed pursuant to Crim.R. 12(K), presenting a sole assignment of error for our review.

II

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' [SIC] MOTION TO SUPPRESS.

{¶8} In its sole assignment of error, the State argues that the evidence obtained from Myers' home should not have been suppressed. Specifically, it contends that the affidavit in

support of the search warrant included sufficient evidence to establish probable cause for the issuance of the warrant. We agree.

A. Fourth Amendment's Protections

{¶9} The Fourth Amendment to the United States Constitution, which is incorporated against the States by the Fourteenth Amendment, provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to searched and the persons or things to be seized.

Article I, Section 14 of the Ohio Constitution, which has language almost identical to the Fourth Amendment, affords Ohioans coextensive protections against unreasonable searches and seizures. *State v. Robinette*, 80 Ohio St.3d 234, 245 (1997). Before the issuance of a search warrant, "the judicial officer issuing such a warrant [must] be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." *Whiteley v. Warden*, 401 U.S. 560, 564 (1971). Crim.R. 41 incorporates these constitutional principles by requiring judges to only issue warrants after finding that probable cause for the search exists, Crim.R. 41(C), and mandating that the affidavit submitted in support of the warrant request have the following: (1) the name or description of the person or place to be searched; (2) the name or description of the property to be searched and seized; (3) the offenses related to the search and seizure; and (4) the factual basis for the affiant's belief that the property to be seized is located in the place described, Crim.R. 41(C)(1).

B. Standard of Review for Issuing Judge's Determination of Probable Cause

{¶10} To determine if an affidavit in support of a search is supported by probable cause, a judge must "make a practical, common-sense decision whether, given all the circumstances set

forth in the affidavit before him [or her], 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." *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983); *see also State v. George*, 45 Ohio St.3d 325 (1989), paragraph one of the syllabus (adopting *Gates*). The Ohio Supreme Court has instructed courts to grant "great deference" to the issuing judge's determination of probable cause. *George* at paragraph two of the syllabus. The Court has described this highly deferential standard as follows:

> 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, * * * doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.

Id.

{¶11} Probable cause is " 'the existence of evidence, less than the evidence that would justify condemnation, such as proof beyond a reasonable doubt or by a preponderance; in other words, probable cause is the existence of circumstances that warrant suspicion.' " *State v. Tejada*, 9th Dist. Summit No. 20947, 2002-Ohio-5777, ¶ 8, quoting *State v. Young*, 146 Ohio App.3d 245, 254 (11th Dist.2001). Based on this definition, "the standard for probable cause does not require a prima facie showing of criminal activity." *Id*. Instead, we must simply look for the probability of criminal activity. *State v. Crumpler*, 9th Dist. Summit Nos. 26098, 26118, 2012-Ohio-2601, ¶ 10; *see also State v. Garza*, 3d Dist. Henry No. 7-13-04, 2013-Ohio-5492, ¶ 32 ("The amount of proof sufficient for a probable cause determination does not necessarily require certainty that criminal activity is occurring at the defendant's premises"). When

conducting a review of the probable cause behind a search warrant, we are mindful that we are "limited to the four corners of the search warrant affidavit." *State v. Russell*, 9th Dist. Summit No. 26819, 2013-Ohio-4895, ¶ 9.

C. The Warrant in this Matter was Supported by Probable Cause

{¶12} Applying these principles here and granting due deference to the issuing judge's determination, we must find that the search warrant was properly based on probable cause that evidence of Myers' illicit activities would be found in his home on Alaho Street. The affidavit indicates that Detective Palmer and other law enforcement personnel observed at least three control buys in which a confidential source purchased marijuana from Myers. It also states that there was a six month investigation into Myers' trafficking operations and that a confidential source told Detective Palmer about Myers distributing marijuana around the Akron area for a few months before June 2014. Like the trial court, we believe that this information constitutes a substantial basis for concluding that Myers was involved in drug trafficking as a seller. *See United State v. Whitner*, 219 F.3d 289, 296 (3d Cir.2000) ("We have repeatedly noted * * * that direct evidence linking the crime to the location to be searched is not required to support a search warrant.").

{¶13} It naturally flows from such a determination that evidence of Myers' drug trafficking is likely to be found at his residence, which was described in the affidavit as the Alaho Street house. Detective Myers, a 22-year police veteran, explicitly attested that drug traffickers tend to keep evidence of their activities in their residences. Indeed, this connection between drug traffickers and their residences has been consistently recognized by the courts. *See, e.g., United States v. Reddrick*, 90 F.3d 1276, 1281 (7th Cir.1996) ("[O]ur prior cases have recognized that, in issuing a search warrant, a magistrate is entitled to draw reasonable inferences

