LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date May 31, 2019 Case No. 17CR096656

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS

MONTELL D. JOHNSON
Defendant

Michael Stepanik
Defendant's Attorney

This matter is before the Court on Defendant's Motion to Suppress, filed September 14, 2018; the State's Objection, filed March 6, 2019; the State's Amended Objection, filed April 10, 2019; and the Defendant's Supplemental Motion To Suppress, filed May 30, 2019.

Oral hearing had on May 23, 2019.

The Motion is not well-taken and hereby DENIED.

See Judgment Entry.

JUDGE D. Chris Cook

cc: Griffin, Asst. County Pros.
Stepanik, Esq.

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PROCEDURAL HISTORY

This matter is before the Court on Defendant's Motion to Suppress, filed September 14, 2018; the State's Objection, filed March 6, 2019; the State's Amended Objection, filed April 10, 2019; and, the Defendant's Supplemental Motion To Suppress, filed May 30, 2019.

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STATEMENT OF PERTINENT FACTS

On July 2, 2017, at approximately 12:36 pm, Officers of the Lorain Police Department ("LPD") learned *via* dispatch that gunshots had been heard in the area of West 22nd Street and Beech Avenue in the City of Lorain. Officers where familiar with this residence as being in a high-crime area and were familiar with the Defendant due to prior law-enforcement contacts.

Officers arrived at the area and learned that two men had carried a body to a red Dodge vehicle ("The Vehicle"). The Vehicle left the area and headed to a local hospital. It was later learned that the person carried to The Vehicle and transported to the hospital died.

The only residence in the immediate area was located at 2144 Beech Avenue ("The Residence"), the home of the Defendant.

LPD Officer Sgt. Jacob Morris ("Sgt. Morris") was one of the first officers to respond. Sgt. Morris spoke to a witness, Samuel Sanchez ("Sanchez"), who lives on the other side of the block across from the Residence. Sgt. Morris initially interviewed Sanchez outside of his residence after Sgt. Morris was advised that Sanchez might have information about the shootings.

This first interview, "informal" as described by Sgt. Morris, was brief and not recorded ("Interview No. 1"). In Interview No. 1, Sgt. Morris testified that Sanchez told him that he "saw two guys carrying a man *from The Residence* to The Vehicle." Sgt. Morris testified that he related Sanchez's account to his direct supervisor, Lt. Ed Super of LPD ("Lt. Super"), who instructed Sgt. Morris to re-interview Sanchez and to record the interview.

Sgt. Morris then went to his cruiser to get his cell phone and re-interviewed Sanchez ("Interview No. 2"), this time recording the interview. In this second interview, Sanchez states that he saw two men carry another man to a red Dodge car. Sanchez, however, does not say that the men came from The Residence, nor does Sgt. Morris query him on this issue.[1]

Immediately after the interview, Sgt. Morris confirmed to Lt. Super that he just re-interviewed Sanchez and that the conversation, Interview No. 2, was recorded. Based upon this information, Lt. Super prepared a search warrant with Affidavit which he presented to the Honorable Judge James Miraldi ("Judge Miraldi") for signature.

At no time in his second discussion with Lt. Super did Sgt. Morris advise Lt. Super that Sanchez left-out or did not reiterate his previous statement that he saw the men remove the person from The Residence.

Accordingly, at Paragraph 3 of his Affidavit, Lt. Super avers that ". . . Officers were notified of a Witness, who in a taped statement notified them that he observed two males carrying the body of a third male in a blue shirt *out of the residence* located at 2144 Beech Avenue . . ." (Emphasis added.)

And, at Paragraph 5 of his Affidavit, Lt. Super avers that "This male matches the description of the male *being carried out of 2144 Beech Avenue.*" (Emphasis added.)

Based upon Lt. Super's Affidavit, and in particular, Paragraphs 3 & 5[2], Judge Miraldi signed the Search Warrant for The Residence. Lt. Super then proceeded to The Residence in order to execute the warrant.

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[1] At the suppression hearing, Sanchez testified that there was only one interview (Interview No. 2), and that he never stated that he saw the men remove the body from the residence. These discrepancies will be addressed *infra.*

[2] Paragraphs 3 & 5 in Lt. Super's Affidavit are the only statements of fact that create a nexus, and thus probable cause, between The Residence and the incident.

