ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	**Case No. S-2022-41**
v.	)	
	)	
JOSHUA KYLE RHYNARD,	)	
	)	
Appellee.	)	
	)	

SUMMARY OPINION

MUSSEMAN, JUDGE:

The State of Oklahoma charged Joshua Kyle Rhynard, Appellee, by Information in the District Court of Kay County, Case No. CF–2021–245, with Count 1: Unlawful Possession of Controlled Drug With Intent To Distribute (Methamphetamine); Count 2: Possession of Firearm After Former Felony Conviction; Count 3: Possession of Controlled Dangerous Substance (Marijuana); and Count 4: Unlawful Possession of Drug Paraphernalia.[1] These charges arose from

[1] A supplemental Information was filed by the State alleging Appellee has two prior felony convictions.

evidence obtained during the execution of a search warrant by police on April 30, 2021, at Appellee's residence in Ponca City.

Appellant, the State of Oklahoma, now appeals and raises three propositions of error. In Proposition I, the State argues that the trial court erred in suppressing the search warrant because the warrant contained sufficient particularity of the place to be searched. In Proposition II, the State argues that innocent technical errors in a search warrant found within the description of the location to be searched are excused where an officer with personal knowledge of the address to be searched participates in the execution of the warrant. In Proposition III, the State argues the trial court erred in failing to apply the good-faith exception to the warrant requirement.

We must first address whether this Court has jurisdiction to hear this appeal. "[T]he State can only bring this appeal if it is authorized by one of the limited instances listed in Section 1053 of Title 22 of the Oklahoma Statutes. This statutory authority cannot be enlarged by construction." *State v. Gilchrist*, 2017 OK CR 25, ¶ 9, 422 P.3d 182, 184. To determine whether section 1053 affords the State an appeal, "we review the nature of the judgment or order below to ascertain if it falls within Section 1053's jurisdictional limits.

Specifically, we review the substance of the relief requested regardless of the title of the pleading regardless of the title affixed to the motion or pleading." *Id.* 2017 OK CR 25, ¶ 10, 422 P.3d at 1084-85 (internal citations omitted).

Here, the State has sought relief pursuant to subsection 1053(5) which allows review "upon a pretrial order, decision, or judgment suppressing evidence **where appellate review of the issue would be in the best interest of justice**." 22 O.S.2011, § 1053 (emphasis added).

We have defined the phrase 'best interests of justice' to mean that "the evidence suppressed forms a substantial part of the proof of the pending charge, and the State's ability to prosecute the case is substantially impaired or restricted absent the suppressed or excluded evidence." *State v. Sayerwinnie*, 2007 OK CR 11, ¶ 6, 157 P.3d 137, 139. The State's brief fails to address "best interest of justice," as though it is not a statutory requirement. The State has made no showing in its appeal brief that it cannot proceed without the suppressed evidence. This showing is foundational to the appeal and allowing it to proceed would effectively rewrite subsection 5 to

allow the State to appeal *any* pretrial order, decision, or judgment suppressing evidence.

While the State's failure to trigger this Court's jurisdiction under 22 O.S.2011, § 1053(5) is fatal, we also note that the State failed to comply with the briefing requirements set forth in this Court's own rules. Rule 3.5(A)(4) requires that an Appellant must provide a "statement of facts relevant to the issues presented for review, with appropriate references to the record." *See* Rule 3.5, *Rules of the Oklahoma Court of Criminal Appeals.* Title 22, Ch. 18 App (2022). Rule 3.5(A)(5) separately requires that an Appellant's brief must include "[a]n argument, containing the contentions of the appellant, which sets forth all assignments of error, supported by citations to the authorities, statutes and **parts of the record**." *Id.* (emphasis added).

Review of suppression of evidence obtained through a search warrant is based upon a totality of the circumstances, which requires a thorough look at the particular facts of the case. *See Marshall v. State*, 2010 OK CR 8, ¶ 49, 232 P.3d 467, 479. In this appeal, Appellant's brief does include a Statement of Facts that refers back to the record. Appellant's brief, however, does not include references

to the record in the argument. As subsection (A)(4) and (A)(5) are distinct requirements, compliance with one is not compliance with the other. Furthermore, the Statement of Facts presented by Appellant is insufficient to support the propositions argued. The State has not complied with the requirements set forth in Rule 3.5.

