IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2020-0495
Plaintiff-Appellee,	:	On Appeal from the Hamilton County Court of Appeals,
vs.	:	First Appellate District
LEANDRE JORDAN,	:	C.A. Case Nos. C-1800559 C-1800560
Defendant-Appellant.	:	

MERIT BRIEF OF DEFENDANT-APPELLANT LEANDRE JORDAN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judge by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

On direct appeal, Mr. Jordan challenged his arrest as unlawful because it was not supported by probable cause and because the arresting officers failed to obtain a warrant though it was entirely practicable under the circumstances to do so. *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845, 934 N.E.2d 413, ¶ 23 (2d Dist.), citing *State v. Heston*, 29 Ohio St.2d 152, 280 N.E.2d 376 (1972). In this case, the purported probable cause was developed over a week prior to Mr. Jordan's arrest. There was no exigency to justify the delay, and the officers did not observe the commission of a new felony prior to his arrest. Rather, during this one-week period, the arresting officers continuously surveilled Mr. Jordan at his place of employment, but no new information emerged to support the alleged probable cause. All relevant information supporting probable cause was developed within the first couple days following the burglary. The First District Court of Appeals rejected Mr. Jordan's arguments, finding adequate probable cause to arrest and cited the majority position in Ohio that *Brown* and R.C. 2935.04 permit warrantless arrests in a public place that are based on probable cause. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858. The First District expressly declined to consider whether it was practicable under the circumstances to obtain a warrant, as it found the holdings in *Heston* and *VanNoy* to be at odds with *Brown*. *State v. Jordan*, 2020-Ohio-689, 145 N.E.3d 357, ¶ 19 (1st Dist.).

Applying *Brown* in cases involving a delayed probable cause arrest effectively eliminates

the warrant requirement. Rather than obtain a warrant in this case, the arresting officers delayed the arrest without justification. There was no indication that Mr. Jordan was going to commit another burglary or any criminal offense, and he was not engaged in any new criminal offense at the time he was arrested. If the officers had time to delay their probable-cause arrest, they certainly had time to obtain a warrant. But under *Brown*, they seemingly had no obligation to do so. Warrantless arrests under the circumstances in this case are not what *Brown* and R.C. 2935.04 contemplated. Analyzing the circumstances surrounding the delay and the decision to forgo the warrant requirement is necessary to ensure the warrantless arrest was reasonable, and thus, constitutional.

There is tension within the Ohio Courts of Appeals regarding the proper scope of R.C. 2935.04. This case endeavors to relieve that tension and set forth the appropriate constitutional parameters with respect to delayed probable cause arrests under R.C. 2935.04. This Court must recognize that probable cause to arrest without a warrant does not last indefinitely, and that an arrest warrant must be required when it is practicable under the circumstances to obtain one.

STATEMENT OF FACTS

On December 12, 2016, a burglary occurred on Wilbud Drive in Cincinnati, Ohio, at the home of James and Emiko Locke. (T.p. 153-154). A first-floor bedroom was entered into through a back window, and a safe, containing $40,000 and personal papers, was taken. (T.p. 154, 156; 3/7/18 Motion to Suppress State's Exhibit 1).

Detective Mark Longworth of the Cincinnati Police Department investigated the burglary. (T.p. 154). Longworth considered the burglary "unusual" in that only the safe was taken, and no other valuables were removed from the house. (T.p. 157). He documented this finding in his police report, noting, "Since there was only one entry and exit point, and no other

valuables were missing, it is likely that the suspect knew what they were looking for in the residence." (3/7/18 Motion to Suppress State's Exhibit 1). Other than James and Emiko, their son Michael and their godson Demarco were the only people who knew about the safe. (T.p. 157).

The Lockes suspected their son Michael was involved in the burglary. (T.p. 158). According to Longworth, Michael had been kicked out of the house but had recently returned. (*Id.*). On the day of the burglary, Michael had repeatedly called his parents trying to ascertain their whereabouts. (*Id.*). The break-in occurred when the Lockes were not home, so the Lockes became suspicious of Michael's attempts to determine if they were home. (T.p. 158-59).

Michael returned home on the day of the burglary and appeared to be "fishing for information" about what happened. (T.p. 163). A young neighbor indicated he saw a cream-colored Chrysler 300 in the neighborhood, prompting Michael to yell at the boy and ordered him to leave the house. (T.p. 164).

Longworth later interviewed the juvenile who saw the cream-colored Chrysler. (T.p. 158). No distinguishing details were provided regarding the Chrysler, and the juvenile did not identify a driver, a passenger, or a license plate number. (T.p. 162, 183, 186). Longworth testified he thought the neighbor saw the vehicle from inside his residence and got the impression the juvenile saw the vehicle by looking out the window. (T.p. 162). Despite the limited detail regarding the vehicle, the Lockes assumed the vehicle belonged to Michael's friend "Dre," as they knew he drove that type of vehicle. (T.p. 158). Per Longworth, the Lockes "thought that Dre was trouble," and they "didn't like him." (T.p. 160, 191). The Lockes knew Dre was a barber who worked near Kroger on Warsaw Avenue. (160, 162). Longworth identified a cream-colored Chrysler 300 parked across the street in the back of Kroger's parking lot. (T.p.

159-160). He testified the vehicle was registered to a relative, but determined LeAndre Jordan was the operator. (T.p. 160).

Longworth interviewed Michael a couple days after the burglary. (T.p. 163-64). During that interview, Michael said he was with Mr. Jordan on the day of the burglary and that Mr. Jordan drove a Chrysler. (T.p. 166). Longworth testified he searched Michael's cellphone, with Michael's permission, and confirmed the Lockes' assertion that Michael had been calling his family around the time of the burglary. (T.p. 166). Longworth also noticed Michael had called Mr. Jordan at 4:36 p.m. and 4:49 p.m. and had received a call from Mr. Jordan at 5:03 p.m. (T.p. 168). Longworth believed Mr. Jordan was "involved in the burglary and complicit[]." (T.p. 169).

Longworth testified he observed Mr. Jordan get in and out of the Chrysler 300 parked at Kroger between the date of the burglary, December 12, 2016, and the date of Mr. Jordan's arrest, December 20, 2016. (T.p. 187). Longworth said he had been watching Mr. Jordan for several days before his arrest and observed his parked car across the street from where Mr. Jordan worked. (T.p. 171, 187). No explanation for this ongoing surveillance was provided.

On December 20, 2016, Longworth and his partner Detective Coombs surveilled the car outside the barber shop and waited for Mr. Jordan to leave so they could stop him. (T.p. 169, 173). Longworth testified they were able to stop the suspected car and Mr. Jordan was driving. (T.p. 164). However, on cross-examination it was clarified that detectives arrested Mr. Jordan as he was walking toward his car after leaving a cellphone store. (T.p. 174). Longworth also testified Mr. Jordan was driving the Chrysler 300 when he was apprehended and arrested; however, during the post-arrest interview, Longworth noted Mr. Jordan was driving a black Lexus the day he was arrested. (T.p. 171, 175-77).