At the same time that Lt. Super was working on the warrant and getting it signed by Judge Miraldi, LPD had created a perimeter around The Residence. Detective Camarillo ("Det. Camarillo") of LPD was at The Residence processing additional information; he is also a member of the LPD S.W.A.T. Team.

Det. Camarillo learned that a caller to 911 had been identified. This caller advised LPD that he observed a male standing on the porch of The Residence holding a rifle. LPD also learned from other witnesses that individuals inside of The Residence had fled from the house and that the person removed from The Residence had died.

Concerned for the welfare of persons who may be injured inside of The Residence, Captain Watkins ("Capt. Watkins") of LPD, the officer in charge of the investigation, contacted a Lorain County Assistant Prosecutor to determine whether exigent circumstances existed sufficient to justify a warrantless entry into The Residence to check for injured persons. After a discussion about the matter, a decision was made to enter The Residence for this purpose.

Det. Camarillo and his team then approached The Residence, knocked on the door, instructed any occupants to exit, then entered The Residence. The officers searched The Residence for injured persons – no injured persons were found.

The officers did find, however, located in plain view, items of contraband including narcotics and a scale. The search was discontinued and The Residence secured until the arrival of Lt. Super with the warrant.

Once Lt. Super returned with the warrant, the officers re-entered The Residence pursuant to the warrant and discovered additional items of contraband.

The Defendant was subsequently indicted based upon the contraband discovered in The Residence.

STANDARD OF REVIEW

MOTIONS TO SUPPRESS

A motion to suppress presents a mixed question of law and fact: When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.

Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion

of the trial court, whether the facts satisfy the applicable legal standard. *State v. Oberholtz*, 9th Dist. Summit No. 27972, 2016-Ohio-8506, ¶ 5, quoting *State v. Burnside*,

100 Ohio St.3d 152, 2003-Ohio-5372; *State v. Carey,* 2018-Ohio-831, 9th Dist. No. 28689, Summit (3/7/2018) at ¶ 8.

The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." Article I, Section 14, of the Ohio Constitution contains nearly identical language. "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant, unless an exception to the warrant requirement applies." *State v. Hetrick*, 9th Dist. Lorain No. 07CA009231, 2008-Ohio1455, ¶ 19, citing *Katz v. United States*, 389 U.S. 347, 357 (1967).

"[A]n appellate court's review of the trial court's findings of fact looks only for clear error, giving due deference as to the inferences drawn from the facts by the trial court." *State v. Hunter*, 151 Ohio App.3d 276, 2002-Ohio-7326, ¶ 24 (9th Dist.), citing *State v. Russell*, 127 Ohio App.3d 414, 416 (9th Dist.1998), reference *State v. Soto,* 9th Dist., Lorain No. 17CA011024, 2017-Ohio-4348, at ¶ 6.

ANALYSIS

SEARCH NO. 1 - A WARRANTLESS SEARCH BASED UPON EXIGENT CIRCUMSTANCES

When Det. Camarillo and his team entered The Residence without a warrant (Search No. 1), they did so ostensibly under the exigent circumstances doctrine, to wit: to search for possibly injured persons.

The United States Supreme Court has addressed the warrantless entry into a residence and the sanctity attendant with one's home.

> As the court unanimously reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (92 S.Ct. 2125, 2134, 32 L.Ed.2d 752). And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort. *Id.* at ——, 100 S.Ct. at 1379-80 (footnote omitted). The court emphasized the difference between a warrantless seizure in an open area and one on private premises, *id.* at ——, 100 S.Ct. at 1380, and concluded: "In terms that apply

> equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. **Absent exigent circumstances**, that threshold may not reasonably be crossed without a warrant." *Id.* at ——, 100 S.Ct. at 1373. (Emphasis added.)