The best interests of justice standard has not been met in this case. Furthermore, the State has waived its three propositions of error by failing to comply with Rule 3.5 in each proposition. Therefore, we decline to review the State's appeal as it does not qualify under the statutory requirements for an appeal. *See State v. Lefebvre*, 1994 OK CR 38, ¶ 3, 875 P.2d 431, 432 (this Court declined to review proposition of error in state appeal as statutorily proscribed). The State's appeal is not proper and is hereby **DISMISSED.**

DECISION

We find that the State has not shown, and the record does not reflect, that review of this appeal is in the best interest of justice. The State's appeal in this matter is **DENIED**. This case is **REMANDED** to the trial court for further proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal*

Appeals, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM
THE DISTRICT COURT OF KAY COUNTY
THE HONORABLE DAVID R. BANDY
ASSOCIATE DISTRICT JUDGE

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OPINION BY: MUSSEMAN, J.
ROWLAND, P.J.: Concur in Results
HUDSON, V.P.J.: Dissent
LEWIS, J.: Concur
LUMPKIN, J.: Concur

HUDSON, VICE PRESIDING JUDGE, DISSENTING:

I dissent to today's decision. *First*, I find meritless Appellee's challenge to our authority to hear this appeal based on the State's failure to argue explicitly in its brief that review of the trial court's order would be in the best interests of justice. The phrase "best interests of justice" as used in 22 O.S.2021, § 1053(5) means "the evidence suppressed forms a substantial part of the proof of the pending charge, and the State's ability to prosecute the case is substantially impaired or restricted absent the suppressed or excluded evidence." *State v. Sayerwinnie*, 2007 OK CR 11, ¶ 6, 157 P.3d 137, 139.

In *Sayerwinnie*, we denied review of a state appeal because:

> The State . . . has made no showing that it cannot proceed without the suppressed evidence. Nor has the State made any argument that this evidence comprises a substantial portion of its case and that its ability to prosecute the case will be restricted, at all. In fact, the State has made no argument regarding the "best interest of justice" standard; therefore, we find that this appeal must be denied.

Id., 2007 OK CR 11, ¶ 7, 157 P.3d at 139.

In the present case, the State argues: "Suppression of this evidence results in a dismissal of the case." This argument clearly suggests the suppressed evidence consists of a substantial portion of its case. Indeed, the District Court's order suppressed the State's physical evidence which, of course, is critical in any narcotics and firearm prosecution. Even a cursory review of the briefs filed in this case confirms that the trial court's order suppressing the evidence substantially impairs the State's ability to proceed with the charges alleged. I would find on this record that that the State has made an adequate showing that the best interests of justice warrant review of this appeal. While the State's argument on this point could be more explicit and certainly better developed, that is no reason to find a lack of jurisdiction over this appeal.

Second, I disagree with the majority's conclusion that all three of the State's propositions of error are waived from review because the arguments contained therein are not supported by citations to the record. The somewhat unconventional briefing methods used by the State in this appeal are adequate (barely) to preserve its claims, particularly considering the limited nature of the record before us.

Third, I would grant relief to the State based on the District Court's abuse of discretion in suppressing the evidence. *See State v. Ballenger*, 2022 OK CR 11, ¶ 16, 514 P.3d 478, 482 (reviewing trial court's pretrial suppression of evidence for abuse of discretion). Both the United States Constitution and the Oklahoma Constitution provide that no search warrant shall issue except upon probable cause, supported by oath or affirmation; and that the place to be searched, and the persons or things to be seized, shall be particularly described. U.S. Const. amend. IV, XIV; Okla. Const. art. 2, § 30. "The manifest purpose of [the] particularity requirement was to prevent general searches." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). *See Berger v. New York*, 388 U.S. 41, 58 (1967); *Hager v. State*, 1986 OK CR 149, ¶¶ 6-7, 726 P.2d 1181, 1183. Because the Fourth Amendment of the United States Constitution and Article II, § 30, of the Oklahoma Constitution protect the same rights, our interpretation of both are governed by the Supreme Court's Fourth Amendment jurisprudence, including the Court's pronouncements on the exclusionary rule. *State v. Sittingdown*, 2010 OK CR 22, ¶ 17, 240 P.3d 714, 718 (citing *United States v. Leon*, 468 U.S. 897 (1984)).

The present case arises from a search warrant obtained and executed by Ponca City police officer Kisen Sharp. The factual basis for the probable cause showing included an informant's statement confirming that Appellee was distributing methamphetamine out of his garage apartment along with surveillance conducted by Officer Sharp confirming consistent vehicular and foot traffic throughout the day coming and going to Appellee's residence. A car registered to Appellee was also parked at the residence.