The detectives conducted a search of Mr. Jordan's person following the arrest, and obtained Mr. Jordan's girlfriend's identification card and a set of keys with an apartment number. (T.p. 170). Longworth determined Mr. Jordan was staying at the address associated with these items and obtained a search warrant for the items related to the burglary at that address. (*Id*.). At the apartment, officers found $2,097 in cash, heroin, cocaine, an electronic scale, and an inoperable pistol, among other items inside a bedroom closet. (State's Exhibit 10, Search Warrant Inventory).

On December 28, 2016, the Hamilton County Grand Jury indicted Mr. Jordan on one count of trafficking in heroin under R.C. 2925.03(A)(2); one count of aggravated trafficking in drugs under R.C. 2925.03(A)(2); one count of possession of heroin under R.C. 2925.11(A); and one count of aggravated possession of drugs under R.C. 2925.11(A). (C180560 T.d. 1). In a separate indictment returned on April 20, 2017, Mr. Jordan was charged with one count of trafficking in cocaine under R.C. 2925.03(A)(2); and one count of possession of cocaine under R.C. 2925.11(A). Both counts contained a major drug offender specification. (C180559 T.d. 1). The state filed a motion to join the indictments on May 5, 2017, which was granted on July 11, 2017. (C180560 T.d. 21, 30; C180559 T.d. 7, 18). Mr. Jordan was never indicted on any changes pertaining to the burglary of the Locke residence.

The case proceeded to a jury trial on June 18, 2018. (T.p. 238-948). The jury returned its verdict on June 25, 2018. (T.p. 953-960). Under B-1607185, the jury found Mr. Jordan guilty on all Counts: Count 1, trafficking in heroin; Count 2, aggravated trafficking in drugs; Count 3, possession of heroin; and Count 4, aggravated possession of drugs. (T.p. 955-957). Under B-1702130, the jury found Mr. Jordan not guilty on Count 1, trafficking in cocaine, and found him

guilty on Count 2, possession of cocaine, and additionally found the amount of cocaine was equal to or greater than 100 grams. (T.p. 954-55).

ARGUMENT

<u>Sole Proposition of Law</u>: Under R.C. 2935.04, once probable cause is established, a warrantless arrest is unconstitutional if there is unreasonable delay in effecting the arrest. Whether the delay is reasonable depends upon the circumstances surrounding the delay and the nature of the offense.

A. The Fourth Amendment and Ohio's Constitutional right against unreasonable seizure.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons * * * against unreasonable * * * seizures, shall not be violated." Article I, Section 14 of the Ohio Constitution is nearly identical to the Fourth Amendment, and this Court has interpreted it as affording at least the same protection as the Fourth Amendment. *State v. Hoffman*, 141 Ohio St.3d 428, 2014-Ohio-4795, 25 N.E.3d 993, ¶ 11, citing *State v. Robinette*, 80 Ohio St.3d 234, 238-239, 685 N.E.2d 762 (1997).

When an officer has arrested and physically restrained the liberty of a citizen, a "seizure" has occurred within the meaning of the Fourth Amendment. *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, 936 N.E.2d 529, ¶ 13 (10th Dist.), citing *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), fn. 16. The surest protection against unreasonable, warrantless seizures is for a neutral and detached magistrate to conduct a probable cause determination whenever possible. *Gerstein v. Pugh*, 420 U.S. 103, 111-13, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). "'The historic purpose of the arrest warrant in the criminal context was to interpose between the government and the citizen a neutral officer charged with protecting basic rights[;]' the requirement is designed 'to interpose the magistrate's determination of probable cause between the zealous officer and the citizen.'" (Internal citations omitted). *State v. Jones*,

183 Ohio App.3d 839, 2009-Ohio-4606, 919 N.E.2d 252, ¶ 10 (2d Dist.) .

"A warrantless seizure is *per se* unreasonable unless it falls within one of the recognized exceptions to the warrant requirement." *State v. Pies*, 140 Ohio App.3d 535, 539, 748 N.E.2d 146 (1st Dist.2000), citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.E.2d 576 (1967). One exception to the warrant requirement is when an officer has probable cause that an offense has been committed and the arrest is made in a public place. *United States v. Watson*, 423 U.S. 411, 418, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). The Ohio General Assembly codified this exception at R.C. 2935.04, also known as the felony arrest statute.

R.C. 2935.04 provides: "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained." As this Court has recognized, arrests under this statute generally do not violate the Fourth Amendment. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 66, citing *Watson*, 423 U.S. 411. However, prior to *Brown*, this Court also said when there is a warrantless arrest based on probable cause, it must also be impracticable under the circumstances for an officer to obtain an arrest warrant prior to making the arrest. *State v. Heston*, 29 Ohio St.2d 152, 280 N.E.2d 376 (1972), paragraph two of the syllabus; *State v. Woodards*, 6 Ohio St.2d 14, 20, 215 N.E.2d 568 (1966).

While arrests pursuant to R.C. 2935.04 *generally* do not violate the Fourth Amendment, this generalization should not be extended to delayed warrantless arrests when there is no justification for the delay, and the circumstances demonstrate there was ample time to procure an arrest warrant. "[T]he reason for arrests without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses

required that such arrests should be made at once without a warrant." *Carroll v. United States*, 267 U.S. 132, 157, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Seemingly, the felony arrest rule was to protect the ability of law enforcement to make felony arrests at the time of the offending conduct. However, the current application of R.C. 2935.04 to felony arrests seems to allow for all types of warrantless arrests, even when the circumstances leading up to the arrest demonstrate there was ample time to obtain a warrant.

Delayed probable cause arrests must not be upheld as constitutional in all instances, as delayed arrests without justification for the delay are unreasonable in light of the Fourth Amendment's warrant requirement. Delayed probable cause arrests must be limited in scope to preserve the integrity of the warrant requirement, and to maintain the vital function of having a neutral and detached magistrate determine probable cause. Accordingly, this Court should hold that once probable cause to arrest is established, a warrantless arrest is unconstitutional if there is unreasonable delay in making the arrest.

B. Mr. Jordan's delayed probable cause arrest is distinguishable from *Brown, Watson* and *Heston*, prompting a need to narrow the application of R.C. 2935.04.

Relying on R.C. 2935.04 and *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 59 (1976), this Court has held a warrantless arrest based on probable cause that occurs in a public place is constitutional under the Fourth Amendment. *Brown* at 115 Ohio St.3d 55, at ¶ 66. *Brown* has been invoked to uphold warrantless, probable-cause arrests, despite circumstances where officers delayed in making their arrest, like in Mr. Jordan's case. *State v. Jordan*, 2020-Ohio-689, 145 N.E.3d 357 (1st Dist.). *See State v. Taylor*, 10th Dist. Franklin No. 18AP-7, 2019-Ohio-2018; *State v. Hovatter*, 5th Dist. Fairfield No. 17-CA-37, 2018-Ohio-2254. In deciding this case below, the First District noted the holding in *Heston* that, in addition to finding probable cause, it must also be impracticable under the circumstances to obtain a warrant, has been

"discredited" by *Watson* and *Brown*. *Jordan* at ¶ 21. However, *Brown* did not expressly overrule *Heston*'s holding, and close review of the two opinions indicates that the decisions are not in conflict. While *Heston* did not expressly apply R.C. 2935.04 as the defendant's arrest appears to not have occurred in a public place, the specific facts surrounding the arrest demonstrate when it would be impracticable to obtain a warrant. Moreover, *Brown* and *Watson* did not expressly permit police to forgo the warrant requirement and make an arrest based on untested probable cause at their discretion in all instances. While *Watson* did decline to impose any exigency or undue delay requirement upon probable cause arrests, it did not eviscerate the warrant requirement with respect to all felony arrests. *Watson*, 423 U.S. at 432, fn. 3 (Powell, J., concurring).