And, the Ohio Supreme Court has said on the issue in the matter of *State v. Applegate,* 68 Ohio St.3d 348, 1994-Ohio-356,

> A warrantless police entry into a private residence is not unlawful if made upon exigent circumstances, a "specifically established and well-delineated exceptio[n]" to the search warrant requirement. *Katz v. United States* (1967), 389 U.S. 347." "'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " *Mincey v. Arizona* (1978), 437 U.S. 385, 392–393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290, 300, quoting *Wayne v. United States* (C.A.D.C.1963), 318 F.2d 205, 212, certiorari denied (1963), 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86. In *Wayne,* then-federal Court of Appeals Judge Warren Burger explained the reasoning behind the exigent circumstances exception:
>
> " [T]he business of policemen and firemen is *to act,* not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation of the judicial process." *Wayne* at 212.
>
> A warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Terry v. Ohio* (1968), 392 U.S. 1, 26, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889, 908. *Applegate,* at ¶ 2.

Further, the Ninth District Court of Appeals has repeatedly recognized public policy exception of exigent circumstances to protect life and limb.

In *State v. Linder,* 9th Dist. Summit No. 27788, 2016-Ohio-3435, the court stated,

> At the suppression hearing, the State argued that the warrantless entry of Mr. Linder's house fell within the exigent circumstances exception, other times known as the community-caretaking exception. *State v. Dunn,* 131 Ohio St.3d 325, 2012-Ohio-1008, 964 N.E.2d 1037, ¶ 15. In *Dunn,* the Ohio Supreme Court explained that the exception exists because "police officers are duty-bound to provide emergency services to those who are in danger of physical harm[.]" *Id.* at ¶ 20. It "allows police officers to stop a person to render aid if they reasonably believe that there is an immediate need for their assistance to protect life or prevent serious injury." *Id.* at ¶ 22. The United States Supreme Court has also

recognized the exception, explaining that "[o]ne exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." *Brigham City, Utah v. Stuart,* 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). *Linder,* at ¶ 8.

Officers do not need "ironclad proof" of a likely serious or life-threatening injury to invoke the emergency aid exception. *Dunn* at ¶ 19. Instead, "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the officer's state of mind, 'as long as the circumstances, viewed *objectively,* justify [the] action.' " (Alteration in original). *Stuart* at 404, 126 S.Ct. 1943, quoting *Scott v. United States,*436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). "The officer's subjective motivation is irrelevant." *Id. Linder,* at ¶ 9.

And, in the matter of *State v. Secriskey,* 9th Dist. Summit No. 28093, 28094, 2017-Ohio-4169, the Ninth District noted the presence of exigent circumstances involving the discovery of meth labs,

"[A] search conducted without a warrant issued upon probable cause is '*per se* unreasonable * * * subject only to a few specifically established and well-delineated exceptions.' " *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), quoting *Katz v. United States*, 389 U.S. 347, 357 (1967). "One such exception is a search based upon probable cause and the existence of exigent circumstances. A 'narrower subset' of the exigent circumstances exception is the emergency aid exception." (Internal citations omitted.) *State v. Armbruster*, 9th Dist. Summit No. 26645, 2013–Ohio–3119, ¶ 7. The emergency aid exception "allows the police 'to enter a dwelling without a warrant and without probable cause when they reasonably believe, based on specific and articulable facts, that a person within the dwelling is in need of immediate aid.' " *State v. Baker*, 9th Dist. Summit No. 23713, 2009–Ohio–2340, ¶ 6, quoting *State v. Gooden*, 9th Dist. Summit No. 23764, 2008–Ohio–178, ¶ 6. *Secriskey,* at ¶ 9.

WERE THERE SUFFICIENT EXIGENT CIRCUMSTANCES FOR THE POLICE TO ENTER THE RESIDENCE WITHOUT A WARRANT IN ORDER TO PERFORM THEIR COMMUNITY CARETAKER ROLE

The answer is yes.

In order to resolve this question, the Court must consider all of the facts and circumstances available to the officers objectively and determine whether their actions in entering The Residence without a warrant were justified.

At the time the decision was made by Capt. Watkins to enter The Residence, law enforcement *believed*[3] the following facts to be afoot: multiple gun shots had been fired in the area, a man was carried from The Residence to a vehicle where he was taken to the hospital, the man taken to the hospital was dead on arrival, an eyewitness observed a man with a rifle on the porch at The Residence, multiple people exited The Residence, The Residence was in a high-crime area, and officers were familiar with the Defendant as they had prior incidents involving him.

Based upon all of these factors, and upon consultation with an assistant county prosecutor[4], the decision was made by LPD to enter The Residence without a warrant to ensure that no other persons were injured inside. While inside The Residence, officers observed contraband in plain view.