The record shows that the address for Appellee's residence, the location of the search in this case, was 516 South Fourth St. in Ponca City. A heavily weathered address placard bearing the numbers "516", with the number six hanging upside down, and partly below, the main placard, was posted on the corner of the building, adjacent to and above the stairs leading to Appellee's garage apartment.

The search warrant affidavit, like the search warrant itself, listed the address for this location as "518 ½ South Fourth St., Ponca City, Kay County, OK 76401". Officer Sharp first learned that the address listed in the search warrant was erroneous during the pretrial proceedings in this case when defense counsel presented a photograph of the weathered address placard on Appellee's building.

Officer Sharp testified that he did not see the address placard on the building during the execution of the search warrant. Officer Sharp testified that he could never get closer than a half a block to a block away during his undercover surveillance of Appellee's residence.[1]

The record shows that the detached garage with Appellee's second-floor apartment shares a driveway with his parents' home, which is the main residence on the property. The detached garage building stands generally behind and to the right of the main residence. The address for the parents' residence is 518 South Fourth St. The State tells us that, because both buildings were on the same lot, Officer Sharp inferred that the address of Appellee's residence was 518 ½ South Fourth St.[2]

Despite the apparent error with the address, the record shows that the detailed physical description of the residence listed by Officer Sharp in the affidavit for search warrant and the search warrant itself

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[1] Despite the distance, Officer Sharp described seeing "consistent foot traffic, bicycle traffic and short-term vehicle traffic" coming and going to the alleyway of Appellee's residence during the five or six days of surveillance.

[2] In the search warrant application, Officer Sharp reported that informant Ryan O'Hara told him the address for Appellee's apartment was "518 ½ South Fourth St. in Ponca City". At preliminary hearing, however, O'Hara was asked whether he remembered the address that he gave Officer Sharp for Appellee's apartment. His response was "No. I didn't—I didn't know the address".

was accurate.[3] Prior to the search, Officer Sharp also knew that a vehicle parked in the alleyway to the garage apartment was registered to Appellee at 518 South Fourth St. The dominion and control item recovered during the search of the garage apartment listed Appellee's address as 518 South Fourth St. Nothing recovered during the search listed 516 South Fourth St. as Appellee's address.

At the suppression hearing, the State introduced color photographic exhibits[4] of the residence's exterior and the surrounding homes, as well as testimony from Officer Sharp, confirming the general accuracy of the description of Appellee's residence used in the search warrant. No evidence was presented of any other residence in the vicinity, or for that matter in Ponca City,

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[3] In this regard, the search warrant stated:

> The place to be searched is described as a two-story single family dwelling garage apartment with white siding and grey composite shingles on the roof. On the north side of the building is a staircase leading to the second level to access the apartment. The front door of the residence faces north on the second level. Your affiant has been to the described residence and can return to the above address.

[4] Appellee complains that the appeal record contains only black and white photographs. This Court, however, has the original transcripts and the original exhibits admitted during the suppression hearing. The photographic exhibits made part of the record on appeal before this Court are all color photographs.

with the address of 518 ½ South Fourth St. Defense counsel urged at the hearing on the motion to suppress that the 518 ½ South Fourth St. "is not a real address". The evidence also shows the main residence at 518 South Fourth St. where Appellee's parents live is a much larger, and much different, two story home that would not be confused for the garage apartment described in the search warrant.

Assuming *arguendo* a Fourth Amendment violation arose from the wrong address for Appellee's residence being listed in the search warrant, the good faith exception to the exclusionary rule applies in this case. *See State v. Wallace*, 2019 OK CR 10, ¶ 20, 442 P.3d 175, 181; *Sittingdown*, 2010 OK CR 22, ¶¶ 18-19, 240 P.3d at 718. "The fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009). The Fourth Amendment does not require the suppression of evidence obtained from an objectively reasonable reliance on a search warrant, even if the warrant is subsequently invalidated. *Leon*, 468 U.S. at 922-24. Suppression "cannot logically contribute to the deterrence of Fourth Amendment violations" if the officer acted in objectively reasonable belief that the warrant was properly issued. *Id.* at 921-22. In *Leon*,

the Supreme Court held that "a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923. "The test is an objective one that asks 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *United States v. Otero*, 563 F.3d 1127, 1134 (10th Cir. 2009) (quoting *Leon*, 468 U.S. at 922 n.23).