1. *State v. Brown*.

An unreasonable delay preceding an arrest was not implicated in *Brown*. Notably, the warrantless arrest issue was raised under an ineffective assistance of counsel claim for failure to file a motion to suppress. *Brown* at ¶ 65. In *Brown*, police were charged with investigating two murders that took place on January 1, 2004, in the west-side area of Cleveland. *Id*. at ¶¶ 3, 8, 21. On January 4, police received a tip that implicated Brown in the murders, and also connected him to a black Cadillac Escalade as well as the location where the Escalade was usually parked. *Brown* at ¶¶ 26-27. On January 6, police received a report that a black Cadillac Escalade was parked in the identified area, but discovered the license plates were registered to a different vehicle. *Id.* at ¶ 28. Police placed the vehicle under surveillance and eventually saw Brown enter the Escalade and drive away. *Id*. The police followed and stopped the vehicle, and Brown was arrested. *Id*.

Brown challenged the informant's tip as insufficient to establish probable cause to stop and argued counsel was ineffective for failing to file a motion to suppress. Finding the tip

sufficient, this Court also found there was independent probable cause to stop and arrest Brown for the crime of using unauthorized plates. *Id*. at ¶ 68. The informant's tip pertaining to the murders was therefore unnecessary to facilitate a legal stop. *Id*. Moreover, the investigating officers in *Brown* identified the Cadillac Escalade within two days of receiving the informant's tip and did not delay in pursuing Brown once they saw him leave in the vehicle. Thus, this case did not present any unnecessary delay. Even if it did, any delay would be rendered immaterial based on the independent probable cause to stop and arrest Brown for the unauthorized license plates. *See State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶¶ 21-22 (delay in executing an arrest warrant for prior conduct was rendered immaterial by the transaction that immediately precipitated the warrantless arrest).

2. *U.S. v. Watson*.

The circumstances surrounding the warrantless arrest in *Watson* are similar to *Brown* in that there was evidence of criminal conduct committed at the time of the arrest. On August 17, 1972, an informant provided a postal inspector with information that Watson was in possession of stolen credit cards. *Watson*, 423 U.S. at 412-413. After the informant obtained the card from Watson and delivered it to the postal inspector, the postal inspector arranged with the informant to meet with Watson on August 22, where Watson was expected to furnish additional cards to the informant. *Id*. at 413. Watson canceled the original meeting, but met the informant the next day on August 23. *Id.* The informant was instructed to give a signal if Watson had the stolen cards during their meeting. *Id*. Watson was arrested promptly after the informant gave the signal. *Id*.

The Ninth Circuit Court of Appeals invalidated the arrest on the basis that there was ample time to get an arrest warrant, which the United States Supreme Court expressly declined to uphold when it reversed the Circuit Court's decision. *Id*. at 414. Additionally, while the Ninth

Circuit found it significant that the testimony supporting probable cause to arrest was related to the August 17 conduct reported by the informant, the United States Supreme Court seemingly found probable cause to arrest on August 17 was inconsequential due to the fact that there was a crime contemporaneous to the arrest on August 23. *See Id*. at 435, fn. 1 (Marshall, J., dissenting) (finding that exigent circumstances justifies a warrantless arrest where there was contemporaneous probable cause).

Watson's majority opinion advised "[l]aw enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate." *Id*. at 423. However, it immediately undermined this advisement by "declin[ing] to transform this judicial preference into a constitutional rule" when warrantless public arrests have long been recognized as constitutional, and also declined "to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it is practicable to get a warrant, whether the suspect was about to flee, and the like." *Id*.

Despite this conflicting advisement, *Watson* did not purport to and should not be interpreted as having eliminated the warrant requirement for all probable cause arrests. As *Watson*'s concurring opinion noted, the majority's holding should not be construed as a retreat from applying careful judicial scrutiny to warrantless arrests, because despite the majority's holding, an arrest without a warrant still "'bypasses the safeguards provided by an objective predetermination of probable cause, and substitute instead the far less reliable procedure of an after-the-event justification for the arrest . . . , too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.'" *Watson* at 432, fn. 6 (Powell, J., concurring), quoting *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

3. *State v. Heston.*

This Court stated in *Heston* that "[u]nder certain circumstances, a warrant need not be obtained in order to render a valid arrest. The arresting officer must have probable cause to believe that a felony was committed by defendant, and the circumstances must be such as to make it impracticable to secure a warrant." *Heston* at 155, quoting *Woodards*, 6 Ohio St.2d 14 at 20, and citing *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *Jones v. United States*, 357 U.S. 493, 499, 500, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958); *Chapman v. United States*, 365 U.S. 610, 615, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961). The *Heston* Court was presented with a clear instance where circumstances made it impracticable for law enforcement to obtain a warrant: when a suspect is a flight risk. *Heston* at 153, 155. A special agent for American Express received a tip from an unidentified informant implicating Heston, among others, in having stolen American Express money orders, two I.B.M. machines, a check writer, and stolen checks. *Id*. at 152-153. The informant provided the names of all persons involved and an apartment address where the property was located. *Id*. The informant also advised that the parties intended to cash the money and leave town. *Id*. at 153.

The special agent notified Cleveland police of the informant's tip the next day. *Id*. Police then verified Heston had been recently charged with burglary in connection with the theft of the two I.B.M. machines. *Id*. Police also discovered forged checks had been passed in the area where the apartment allegedly containing the stolen property was located. *Id*. Additionally, the named suspects were found to have criminal records of forgery and burglary. *Id*. Based on these discoveries, police went to the apartment to investigate. They found Heston, and he was arrested at the scene without a warrant. *Id*. This Court determined that the information from the informant regarding the suspects intending to leave town, combined with the fact that one of the suspects had already left, justified proceeding without a warrant. *Id*. at 155.

4. Delayed probable cause arrests require a *Heston* analysis.

The circumstances surrounding the arrests in *Brown, Watson*, and *Heston* are remarkably different from the events precipitating Mr. Jordan's arrest. In *Brown* and *Watson*, the probable cause to arrest was developed and acted on at the time of the arrest. Similarly, in *Heston*, the officers acted immediately once the informant's tip was verified and with knowledge that the suspect was intending to flee. Mr. Jordan, however, was not engaged in any criminal activity at the time he was arrested, there was no indication that he was a fight risk, and there was no indication that he was expected to commit a burglary or any criminal offense. There was no explanation for the several days of surveillance after the cream-colored Chrysler 300 had been identified and verified by the juvenile who saw the vehicle on the day of the burglary, or after Michael's interview when calls between Michael and Mr. Jordan were discovered. The officers simply elected to forgo obtaining a warrant to watch Mr. Jordan for over a week without explanation. This was unreasonable. These facts do not comport with *Brown* or *Watson*, and call for analysis like the one set forth in *Heston*. There was no exigency present at the time of Mr. Jordan's arrest, and it was entirely practicable under the circumstances for the arresting officers to obtain a warrant.