As noted by the numerous cases cited, the exigent circumstances exception to the warrant requirement is compelling where there is a threat to human life or limb. As Justice Burger noted in *Wayne, supra,* "The business of policemen . . . is to *act,* not speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation of the judicial process." *Id.* at 212.

And, the Ohio Supreme Court has observed that police officers are ". . . duty bound to provide emergency services to those who are in danger of physical harm." *Dunn, supra.*

Given that officers do not need "ironclad proof" of likely serious or life-threatening injury to invoke the emergency aid exception, the question becomes the following: did the officers have a reasonable belief, based upon the information available to them at the time that a person or persons inside The Residence might be in need of immediate aid?

In light of the information articulated above, and when viewed objectively, the answer is clearly yes. The members of the LPD that entered The Residence did so for the purpose of investigating the possibility that one (or more) people were inside The Residence and needed emergency care.

As multiple shots had been fired, multiple people had fled The Residence, one man was already dead who was taken out of The Residence, and another man was observed on the porch with a rifle, this Court cannot say that the police lacked a reasonable basis to

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[3] The question does not turn on whether the facts were actually true but whether the officers knowledge of what they believed the facts to be, viewed objectively, justified their warrantless entry.

[4] As a matter of law, it is unclear how much weight to give this fact, if any. Suffice to say that the officers were cognizant of the warrant requirement and sought the advice of a prosecutor before entering The Residence.

enter The Residence without a warrant in order to search for injured people and render aid if necessary.

Accordingly, the warrantless entry into The Residence by LPD in order to carry-out their community caretaking function was reasonable given the totality of the exigent circumstances.

SEARCH NO. 2 - A SEARCH PURSUANT TO A WARRANT AND THE INEVITABLE DISCOVERY DOCTRINE

As noted, *supra,* after their initial entry, LPD left The Residence without securing any of the contraband in order to continue/renew the search once a warrant was obtained. A warrant was obtained, signed by Judge Miraldi that authorized the search of The Residence in order to seek evidence that might be related to the shooting and homicide that had recently occurred.

Once the warrant was on-scene, The Residence was re-searched and in addition to the contraband initially observed, officers found more contraband, including a weapon and ammunition. These items were secured and the Defendant was subsequently indicted.

It is the State's position, and this Court agrees, that if either A) LPD would have elected not to enter the residence without a warrant, or B) their decision to enter without a warrant was not legally justified under the exigent circumstances exception, that the contraband would have been discovered anyway pursuant to Search No. 2, which was authorized by a judge.

The seminal Ohio State Supreme Court case on the inevitable discovery doctrine is *State v. Perkins,* 18 Ohio St.3d 193 (1985). In *Perkins,* the Supreme Court of Ohio, following a recent decision on the issue by the United States Supreme Court[5], adopted the inevitable or ultimate discovery doctrine,

> The Supreme Court on appeal, by balancing the competing societal interests mentioned above, adopted the ultimate or inevitable discovery exception and held, "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means * * * then the deterrence rationale has so little basis that the evidence should be received." *Nix, supra* * * * Once again, the court reasoned that the prosecution should not be placed in a worse position at trial because of some earlier police misconduct when the evidence gained would have ultimately been found in the absence of such misconduct. While the Exclusionary Rule is used to

[5] See: *Nix v. Williams* (1984), 467 U.S. 431.

> deny the admission of evidence unlawfully gained, and thereby to put the state in the same position it would have been absent the evidence seized, the rule should not be used to put the state in a worse position by refusing evidence that would have been subsequently discovered by lawful means.
>
> In addition, we note that the ultimate or inevitable discovery exception acts to forgive the constitutional violation made in gaining the evidence, as the Supreme Court ruled that the prosecution is not required to prove the absence of bad faith on the part of law enforcement officials in obtaining the evidence. *Nix, supra* * * *

Perkins, at ¶ 2.

> It is our conclusion to follow this rationale and hold that illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation. The prosecution will have the burden to show within a reasonable probability that police officials would have discovered the derivative evidence apart from the unlawful conduct.