about where evidence is likely to be kept, based on the nature of the evidence and the type of offense, and that in the case of drug dealers evidence is likely to be found where the dealers live[.]") (Citations omitted.). As a result, courts throughout the nation have routinely upheld search warrants for suspected traffickers' residences even when there has been no observation of illegal activity at, or near, those residences. *See, e.g., United States v. Newton*, 389 F.3d 631, 636 (6th Cir.2004) ("Detailed evidence of [the defendant's drug operations] was provided to the judge. The police then supplied him with evidence that these addresses were locations where [the defendant] was maintaining a residence. Without regard to any other information in the affidavit, probable cause existed to issue the warrant in relation to these three presumed residences of [the defendant]."), *vacated in part on other grounds sub nom. Newton v. United States*, 546 U.S. 803 (2005); *United States v. Feliz*, 182 F.3d 82, 87 (1st Cir.1999) (upholding warrant even though there was no observation of drug trafficking near the defendant's apartment since "[i]t followed [from the evidence of the defendant's role in drug trafficking] that a likely place to seek to find incriminating items would be [the defendant]'s residence"); *State v. Joiner*, 8th Dist. Cuyahoga No. 81394, 2003-Ohio-3324, ¶ 25 (upholding warrant for search of the defendant's residence even though the investigating officer "could not say * * * that he knew of excessive traffic in and out of the [residence], nor could he point to any specific incidents which led him to believe that the defendant was selling drugs from that apartment"). We recognize that there are cases in which courts have rejected search warrants for defendants' residences, but their facts are sufficiently distinguishable from this matter that we find their guidance unavailing here. *Compare United States v. Lester*, 184 Fed.Appx. 486, 490 (6th Cir.2006) (finding no probable cause for search warrant of the defendant's house where affidavit contained no substantiation for the conclusion that the defendant was involved in the drug trade with his brother since all the

observed drug deals during the investigation were between buyers and the defendant's brother); *United States v. McPhearson*, 469 F.3d 518, 525 (6th Cir.2006) (finding no probable cause for search warrant of the defendant's house where affidavit did not include information indicating that the defendant was a known drug dealer); *State v. Hampton*, 1st Dist. Hamilton No. C-080187, 2008-Ohio-6088, ¶ 17 (finding no probable cause for search warrant of the defendant's residence since affidavit merely stated that the defendant had purchased a substantial amount of inositol, a legal product that can be used to cut cocaine). Unlike these inapposite cases, Detective Palmer's affidavit provides sufficient information to conclude that Myers is a drug trafficker, which provides the necessary basis for allowing police to search his residence.

{¶14} In light of this well-settled case law, Detective Palmer's averments regarding his knowledge of drug traffickers' tendencies and Myers' engagement in several drug deals provide a substantial basis to conclude that there was probably evidence of drug trafficking at Myers' residence. Moreover, Detective Palmer's averment that a drug buy was scheduled for Myers' residence further bolsters the issuing judge's determination that evidence of drug trafficking was probably located there. *See United States v. Montgomery*, 152 Fed.Appx. 822, 824-825 (11th Cir.2005) (upholding warrant for search of the defendant's residence where, among other circumstances, a drug buy was scheduled for the residence three days before but unconsummated). Accordingly, we cannot find that the warrant was invalid and unsupported by probable cause. Instead, we find that the warrant was properly issued and that the trial court's judgment to the contrary must be reversed.

D. The Purported Defects of the Affidavit

{¶15} Myers' position and the trial court's ruling are primarily based on their view that the information contained in Detective Palmer's affidavit was unspecific, undated, and stale. To

an extent, this view places too onerous a burden on police officers that does not comport with the current state of Fourth Amendment jurisprudence or the practical considerations inherent in assessments of police conduct's constitutionality. *See United States v. Ventresca*, 380 U.S. 102, 108 (1965) (stating that since affidavits in support of search warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation" and that "[t]echnical requirements of elaborate specificity * * * have no proper place in this area"); *Spinelli v. United States*, 393 U.S. 410, 438-439 (1969) (Fortas, J., dissenting) ("A policeman's affidavit should not be judged as an entry in an essay contest. * * * [A] policeman's affidavit is entitled to common-sense evaluation."). Consequently, we decline to disregard the basis for probable cause in this matter simply due to criticisms of what items could have been contained in the affidavit but were not.

{¶16} The trial court correctly pointed out that the affidavit does not explicitly list each and every controlled buy, their dates, and their locations. But, Detective Palmer was not required to include all of this information in his affidavit. *See United States v. Allen*, 211 F.3d 970, 975 (6th Cir.2000) (en banc) ("The affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added."); *United States v. Jones*, 994 F.2d 1051, 1057 (3d Cir.1993) (upholding warrant even though the police officer "might have been able to supply the magistrate judge with a stronger link to the defendants' residences"). Rather than lament the lack of more specific information in the affidavit, the trial court should have considered what information was offered and granted due deference to the issuing magistrate. A review of the affidavit reveals that a "fourth" controlled buy was scheduled, which indicates that there were three previous controlled buys. The affidavit also reveals that Myers was the subject of a six-month police investigation in which a confidential informant said Myers had been distributing marijuana in the Akron area for a few

months before June. This information provides a substantial basis for concluding that there is probable cause to believe Myers is a drug trafficker and was involved in the drug trade for the six months before the affidavit's submission to the issuing judge. Thus, we can find no infirmity in the issuing judge's decision on the basis that the affidavit was unspecific and undated.