C. Applying *Heston* to delayed probable cause arrests.

While no longer followed by the majority of appellate courts in Ohio, the Second District Court of Appeals recognized the holding in *Heston* and applied the "impracticability" standard in *State v. Jones*, 183 Ohio App.3d 839, 2009-Ohio-4606, 919 N.E.2d 252 (2d Dist.), and in *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845, 934 N.E.2d 413 (2d Dist.). *See State v. Taylor*, 10th Dist. Franklin No. 18AP-7, 2019-Ohio-2018, ¶ 14 (noting that *VanNoy* is the minority position in Ohio). Despite these two cases, however, there remains some dispute within the Second District as to whether *Heston* has been discredited by *Brown* and *Watson*. *State v.*

Armstead, 2015-Ohio-5010, 50 N.E.3d 1073, ¶ 40 (2d Dist.) (Welbaum, J., dissenting.). As previously discussed, *Brown* and *Heston* are not truly in conflict. Moreover, neither case adequately considered the application of R.C. 2935.04 to warrantless arrests when there is an unjustifiable delay in making the arrest. *VanNoy* and *Jones*, however, demonstrate how *Heston*'s holding remains viable as applied to delayed probable cause arrests.

1. *Jones* and *VanNoy* promote an exigency requirement.

The Second District has invalidated warrantless arrests when it was practicable under the circumstances to obtain a warrant. That court reasoned that an "arrest without a warrant, when a warrant can timely, safely, and readily be obtained, based upon an alleged prior offense of known facts and timing, denies the arrestee the constitutional right to have a neutral magistrate determine whether there is probable cause to seize the person; rather, it permits a person's seizure, albeit on grounds slightly better than a 'general warrant,' at the temporally unchecked discretion of a law-enforcement officer, based on unverified and unreviewed suspicions." *VanNoy* at ¶ 23, citing *Jones* at ¶ 25. Both cases concerned warrantless arrests that were made after a significant passage of time between the events precipitating probable cause and the arrests.

In *VanNoy*, the defendant had engaged in a drug transaction with a confidential informant. *VanNoy* at ¶ 9. For three and one-half months following that transaction, no warrants were issued, no arrests were made, and no complaints were filed or indictments issued because law enforcement claimed to be conducting an ongoing investigation. *Id*. at ¶ 10. The defendant was subsequently arrested on the three-month old drug transaction during a traffic stop, following a confidential informant's tip that the defendant would be traveling to a known drug house. *Id*. at ¶¶ 11-12.

In light of the three-month delay, the Second District held that the warrantless arrest in *VanNoy* was illegal. The court ruled the "circumstances must be such as to make it impracticable to obtain a warrant." *Id.* at ¶ 24. Exigent circumstances can make the warrant requirement impracticable, which is why exigency is a well-established warrant exception. *Id*. at ¶ 20. But "[i]n the absence of exigent circumstances, judicially untested determinations by police officers are simply not reliable enough to justify an arrest without a warrant – at least where the officers had sufficient opportunity to seek one beforehand." *Id*. at ¶ 23.

Similarly in *Jones*, police had utilized a confidential informant to engage a drug-buy with Jones. The officers had three trafficking charges on file within their police department, but never filed those charges with the court. The buys occurred sometime before January 2008. The particular type of drug and the amounts sold were unknown, but the offenses were classified as fifth-degree felonies per the police files. *Jones* at ¶¶ 3, 16. Three weeks before Jones was arrested, the police initiated a "drug roundup," where they corralled up individuals implicated in drug-related crimes, and Jones was a target in this roundup effort. *Id*. at ¶ 17. However, Jones could not be located at the time. *Id*. On February 15, 2008, the confidential informant informed police that Jones would be traveling to Troy, Ohio that evening, and provided a description of the vehicle and person with whom Jones would be traveling. *Id.* at ¶ 18. The vehicle was eventually located and stopped. The officer who made the stop did not observe any traffic violations, and arrested Jones solely on the charges related to the prior drug offenses. *Id*. at ¶ 26. Finding that the "passage of several weeks made it virtually impossible to establish the impracticability of obtaining a warrant," the Court of Appeals reversed the trial court's denial of Jones' motion to

suppress.[1] *Id*. at ¶ 27. The court further advised that "to hold that an arrest warrant was not required under these circumstances would render the Fourth Amendment's prohibition of warrantless searches and seizures meaningless." *Id*.

Unlike in *Watson* and in *Brown*, there was no probable cause pertaining to new criminal conduct that precipitated the arrests of Jones and VanNoy. And unlike *Heston*, there was never any concern the defendants were a flight risk. Both Jones and VanNoy were arrested for conduct that occurred weeks or months before their arrests. Despite finding probable cause to arrest for those prior offenses, the Second District reversed the trial courts' decisions denying the motions to suppress because both cases presented clear circumstances where it was practicable to obtain a warrant. *Compare State v. Whitt*, 2d Dist. Montgomery No. 2010 CA 3, 2010-Ohio-5291, ¶ 41 (distinguishing *Jones* and *VanNoy* on the basis that events were continuing to unfold during an ongoing drug investigation, new information was developed between the first offense and the arrest, and independent probable cause for a new offense was established on the day of the arrest). The reasoning relied on in these cases is straightforward, that is, "'in the absence of exigent circumstances, judicially untested determinations by police officers are simply not reliable enough to justify an arrest without a warrant – at least where the officers had sufficient opportunity to seek one beforehand.'" *VanNoy* at ¶ 23, quoting *Jones* at ¶ 25.

2. Challenges to *Heston*, *Jones*, and *VanNoy*.

The dissent in *State v. Armstead* directly challenged its district's reliance on *VanNoy*. *State v. Armstead*, 2015-Ohio-5010, 50 N.E.3d 1073, ¶ 47 (2d Dist.) (Welbaum, J., dissenting). In *Armstead*, a vehicle was stopped for a turn signal violation, and Armstead was a front-seat passenger. *Id*. at ¶ 3. Armstead did not have any active warrants for his arrest, but was

[1] Jones failed to raise the issue of whether it was impracticable under the circumstances to obtain a warrant at the trial court level. *Jones* at ¶ 24. The Second District reviewed and reversed the trial court's denial of Jones' motion to suppress under a plain error standard of review. *Id.*

discovered to be the subject of a valid "suspect locator hit." *Id*. This typically indicates another detective wants to speak to the suspect, but the hit in this case indicated Armstead was actually wanted for a DNA sample in relation to a 2012 hit and run. *Id*. at ¶¶ 4, 8-9. The officer testified at the motion to suppress hearing that Armstead was not arrested, and he had no probable cause to arrest him in connection to the traffic stop, the subsequent *Terry* pat-down (revealing no weapons or contraband), or the smell of marijuana. *Id*. at ¶¶ 5-6. The officer never informed Armstead that he was free to go; instead, he instructed Armstead that he needed to come with him to speak to another detective. *Id*. at ¶ 6. Armstead was placed in the back of the officer's police cruiser and was transported for questioning. *Id*. at ¶¶ 6-7. Thereafter, the detective seeking to speak to Armstead went to a judge to obtain a warrant for Armstead's DNA. *Id*. at ¶ 7.