Id. at ¶ 3. See also: *State v. Banks-Harvey,* 152 Ohio St.3d 368, 2016-Ohio-0930, at ¶ 27.

Citing *Perkins, supra,* the Ninth District also confirmed the propriety of the inevitable discovery doctrine in *State v. Farrey,* 9th Dist. Summit No. 26703, 2013-Ohio-4263, stating,

> Evidence that is illegally obtained is properly admitted "once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins,* 18 Ohio St.3d 193 (1985), syllabus . . . Officer Nida would have discovered the cash during a search incident to arrest, which would have permitted Officer Nida to search Farrey's person. *See State v. Kinsell,* 9th Dist. Summit No. 25074, 2010–Ohio3854, ¶ 24. *See also Ashland v. McClain,* 5th Dist. Ashland No. 12–COA–044, 2013–Ohio–2436, ¶ 13–15.

Farrey, at ¶ 17.

> Because Officer Nida had probable cause to arrest Farrey and the money would have been discovered during a search incident to arrest, the money was admissible under the inevitable discovery doctrine.

Id. at ¶ 18.

Similarly, in the case at bar, once LPD obtained the warrant to search The Residence for evidence related to the homicide, the contraband would have been discovered within the course and scope of the search.

Accordingly, had either LPD not entered The Residence under exigent circumstances to check for injured persons or, if their warrantless entry was not legally cognizable, the contraband found inside The Residence would have been discovered anyway during Search No. 2, the search pursuant to a warrant.

WAS THE WARRANT INVALID BASED UPON A DEFECTIVE AFFIDAVIT

While the Defendant urges that no exigent circumstances existed sufficient to justify the warrantless entry into his home, the real gravamen of his motion is that Lt. Super's Affidavit was defective thereby invalidating the search warrant.

I disagree.

The thrust of the Defendant's arguments are 1) the Affidavit itself is lacking in sufficient probable cause and 2) Lt. Super's statements in the Affidavit were ". . . deliberately false or made with reckless disregard for the truth."

Both of these positions lack merit.

First, the Affidavit contains facts that are sufficient to establish probable cause to search The Residence.

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.'" *State v. Myers*, 9th Dist. Summit No. 27576, 2015-Ohio-2135, ¶ 10, quoting *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983).

Courts should give "great deference" to the determination of probable cause made by the judge or magistrate who issued the search warrant. *Myers* at ¶ 10. The applicable standard of review is 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.*, quoting *State v. George*, 45 Ohio St.3d 325 (1989), paragraph two of the syllabus. *State v. Jackson,* 9th Dist. Summit No. 28691, 2018-Ohio-1285, 4/4/2018, at ¶16.

"'Probable cause means 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). Under that definition, while a *prima facie* showing of criminal activity is not required, we must instead look for the probability of criminal activity. *Myers* at ¶ 11. "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.'" Id., quoting *State v. Russell*, 9th Dist. Summit No. 26819, 2013-Ohio-4895, ¶ 9. *Jackson* at ¶17.

Even without giving "great deference" to Judge Miraldi's determination that probable cause exists, the facts in Lt. Super's Affidavit clearly establish circumstances that "warrant suspicion."

Lt. Super avers the following pertinent facts: that he is an officer with 31 years of experience, that LPD received a 911 call of shots fired near the Defendant's residence, a witness observed that two males carried a body out of the Defendant's residence - who was loaded into a vehicle, a male gunshot victim was taken to Mercy Hospital moments later, the male was dead on arrival, the male matched the description of the man taken from the Defendant's residence, and, the Defendant resided at The Residence and is a gang member and known drug dealer.

With respect, it is not a close call that these facts, considered in their totality established probable cause to search The Residence.

WHAT ABOUT THE INCONSISTENCIES OF THE STATEMENTS PROVIDED TO LT. SUPER (THE AFFIANT) BY SGT. MORRIS

The Defendant's most strident argument is that the information contained in the search warrant Affidavit is unreliable or flat-out wrong, that the facts averred-to by Lt. Super were inaccurate, and that the information relayed to him by Sgt. Morris was false.