The affidavit for search warrant in this case was submitted by Officer Sharp to a magistrate for Appellee's apartment that he had surveilled and believed had the address of 518 ½ South Fourth St. Review of the search warrant issued in this case does not suggest it was so facially deficient that the officers could not reasonably presume it to be valid. There is no evidence suggesting widespread knowledge in the community that the address for Appellee's apartment was 516 South Fourth St. The sum-total of the evidence in this case demonstrating that the address for Appellee's apartment is 516 South Fourth St. is a weather-beaten, and possibly rusted, address placard found in substantial disrepair on the front of Appellee's building. The detailed physical description of the

residence listed in the search warrant, however, matched the physical description of Appellee's residence. Officer Sharp also served the warrant so there was no danger that the wrong address would be targeted.

The information discovered by Officer Sharp during his investigation prior to obtaining the search warrant provided reasonably objective support for his conclusion that the address was 518 ½ South Fourth St. and reasonably supported his reliance on the warrant using this address. The registration of Appellant's vehicle, parked at his residence, listed Appellee's address as 518 South Fourth St. The detached garage building with Appellee's second-floor apartment was located adjacent to the main residence, on the back side of the property, where his parents lived which had the address of 518 South Fourth St. Photographs taken from the street in front of Appellee's residence do not reveal a separate address for Appellee's garage apartment. Both buildings use the same driveway.

Moreover, Officer Sharp's failure to notice the address placard during the execution of the search warrant is understandable. The record shows the address placard was extremely weather-beaten and

in disrepair, suggesting disuse, and was not visible from the street. The location of the address placard on the corner of the building, above and to the side of the stairs leading to the upstairs entrance of the garage apartment, made it more likely that reasonably well-trained officers serving a search warrant or, for that matter, conducting covert surveillance in the surrounding vicinity, might miss it.

Under the total circumstances, Officer Sharp's failure to realize the actual address of the apartment was 516 South Fourth St. was objectively understandable and reasonable based on the circumstances presented here. *Cf. Maryland v. Garrison*, 480 U.S. 79, 88 (1987) ("the validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable"). Further, there was no reasonable probability that the wrong house would be searched because again Officer Sharp had personally surveilled the premises and accompanied the other officers in executing the search warrant. Here, despite the error in the description, Officer Sharp—the affiant for the search warrant—and

other officers could still ascertain with little effort the place intended to be searched. "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment[.]" *Hill v. California*, 401 U.S. 797, 804 (1971).

Under these circumstances, the good faith exception to the exclusionary rule applies. There is nothing indicating bad faith actions by Officer Sharp. There was no law enforcement purpose for Officer Sharp intentionally to state the wrong address on the warrant for Appellee's apartment—the place where it was actually executed by him and for which there was probable cause to search. Appellee raises a purely technical violation of the Fourth Amendment with this claim judged by the interests the amendment was designed to protect.

The trial court based its ruling on past instances where law enforcement had executed a search warrant at the wrong address and gun violence resulted between the bystanders inside and the police. The trial court apparently sought to deter future tragedies of this kind by excluding the evidence. The concerns expressed by the trial court about the dangers of search warrants bearing the wrong address are important and legitimate but do not warrant suppression

of the evidence here. The Supreme Court has made clear that the exclusionary rule applies "*only* where it 'results in appreciable deterrence.'" *Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 909) (emphasis added). Further, "the benefits of deterrence must outweigh the costs." *Id.* Here, they do not.

There is no meaningful deterrence value with respect to future Fourth Amendment violations from suppression of the evidence in this case. Based on Officer Sharp's involvement in serving the warrant this is simply not a scenario, like the one envisioned by the District Court, where there is a reasonable likelihood the police would endanger innocent bystanders or law enforcement by serving the warrant at the wrong residence. Nor do the perceived benefits from applying the exclusionary rule in this case outweigh the substantial costs inflicted on the criminal justice system. "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'" *See Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 908).

The record also does not suggest any form of reckless disregard to constitutional rights, or some other form of systemic error

disregarding constitutional requirements, that would justify exclusion for police negligence in this case. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 U.S. at 145. "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* The record here simply does not reveal the level of culpability required to justify application of the exclusionary rule. I find that the District Court abused its discretion in suppressing the evidence in this case based on the purported Fourth Amendment violation. Based upon the foregoing, I dissent to today's decision and would grant relief to the State.