{¶17} Our conclusion on this point is consistent with the Eighth Circuit Court of Appeals' judgment in *United State v. Formaro*, 152 F.3d 768 (8th Cir.1998). There, the defendant challenged the probable cause for a search warrant of his residence on the basis that the affidavit did not include the dates or number of previous drug buys. The Eighth Circuit rejected this argument on the basis that the investigating officer's "statements that [the defendant] had been under investigation since January 1996 and that during that time informants had made controlled purchases established probable cause to believe that [the defendant] had been involved in ongoing drug activity." *Id*. at 770. The court further stated that "the information in the application 'support[ed] the inference that [the defendant] was more than a one-time drug seller.' " *Id*. at 770-771, quoting *United States v. Pitts*, 6 F.3d 1366, 1370 (9th Cir.1993). Detective Palmer's affidavit contains almost the same information as the affidavit in *Formaro*, which compels us to reach the same conclusion that there was sufficient information to establish probable cause of Myers' drug trafficking activities.

{¶18} We similarly reject the trial court's conclusion that the information contained in Detective Palmer's affidavit was stale. The judicial concept of staleness was first developed in *Sgro v. United States*, 287 U.S. 206 (1932), where the United States Supreme Court declared that "it is manifest that the proof [of probable cause] must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Id*. at 210; *see also State v. Ruffin*, 9th Dist. Summit No. 25916, 2012-Ohio-1330, ¶ 10 (stating that a search warrant

must be based on "timely information"). The Court cautioned that "[w]hether the proof meets this test must be determined by the circumstances of each case." *Id*. at 210-211. Since *Sgro*'s issuance, courts have recognized that "a primary consideration in evaluating the staleness issue is whether the affidavit describes a single transaction or a continuing pattern of criminal conduct." *United States v. Tucker*, 638 F.2d 1292, 1299 (5th Cir.1981). The Tenth Circuit Court of Appeals has provided the following reasoning for the primacy of this consideration:

> [T]he vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of facts relied upon and the issuance of the affidavit. Together with the element of time we must consider the nature of the unlawful activity. Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, *the passage of time becomes less significant*.

(Emphasis added.) *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir.1972).

{¶19} Detective Palmer's affidavit reveals that Myers was involved in a continuing course of drug trafficking since January 2014. As a result, the passage of time in this matter is less significant here than situations where the affidavit relates to a single instance. *Compare United States v. Basham*, 268 F.3d 1199, (10th Cir.2001) (finding that eight-month old information in affidavit was not stale where the defendant was involved in drug trafficking) *and State v. Prater*, 12th Dist. Warren No. CA2001-12-114, 2002-Ohio-4487, ¶ 14 (finding that information in affidavit was not stale where the affidavit described ongoing drug trafficking operations but last dated incident occurred six months before the request for a search warrant) *with United States v. Wagner*, 989 F.2d 69, 75 (2d Cir.1993) (finding that isolated six-week old marijuana purchase was too stale to provide probable cause for search of the defendant's residence) *and State v. Gales*, 143 Ohio App.3d 55, 62 (8th Dist.2001) (finding that information in affidavit was stale where the affidavit simply referred to two isolated incidences of drug deals

three months before the warrant's issuance). Moreover, the fact that a drug buy was scheduled for May 28, 2014 at Myer's residence, a mere five days before the warrant's issuance, produces the inescapable conclusion that Myers' ongoing drug trafficking operations were still churning forward at the time that Detective Palmer prepared his affidavit.

{¶20} To support his position for affirmance, Myers analogizes to our decision in *Ruffin*. After reviewing *Ruffin*, however, we find Myers' reliance to be misplaced. There, we did not base our resolution of the appeal on the issue of staleness. Rather than addressing the merits of the defendant's staleness argument, we merely stated that the "case present[ed] a close call" before declaring that "[w]e need not answer [the staleness question], as we conclude that the good faith exception applies to the case[.] *Ruffin*, 2012-Ohio-1330, at ¶ 12-13.

{¶21} Even if *Ruffin* was decided on staleness grounds, we would still find that this matter is distinguishable. Unlike this matter, *Ruffin* did not implicate an affidavit that demonstrated the existence of an ongoing drug trafficking operation and it only referred to two previous controlled buys. Here, the affidavit not only refers to four controlled buys but also states that Myers has distributed marijuana around the Akron area for a few months and was the subject of a police investigation for six months. Accordingly, *Ruffin* does not control our resolution of the staleness question in this matter and we cannot conclude that the information in Detective Palmer's affidavit was stale.

{¶22} In sum, the issuing judge had a substantial basis to conclude that there was probable cause to search Myers' residence for evidence of drug trafficking. Consequently, we sustain the State's sole assignment of error.

III

{¶23} Having sustained the State's assignment of error, we reverse the judgment of the Summit County Court of Common Pleas and remand this matter for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

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(C). 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 Appellee.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

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

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