In support of this position, the Defendant points to the inconsistency between Sgt. Morris's testimony and the testimony of Sanchez. Recall that Sanchez testified that there

was only one interview with Sgt. Morris (Interview No. 2), that is was recorded, and that at no time in the interview did he advise Sgt. Morris that he (Sanchez) told him that he actually saw men carry a body *out of The Residence.*

Conversely, Sgt. Morris testified that there were in fact two interviews, that in the first, unrecorded, less formal interview (Interview No. 1) Sanchez did tell him (Sgt. Morris) that he saw the men carry the body out of The Residence, and that he did not reiterated that fact during Interview No. 2, the taped interview.

According to the Defendant, this inconsistency in what Sanchez told (or did not tell) Sgt. Morris, that Sgt. Morris related to Lt. Super, is fatal to the warrant because regardless of which version one believes, Paragraphs 3 & 5 of the Affidavit are not accurate. Recall that in Paragraph 3, Lt. Super avers that ". . . Officers were notified by a Witness, who in a taped statement notified them that he observed two males carrying a body of a third male in a blue shirt *out of the residence . . .*" (Emphasis added.)

It is correct that this statement is not completely accurate – to the extent that the witness (Sanchez) did not say <u>on the tape</u> that he observed two males carrying a body of a third male out of The Residence. Similarly, in Paragraph 5, Lt. Super again avers that ". . . the description of the male seen being carried *out of 2144 Beech Avenue.*" (Emphasis added.") Though in this instance, Lt. Super does not aver that this statement of Sanchez was on tape.

Regardless of whether Sgt. Morris conducted one or two interviews, and regardless whether Sanchez did or did not say he saw the men carry the body out of the residence, there is no question that that is what Sgt. Morris told Lt. Super, who based upon this information from a fellow officer, swore to it in the Affidavit.

It is axiomatic that a search warrant may be based in whole or in part on hearsay. Crim. R. 41(C)(2) reads, in pertinent part,

> 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.

And, the Ohio Supreme Court has noted,

> With respect to defendant's assertion that the warrant affidavit basically fails to establish probable cause, we note that it is now well established that a warrant affidavit may be based upon hearsay information and need not reflect the direct observations of the affiant. * * * As long as the magistrate is presented with a

> substantial basis to credit the hearsay, so that he will be able to make a neutral and detached determination of probable cause, the affidavit will be sufficient in that regard. * * *

State v. Roberts, 62 Ohio St.2d 170 (1980), at ¶ 9.

In the case at bar, the hearsay statements that Lt. Super relied-upon were related to him by a fellow law enforcement officer, on-scene, who had just (arguably) twice interviewed an eyewitness. Clearly, Judge Miraldi was presented with a substantial basis upon which to rely upon the hearsay statements that Lt. Super swore to.

Finally, the Defendant urges that Lt. Super's statements in Paragraphs 3 & 5 were deliberately false or made with reckless disregard for the truth. The Defendant has the burden of demonstrating the falsity or reckless disregard for the truth of the Lt. Super, the Affiant's, statements.

> A defendant who seeks to overcome the presumption of validity accorded a warrant affidavit by making a substantial preliminary showing of a knowing, intentional, or reckless falsity, has, under *Franks, supra*, the task of supporting his allegations by more than conclusional accusations, or the mere desire to cross-examine. Instead, a challenge to the factual veracity of a warrant affidavit must be supported by an offer of proof which specifically outlines the portions of the affidavit alleged to be false, and the supporting reasons for the defendant's claim. This offer of proof should include the submission of affidavits or otherwise reliable statements, or their absence should be satisfactorily explained. Even if the above is established, the court in *Franks* stated that an evidentiary hearing to review the validity of the search warrant is not mandated by the Fourth Amendment if, after the affidavit material alleged to be false is excluded from the affidavit, there remains sufficient content in the affidavit to support a finding of probable cause.

In this regard, the Court agrees with the Defendant that if the alleged false statements contained in the Affidavit (Paragraphs 3 & 5) are excluded, probable cause is lacking. As such, a hearing was warranted and conducted.

Nevertheless, the Defendant still must show by more than "conclusory accusations" that Lt. Super's statements were false and that he (the Affiant) knew that his statements were false or that he recklessly disregarded the truth.

In this instance, the Defendant can do neither.