Based on these facts, the trial court found there was probable cause to obtain an arrest warrant based on the 2012 felony hit-and-run investigation and denied Armstead's motion to suppress. *Id*. at ¶ 26. The appellate majority reversed, finding the 2012 probable cause was irrelevant to the officer's decision to apprehend Armstead based solely on the traffic stop and limited knowledge of the 2012 alleged crime, as the arresting officer only knew Armstead was wanted for the DNA swab. *Id*. Armstead was therefore found to have been illegally detained without probable cause and without a warrant, without exigent circumstances, and without Armstead voluntarily consenting to being transported in custody for questioning. *Id*. at ¶ 27.

The *Armstead* dissent took issue with the majority's decision, finding the 2012 suspect-locator-hit provided sufficient probable cause for arrest, as officers can make probable cause arrests based on the collective knowledge of the police. *Id*. ¶ 42. As a result, the dissent argued "[a]n arrest warrant was not required to lawfully detain Armstead because the officers collectively were aware of facts supporting probable cause to arrest for a felony offense, and the

arrest was made in a public place." *Id*. ¶ 44. The dissent then criticized the majority's opinion for requiring an arrest warrant, or exigent circumstances to make the arrest, and found that R.C. 2935.04, *Brown*, and *Watson* squarely authorized Armstead's arrest. *Id*. at ¶¶ 47-67.

Similar to *Armstead's* dissent, the First District in this case, as well as the Fifth and Tenth Districts, have refused to acknowledge or apply an exigency requirement to R.C. 2935.04 arrests, finding delayed, warrantless arrest conclusively constitutional under *Brown*. *Jordan*, 2020-Ohio-689 at ¶¶ 19-21; *State v. Taylor*, 10th Dist. Franklin No. 18AP-7, 2019-Ohio-2018; *State v. Hovatter*, 5th Dist. Fairfield No. 17-CA-37, 2018-Ohio-2254. This raises a troubling question: is an arrest warrant ever required for felonies in Ohio? The answer is trending toward no, with the exception of the Second Appellate District. Outside of the Second District, however, strict adherence to *Brown*'s holding has effectively nullified the warrant requirement for delayed felony arrests. To avoid complete elimination of the warrant requirement, judicial scrutiny must be required with respect to a delayed probable cause arrest to assess whether the delay is reasonable.

D. Absent any exigency or reasonable justification for the delay, a belated warrantless arrest is unreasonable and therefore unconstitutional.

Ohio is free to impose more stringent constitutional requirements when interpreting its own constitution. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 55. Under *Brown*, warrantless arrests under R.C. 2935.04 were deemed "generally" constitutional, but there is no clear guidance on when that generalization fails. While the United States Supreme Court has declined to require a showing of exigent circumstances or whether it was practicable to obtain a warrant under the circumstances, this Court is not beholden to that decision. Moreover, this Court should define the appropriate constitutional parameters of R.C. 2935.04 under the Ohio Constitution as applied to a delayed probable cause arrest. *See State v. Thompson*, 92 Ohio

St.3d 584, 586, 2001-Ohio-1288, 752 N.E.2d 276.

The existence of probable cause does not and should not excuse an unexplained failure to procure an arrest warrant in all instances. Once probable cause that an offense has been committed is established, the passage of time before making the arrest triggers the question as to whether it was reasonable for law enforcement to forgo procurement of an arrest warrant. A set timeframe is not necessary to ascertain what is reasonable, as reasonableness will be governed by the lack of exigency, the nature of the offense, and the circumstances surrounding the delay. *See e.g.*, *State v. Paananen*, 2015-NMSC-031, 357 P.3d 958, ¶ 27 (holding that circumstances other than exigent circumstances can render a warrantless public arrests supported by probable cause reasonable; the critical inquiry is whether it was reasonable for the officer to not procure an arrest warrant.). There must be some justification for not obtaining an arrest warrant to bypass this essential Fourth Amendment requirement.

"Once probable cause exists to arrest a suspect, that probable cause does not continue indefinitely." *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶¶ 21-22. This notion is well understood when making probable cause determinations with respect to search warrants, as probable cause can be rendered stale by the passage of time. *See U.S. v. Frechette*, 583 F.3d 374, 377-378 (6th Cir.2009) ("stale information cannot be used in a probable cause determination" and staleness depends "on the inherent nature of the crime.").

> Since the Fourth Amendment speaks equally to both searches and seizures *** it would seem that the constitutional provision should impose the same limitations upon arrest that it does upon searches. * * * An arrest * * * is a serious personal intrusion regardless of whether the person seized is guilty or innocent. *** Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches.

Jones, 2009-Ohio-4606 at ¶ 9, citing *Watson*, 423 U.S. at 428-429 (Powell, J., concurring).

When analyzing the circumstances surrounding a delayed warrantless arrest, the crucial

inquiry must be whether it was reasonable for the arresting officer to forgo procuring an arrest warrant. This inquiry is necessary to protect the integrity of the warrant requirement and the role of a neutral magistrate tasked with making probable cause determinations. Exigent circumstances is a well-established exception to the warrant requirement. Ohio has already demonstrated when this exception to warrantless arrests applies, *Heston*, 29 Ohio St.2d at 153, 155 (evidence that suspect is a flight risk is sufficient exigent circumstances), and when exigency is lacking due to the passage of time. *Jones* at ¶ 27 (several weeks rendered delay unreasonable in arrest for drug related offense); *VanNoy*, 2010-Ohio-2845 at ¶¶ 23-24 (three month delay for arrest on drug offenses found unreasonable).

Additionally, law enforcement would not be unduly burdened by requiring a warrant when it is practicable to obtain one, as the test for reasonableness would allow for evidence to justify why a warrant was not obtained. *See Whitt*, 2010-Ohio-5291 at ¶ 4; *Kamleh*, 2012-Ohio-2061 at ¶¶ 21-22. When exigent circumstances are lacking, the burden must be on law enforcement to justify the need for a delayed arrest, rather than rewarding law enforcement for circumventing the warrant requirement by validating all probable cause arrests based upon an officer's unfettered discretion and untested probable cause determination. The central inquiry will always be whether the delay was reasonable under the circumstance; exigency is one way of analyzing this issue. The nature of the offense and the circumstances surrounding the delay will also factor into the analysis.

E. Mr. Jordan's delayed warrantless arrest was unreasonable, as it was practicable under the circumstances for law enforcement to obtain a warrant prior to his arrest.

"If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." *Johnson v. United States*, 333 U.S. at 15. All warrantless arrests must be reasonable. The constitutionality

of a warrantless arrest does not begin and end at an officer's probable cause determination. There must be inquiry into the surrounding circumstances to ascertain whether the failure to procure a warrant was reasonable under the circumstance. In Mr. Jordan's case, it was unreasonable for the arresting officers to fail to obtain an arrest warrant prior to Mr. Jordan's arrest.