First, the evidence is conflicting as to whether the information provided by Sanchez contained the statement that he saw the men remove the body from The Residence. Sanchez testified that he never made this statement and it is not on the recorded interview. But Sgt. Morris testified that Sanchez did make the statement in the first, unrecorded interview. Regardless, this information (that a witness saw men remove a body from The Residence) was passed-on to Lt. Super who had every right to rely upon it. There is simply no information in the record or evidence that this Court can point to that supports the proposition that Lt. Super, *the Affiant,* knew what Sgt. Morris told him was inaccurate or that Lt. Super was reckless for relying on the information.

Contrary to the Defendant's scrutiny of Sgt. Morris' statements, the lens of inquiry must instead be focused on Lt. Super's statements – the statements of the Affiant.

> To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that **the affiant** made a false statement, either 'intentionally, or with reckless disregard for the truth.' " *Statev. Waddy* (1992), 63 Ohio St.3d 424, 441, 588 N.E.2d 819, quoting *Franks v. Delaware* (1978), 438 U.S. 154, 155–156, 98 S.Ct. 2674, 57 L.Ed.2d 667. "Reckless disregard" means that the affiant had serious doubts about the truth of an allegation. *United States v. Williams*(C.A.7, 1984), 737 F.2d 594, 602.

State v. McKnight, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶ 31, emphasis added.

Similarly, the Ninth District has recently applied this same standard in the matter of *State v. Perry,* 9th Dist., Lorain No. 15CA010889, 2017-Ohio-1185, at ¶ 12, where the court rejected a challenge to a warrant even after striking one defective paragraph.

Here, as noted above, there is no evidence at all that Lt. Super, *the Affiant,* was aware that there was an inconsistency in the information that Sgt. Morris provided him. And, it should be noted that it is simply that – an inconsistency in Sanchez's statements, not an unconditional falsehood.

Moreover, Lt. Super can hardly be expected to question the veracity of his fellow officer, a Sergeant working the case with him who as far as Lt. Super knew, had interviewed the witness twice! What facts or evidence are present that would lead anyone to conclude that Lt. Super was aware that there was a problem with Sgt. Morris's interviews of Sanchez or that Lt. Super was reckless in relying on the information passed-on to him by his fellow officer?

The answer is none.

Accordingly, Judge Miraldi had every right to rely upon the sworn statements of Lt. Super and Lt. Super had every right to rely upon the information provided to him by Sgt. Morris.

As such, the allegations that Lt. Super, the Affiant ". . . made a false statement in the affidavit . . ." or made statements in which he ". . . recklessly disregarded the truth . . ." are wholly without merit.

IF THE WARRANT WAS DEFECTIVE, DOES THE GOOD-FAITH EXCEPTION PROSCRIBE THE REMEDY OF EXCLUSION

Finally, while not expressly addressed by the parties in their original briefs[6], the Court is cognizant that even if sufficient exigent circumstances did not exist to justify the warrantless entry (Search No. 1) *and* the warrant lacked probable cause (Search No. 2), the LPD Officers who entered The Residence with the warrant and conducted Search No. 2 nevertheless had a good-faith basis to rely on the warrant.

The Ohio Supreme Court adopted the "good-faith" exception in the matter, *State v. Wilmonth,* 22 Ohio St.3d 251 (1986). The Court stated,

> The United States Supreme Court has recently modified the exclusionary rule in *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677. In that case, the court held that the exclusionary rule should not be applied to suppress evidence obtained by police officers acting in objectively reasonable, good faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. The use of the exclusionary rule to enforce Fourth Amendment violations was not eliminated but it no longer applies to cases where the officers execute a warrant in "good faith." Based upon the following analysis, we formally adopt the good faith exception to the exclusionary rule found in *Leon.*

Similarly, the Ninth District has recognized the good-faith exception and even adopted the position that a warrant issued by a magistrate ". . . normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *State v. Ruffin,* 9th Dist., Summit No. 25916, 2012-Ohio-1330, at ¶ 14.

As such, even if no exigent circumstances existed sufficient to justify Search No. 1, and the warrant was defective relative to Search No. 2, the LPD Officers were nevertheless justified in relying on the warrant to enter The Residence and seize the contraband they found.

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[6] See however, Defendant's Supplemental Motion To Suppress, where he does address this issue.

THE DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO SUPPRESS

On May 30, 2019, at 3:45 pm, the Defendant filed a Supplemental Motion To Suppress. Obviously, the State has not had an opportunity to respond.

To paraphrase, the Defendant has supplied the Court with supplemental federal authority[7] that stands for the proposition that law enforcement cannot rely on false information provided by one officer to another in order to preserve the integrity of a tainted Affidavit. In other words, the misconduct of one officer is attributable to all.

While this Court does not dispute the propriety of the legal maxims enunciated by these cases, nor would this Court condone the purposeful misleading of a Magistrate by one officer insulated through an "innocent" officer in order to perpetrate false testimony, such is not the case here.

First, this Court is nowhere near convinced that the Defendant has demonstrated any fraud perpetrated by any officer of LPD. The Defendant, of course, paints a portrait of deception and fraud advanced by Sgt. Morris because there is a dispute as to the number of times he interviewed Sanchez and the content of Sanchez' statement. To be sure, the investigative activity of LPD in this case was less than stellar. Sgt. Morris' failure to confirm in Interview No. 2 the most important piece of the probable cause factors is puzzling, to say the least. Nevertheless, the majority of Sgt. Morris' account of Sanchez' statement is unrefuted and there is simply no evidence that Sgt. Morris or Lt. Super "deliberately or recklessly" misstated facts or misrepresented information to Judge Miraldi.

In coming to this conclusion, this Court, purposely, did not reach a determination as to the credibility conflict between Sgt. Morris' and Sanchez' testimony because such a determination is unnecessary. Sgt. Morris clearly has an interest and bias in this case; his credibility is at issue, his department is tasked with preserving a warrant under less than ideal conditions, and a large amount drugs, a scale, a weapon, and ammunition were found in the home of a (allegedly) known gang member and drug dealer.

Similarly, Sanchez too has a reason to "fudge" his testimony or "forget" Interview No. 1. Sanchez is the Defendant's neighbor, he knows the Defendant and moments before the events at issue unfolded, sold him home-made pastelitos[8]. Perhaps Sanchez realized

[7] Though only one case from the Sixth Circuit.

[8] A pastelito is a toothsome crispy delicacy also known as pastelitos de carne or Salvadoran empanadas and are filled with minced meat and vegetables .

the gravity of his testimony and how damning it was to the Defendant and decided to minimize what he told Sgt. Morris.

Regardless, the Defendant failed to meet his burden that Sgt. Morris intentionally fabricated his testimony or especially that Lt. Super knew anything about the inconsistencies in Sanchez' story. This is particularly so given that Lt. Super instructed Sgt. Morris to record Sanchez' statement in order to avoid the problem presented here. Had Lt. Super any inclination to disregard the truth, fabricate testimony, or perpetrate a fraud upon the court, he surely would not have mandated that Sanchez's testimony be recorded.

As such, the supplemental authority, while legally apposite, is not applicable to the facts at hand.

CONCLUSION

For all of the forgoing reasons, to wit: 1) sufficient exigent circumstances existed to justify LPD's initial warrantless entry into The Residence (Search No. 1) in order to perform its community caretaking role and investigate whether there was a person or persons in need of aid; 2) even if no legally justified exigent circumstances existed, LPD entered the residence based upon a warrant (Search No 2) and would have discovered the contraband anyway; 3) the search warrant Affidavit was factually sufficient to justify a finding of probable cause by Judge Miraldi; 4) there is no evidence at all that Lt. Super was aware of or would have had reason to question the propriety of the information that Sgt. Morris provided him; 5) while there are inconsistencies between Sgt. Morris' account of Sanchez' testimony and Sanchez testimony itself, there is nothing in the record to indicate that Sgt. Morris fabricated testimony or intentionally or recklessly mislead Lt. Super; and, 6) even if there were no exigent circumstances, and the warrant was defective, LPD was justified in relying on it when they entered The Residence for Search No. 2 as they had a good-faith belief that the warrant was valid.

Accordingly, for the foregoing reasons, the Motion To Suppress is not well-taken and hereby DENIED.

Jury trial remains set for **Monday, June 3, 2019 @ 8:30 am.**

NO CONTINUANCES OF THIS TRIAL WILL BE GRANTED ABSENT EXTRAORDINARY CAUSE

IT IS SO ORDERED.

JUDGE D. Chris Cook