Mr. Jordan was an immediate suspect in the burglary that took place on December 12, 2016. The primary objective evidence was obtained within the first couple days: Longworth verified the cream-colored Chrysler with the juvenile eyewitness, and Michael's interview revealed cellphone calls between Michael and Mr. Jordan. Despite this information, detectives did not obtain a warrant, and waited until December 20, 2016 to make their arrest. Continued surveillance did not turn up any new evidence to further support the professed probable cause in this case; yet, the officers did not even attempt to submit the information to a neutral and detached magistrate for an arrest warrant. Arguably, the officers were waiting for Mr. Jordan to drive the Chrysler before making their arrest, but this assertion at the motion to suppress hearing was inconsistent with the fact the arrest was made while Mr. Jordan was driving an entirely different vehicle. Also, Mr. Jordan was not observed committing any new criminal offense at the time he was arrested. Under these circumstances, the officers should not be rewarded for acting on untested probable cause; they should be required to obtain an arrest warrant.

The delay in Mr. Jordan's case is distinguishable from the previously discussed cases for a number of reasons, and his case demonstrates a primary example as to why delayed warrantless arrests require additional scrutiny. First, Mr. Jordan was not observed committing any new felony offense during the surveillance period. *Brown* and *Watson* shared that common feature and those decisions would not be frustrated by the rule Mr. Jordan has proposed. Second, Mr. Jordan was not a suspected flight risk. During the entire period of surveillance, Mr. Jordan was

observed from outside his place of employment. There was no indication that Mr. Jordan was a suspected flight risk, and his behaviors during the surveillance period negated any concern of flight. *See Heston*, 29 Ohio St.2d at 153, 155.

Third, there was no additional exigency present at the time Mr. Jordan was arrested. Mr. Jordan's connection to the cream-colored Chrysler arguably could have created an exigency the moment the connection was revealed. In fact, the "concept of exigency underlies the automobile exception to the warrant requirement," as "the inherent mobility of the automobile created a danger that the contraband would be removed before a warrant could be issued." *State v. Robinson*, 103 Ohio App.3d 490, 497, 659 N.E.2d 1292 (1st Dist.1995), citing *Welsh v. Wisconsin*, 466 U.S. 740, 754, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). If Mr. Jordan's car was suspected to have been involved in a burglary offense, it is reasonable to assume that evidence of stolen items would be located in the vehicle on the day of the offense. The strength of that assumption weakens as time passes, however, as does the exigency along with it. This was particularly true in this case as Mr. Jordan was apprehended on a day when he was driving an entirely different vehicle. Rather than arrest Mr. Jordan close in time to the burglary while he was connected to the Chrysler, the officers decided to wait. The decision to delay the arrest is evidence that it was practicable to obtain a warrant.

The ample amount of time to obtain a warrant prompts consideration of the final distinguishable fact in this case: the nature of the offense. Mr. Jordan's arrest was based on his suspected involvement in a one-time burglary offense. This is distinct from drug investigations, where ongoing surveillance may aid law enforcement in identifying a drug supplier. No such facts were implicated in Mr. Jordan's case, however. Also, unlike drug investigations that carry the likelihood of future drug transactions, there was no indication that Mr. Jordan was going to

engage in any additional burglaries. This was a targeted offense involving a hidden safe with reportedly $40,000 inside; that money was easily convertible. Thus, there was no reason to delay an arrest for this type of offense. The delay was harmful to the victims, as the investigation into Mr. Jordan was fruitless with respect to the burglary. Longworth testified the money found during the apartment search "might" have been connected to the burglary, but notably Mr. Jordan was never indicted on the burglary offense. Most importantly, the delay was harmful to Mr. Jordan, as he was unreasonably arrested on stale probable cause. Despite R.C. 2935.04, Mr. Jordan's right to be free from unreasonable seizure demands that law enforcement obtain a warrant when practicable. Here, the delayed arrest was unreasonable based on a lack of exigency and the surrounding circumstances demonstrating that there was ample time to procure a warrant.

As a result of the unconstitutional arrest, Mr. Jordan's girlfriend's identification card and mailbox key should have been suppressed. "The exclusionary rule is a judicially created remedy applied to exclude evidence from the government's case in chief where it has been obtained by police through an illegal search or seizure in violation of the Fourth Amendment." *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The exclusionary rule applies to both primary evidence directly obtained by police during an illegal search or seizure, and also to derivative evidence, which is evidence discovered from the knowledge gained by the police as a result of the illegal search of seizure, or "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Because Mr. Jordan was illegally arrested, the evidence obtained from his person and during his subsequent detention must be suppressed as fruits of the poisonous tree. This includes the information related to the apartment address, which was used to obtain a search warrant for that apartment. Therefore, the evidence

found during the apartment search must also be suppressed as derivative evidence obtained as a result of the illegal arrest.

CONCLUSION

The First District's ruling must be reversed. Mr. Jordan was unreasonably arrested without a warrant, when there was ample time to obtain one and no circumstances rendered it impracticable to do so. Accordingly, Mr. Jordan respectfully requests that this Court reverse the decision of the First District Court of Appeals and remand the matter to the trial court with instructions to grant his motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Defendant-Appellant LeAndre Jordan has been served on Melynda Machol, Attorney for Plaintiff-Appellee, the State of Ohio, at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 via hand delivery on August 26, 2020.

/s Sarah E. Nelson
Sarah E. Nelson (0097061)

APPENDIX A:
Notice of Appeal
to the Ohio Supreme Court
(April 13, 2020)

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Appellee,	:	On Appeal from the Hamilton
	:	County Court of Appeals,
v.	:	First Appellate District
	:	
LEANDRE JORDAN,	:	Court of Appeals Case
	:	No. C-1800559; C-1800560
Appellant.	:	

NOTICE OF APPEAL OF APPELLANT LEANDRE JORDAN

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Notice of Appeal of Appellant Leandre Jordan

Appellant Leandre Jordan hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-1800559, C-1800560 on February 28, 2020.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Notice was personally served on Melynda J. Machol, Counsel for Appellee, State of Ohio, at via email at melynda.machol@hcpros.org on April 13, 2020.

/s Sarah E. Nelson
Sarah E. Nelson (0097061)

APPENDIX B:
Opinion of the
First District Court of Appeals
(Feb. 28, 2020)

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-180559 C-180560
Plaintiff-Appellee,	:	TRIAL NOS. B-1702130 B-1607185A
vs.	:	
LEANDRE JORDAN,	:	*OPINION.*
Defendant-Appellant.	:	

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed and Cause Remanded

Date of Judgment Entry on Appeal: February 28, 2020

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Melynda J. Machol,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *Sarah E. Nelson,* Assistant Public Defender, for Defendant-Appellant.

CROUSE, Judge.

{¶1} Defendant-appellant LeAndre Jordan appeals his convictions for aggravated trafficking in drugs. In two assignments of error, he argues that the trial court erred in denying his motion to suppress, and in failing to document a three-year license suspension in its sentencing entry. For the following reasons, Jordan's first assignment of error is overruled and his second assignment of error is sustained.

Factual Background

{¶2} The majority of the relevant facts revolve around a burglary that Jordan was accused of committing, but the cases before us relate to drugs and other evidence seized from Jordan's residence after police executed a search warrant looking for evidence related to the burglary.

{¶3} Shortly after 4:30 p.m. on December 12, 2016, James and Emiko Locke returned home to find that their home had been burglarized. The only item missing was a safe containing $40,000 in cash. Cincinnati Police Detective Mark Longworth investigated the burglary. Longworth determined that the burglar's entry and exit point was a broken window in the back of the house. Since there was only one entry and exit point, and no valuables missing besides the safe, Longworth determined that it was likely that the burglar knew what he was looking for when he entered the house.

{¶4} Longworth testified that the burglary was believed to have occurred between 4:15 p.m. and 4:30 p.m. when no one was at home. Longworth testified that the Lockes informed him that only two other people knew what was inside the safe and where it was hidden: their son Michael and their godson Demarco Daniels.

Michael had been "kicked out" of the house by his parents, and had "just recently come back around." The Lockes informed Longworth that Michael had called them on the phone a couple of times around the time of the burglary, trying to determine whether they were home. Longworth testified that the Lockes were "very suspicious" of Michael's attempts to determine if they were home. With Michael's permission, Longworth looked at Michael's phone call history and discovered that he had called his parents at 4:23 p.m. and 4:29 p.m.

{¶5} Longworth testified the Lockes told him that after they discovered the burglary, Michael came to the house and was "kind of fishing around for information about what had happened, what they knew." A neighbor came over and told the Lockes that he had seen a suspicious crème-colored Chrysler 300 parked near their house around the time of the burglary. When the neighbor told the Lockes about the Chrysler, Michael became upset and "yelled at [the neighbor] and told him to get out." Longworth testified that the car's movements, as described by the neighbor, raised his suspicion that it may have been involved in the burglary. Longworth testified that the Lockes informed him that as soon as the neighbor described the car, they knew that it was "Dre's" car. They told Longworth that Michael had been hanging out with Dre lately, and that they thought Dre was trouble.

{¶6} Dre is LeAndre Jordan. The Lockes informed Longworth that Jordan worked at a barbershop on Warsaw Avenue by a Kroger store. Longworth located a crème-colored Chrysler in the parking lot of the Kroger, by the barbershop. Longworth described the car as "unique," and discovered that the car was registered to Jordan's mother. He took photographs of the car and confirmed with Michael that it was Jordan's car. Michael also confirmed that he was friends with Jordan, and

that he had been with Jordan the day of the burglary. Upon further review of Michael's phone call history, Longworth discovered that on the day of the burglary Michael had called Jordan at 4:36 p.m. and 4:49 p.m., and Jordan had called Michael at 5:03 p.m.

{¶7} Longworth placed Jordan under surveillance. Jordan parked the Chrysler in the same spot every day—in the Kroger parking lot across from the barbershop. Police watched him come and go from the car and barbershop for several days. Eight days after the burglary, Longworth arrested Jordan, without a warrant, as Jordan walked to a different car he was driving that day, a black Lexus. Following the arrest, police searched Jordan and discovered keys to his residence. Longworth obtained a search warrant for the residence. When officers searched the residence, they found $2,907, heroin, cocaine, a scale, and an inoperable pistol.

Motion to Suppress

{¶8} In his first assignment of error, Jordan argues that the trial court erred in denying his motion to suppress the evidence seized from his apartment. Specifically, Jordan argues that his arrest was illegal because it was not based on probable cause and was made without a warrant. Jordan contends that all evidence seized from his residence must be suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

{¶9} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Olagbemiro*, 1st Dist. Hamilton Nos. C-170451 and C-170452, 2018-Ohio-3540, ¶ 9. "We defer to the trial court's factual findings if they are supported by competent and credible evidence, but we review de novo the court's application of the law to those facts." *Id.*

{¶10} "A warrantless seizure is per se unreasonable unless it falls within one of the recognized exceptions to the warrant requirement." *State v. Pies*, 140 Ohio App.3d 535, 539, 748 N.E.2d 146 (1st Dist.2000). One such exception is a warrantless arrest in a public place, which does not violate the Fourth Amendment if the police officer had probable cause to believe that the person committed or was committing a felony. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 66, citing *United States v. Watson* 423 U.S. 411, 427, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); R.C. 2935.04.

{¶11} The test for establishing probable cause to arrest without a warrant is "whether the facts and circumstances within an officer's knowledge were sufficient to warrant a prudent individual in believing that the defendant had committed or was committing an offense." *State v. Deters*, 128 Ohio App.3d 329, 333, 714 N.E.2d 972 (1st Dist.1998). "Probable cause is a lesser standard of proof than that required for a conviction, which is proof beyond a reasonable doubt. Probable cause only requires the existence of circumstances that warrant suspicion." *State v. Hackney*, 1st Dist. Hamilton No. C-150375, 2016-Ohio-4609, ¶ 26. It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Thorton*, 1st Dist. Hamilton Nos. C-170586 and C-170587, 2018-Ohio-2960, ¶ 21, quoting *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), fn. 13. Probable cause is a "practical, nontechnical concept." *Gates* at 287. It does not require officers to rule out an innocent explanation for suspicious facts. *Thorton* at ¶ 22.

{¶12} Jordan first argues that the trial court erred by relying on facts learned by police post-arrest in finding that probable cause existed for the arrest. When a

court relies on post-arrest evidence in its denial of a motion to suppress, this court must disregard that evidence to determine if the remaining evidence gave the officer probable cause to arrest. *See City of Washington Court House v. Wagner*, 12th Dist. Fayette No. CA91-01-001, 1991 WL 149551, *2 (Aug. 5, 1991); *State v. Johnson*, 11th Dist. Lake No. 2003-L-210, 2005-Ohio-2077, ¶ 13-16.

{¶13} When the trial court overruled Jordan's motion to suppress, it based its decision, in part, on the fact that "Mr. Jordan himself acknowledge[d] the fact that he drove both cars." Jordan did admit that the Chrysler was his mother's and that he drove it from time to time, but those admissions were made during the post-arrest interview, and so were not known to police at the time of the arrest. Therefore, it was error for the court to rely on Jordan's admissions when ruling on the motion to suppress. The state concedes this error, but argues that other evidence established probable cause to arrest Jordan even without Jordan's post-arrest statements.

{¶14} Jordan argues that after discounting the post-arrest admissions, the remaining evidence relied upon by the court in overruling the motion to suppress was subjective and unreliable. He points to the lack of certain evidence, such as the license plate number of the Chrysler. But, the test is not about what evidence was missing; rather it is about what evidence was before the court.

{¶15} Longworth is a 19-year veteran of the police department. He testified that he determined there was probable cause to arrest Jordan based on "the phone records, the interview with Michael Locke, the interview with the family, the interview with the neighbor, the observations that I made that corroborated those things."

{¶16} It is clear that the Lockes did not like Jordan and thought he was trouble, but their suspicions of Jordan were not based solely on their dislike of him or pure speculation. Rather, once the neighbor told them he had seen a suspicious crème-colored Chrysler near the house around the time of the burglary, they told Longworth that Jordan drove that kind of car, and that Michael (who they suspected was involved in the burglary based on his knowledge of the safe and the phone calls) had been hanging out with Jordan recently.

{¶17} Although the court's consideration of Jordan's post-arrest admissions was error, once we excise the admissions, we are left with evidence sufficient to cause a prudent person to believe that a burglary had been committed, and that Jordan was involved in the burglary.

{¶18} Next, Jordan argues that police failed to obtain an arrest warrant, and that no exigency existed to excuse that requirement. Jordan cites to a Second District case, *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845, 934 N.E.2d 413, ¶ 23 (2d Dist.), for the proposition that Longworth should have obtained an arrest warrant even though he made the arrest in a public place and with probable cause. In *VanNoy*, the court held that "in order for an officer to lawfully perform a warrantless arrest in a public place, the arrest must not only be supported by probable cause, it must also be shown that obtaining an arrest warrant beforehand was impracticable under the circumstances, i.e., that exigent circumstances exist." *Id.*, citing *State v. Heston*, 29 Ohio St.2d 152, 280 N.E.2d 376 (1972), paragraph two of the syllabus.

{¶19} However, the proposition in *VanNoy* and *Heston* is at odds with Ohio Supreme Court precedent. "A warrantless arrest that is based upon probable cause

and occurs in a public place does not violate the Fourth Amendment." *Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, at ¶ 66, citing *Watson*, 423 U.S. at 427, 96 S.Ct. 820, 46 L.Ed.2d 598.

{¶20} As stated by *State v. Taylor*, 10th Dist. Franklin No. 18AP-7, 2019-Ohio-2018, ¶ 14, the Second District's position in *VanNoy* is a minority position. There is even dispute within the Second District as to *VanNoy's* viability. *See State v. Armstead*, 2d Dist. Montgomery No. 26640, 2015-Ohio-5010, ¶ 40 (Welbaum, J., dissenting) (explaining that *Heston* has been discredited by *Watson* and *Brown*, and exigent circumstances or an undue delay requirement cannot be imposed on warrantless arrests made with probable cause).

{¶21} This court follows the majority approach. *See State v. Evans*, 1st Dist. Hamilton No. C-080129, 2009-Ohio-241, ¶ 13, citing *Watson* at 427 ("a warrantless arrest of a person is proper if it is supported by probable cause"). Therefore, the state was not required to show that exigent circumstances existed when it arrested Jordan. Jordan's arrest occurred in a public place and Longworth had probable cause to believe that Jordan had committed a felony. Because Jordan's arrest did not violate the Fourth Amendment, the trial court did not err in denying the motion to suppress. Jordan's first assignment of error is overruled.

License Suspension

{¶22} In Jordan's second assignment of error, he argues that the trial court erred where it announced a three-year license suspension at the sentencing hearing, but imposed a five-year license suspension in its sentencing entry. The state concedes the error.

{¶23} The five-year license suspension in the judgment entry is clearly a clerical error, as the record shows that the trial court imposed a three-year license suspension at the sentencing hearing. We sustain Jordan's second assignment of error, and remand this cause to the trial court to make an entry nunc pro tunc correcting the clerical error in the sentencing entry so that the entry reflects a three-year license suspension. *See* Crim.R. 36; *State v. Cooper*, 1st Dist. Hamilton No. C-180401, 2019-Ohio-2813, ¶ 1.

Conclusion

{¶24} We sustain Jordan's second assignment of error and remand this cause for a nunc pro tunc entry correcting the license-suspension portion of his sentence. We overrule Jordan's first assignment of error, and the judgment of the trial court is affirmed.

Judgment affirmed and cause remanded.

MYERS, P.J., and **WINKLER, J.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

APPENDIX C:
Judgment Entry of the First District Court of Appeals (Feb. 28, 2020)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

D128273584

STATE OF OHIO,	:	APPEAL NOS. C-180559 C-180560
Plaintiff-Appellee,	:	TRIAL NOS. B-1702130 B-1607185A
vs.	:	
LEANDRE JORDAN,	:	*JUDGMENT ENTRY.*
Defendant-Appellant.	:	

ENTERED
FEB 28 2020

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on February 28, 2020 per Order of the Court.

By: _____
Presiding Judge

APPENDIX D:
Judgment Entry of the Hamilton County Court of Common Pleas
(B1607185-A)

ENTERED
SEP 24 2018

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 09/17/2018
code: GJC
judge: 23

D123207459

Judge: ROBERT GORMAN

NO: B 1607185-A

STATE OF OHIO
VS.
LEANDRE JORDAN

JUDGMENT ENTRY: COSTS

Defendant was present in open Court with Counsel **RODNEY J HARRIS** on the **17th** day of **September 2018** for sentence.
The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:

count 1: TRAFFICKING IN HEROIN, 2925-03A2/ORCN,F3

count 2: AGGRAVATED TRAFFICKING IN DRUGS, 2925-03A2/ORCN,F3

count 3: POSSESSION OF HEROIN, 2925-11A/ORCN,F4

count 4: AGGRAVATED POSSESSION OF DRUGS, 2925-11A/ORCN,F5

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

It is therefore ordered and adjudged by the Court that the defendant pay Costs of this prosecution, for which execution is awarded:

COUNTS #1, #2, #3 AND #4 ARE MERGED WITH COUNT #2 IN CASE B 1702130 FOR THE PURPOSE OF SENTENCING.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL,

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **09/17/2018**
code: **GJC**
judge: **23**

Judge: **ROBERT GORMAN**

NO: **B 1607185-A**

STATE OF OHIO
VS.
LEANDRE JORDAN

JUDGMENT ENTRY: COSTS

PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

APPENDIX E:
Judgment Entry of the Hamilton County Court of Common Pleas
(B1702130)

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

ENTERED
SEP 24 2018

date: **09/17/2018**
code: **GJEI**
judge: **23**

Judge: **ROBERT GORMAN**

NO: **B 1702130-A**

STATE OF OHIO
VS.
LEANDRE K JORDAN

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel **RODNEY J HARRIS** on the **17th** day of **September 2018** for sentence.
The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:
count 2: POSSESSION OF COCAINE WITH SPECIFICATION #1, 2925-11A/ORCN,F1

count 1: TRAFFICKING IN COCAINE WITH SPECIFICATION #1, 2925-03A2/ORCN,F1, JUDGMENT ENTRY OF ACQUITTAL

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:
count 2: CONFINEMENT ON M.D.O. SPECIFICATION: 11 Yrs DEPARTMENT OF CORRECTIONS

DRIVER'S LICENSE SUSPENSION: 5 Yrs

COUNT #2 IS MERGED WITH M.D.O. SPECIFICATION #1 TO COUNT #2 AND WITH COUNTS #1, #2, #3 AND #4 IN CASE B 1607185-A.

THE TOTAL AGGREGATE SENTENCE IS ELEVEN (11) YEARS IN THE DEPARTMENT OF CORRECTIONS.

THE DEFENDANT IS TO RECEIVE CREDIT FOR ONE HUNDRED SEVENTY (170) DAYS TIME SERVED.

MANDATORY FINE IN THE AMOUNT OF $10,000.00 IS REMITTED.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **09/17/2018**
code: **GJEI**
judge: **23**

Judge: **ROBERT GORMAN**

NO: **B 1702130-A**

STATE OF OHIO
VS.
LEANDRE K JORDAN

JUDGMENT ENTRY: SENTENCE: INCARCERATION

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE (5) YEARS.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

APPENDIX F:
Entry of the Hamilton County Court of Common Pleas Overruling Defendant's Motion to Suppress

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION

STATE OF OHIO	:	Case No. B1607185 B1702130
Plaintiff	:	
vs.	:	(Judge Luebbers) (Judge Gorman)
LEANDRE JORDAN	:	
Defendant	:	ENTRY OVERRULING DEFENDANT'S MOTION TO SUPPRESS

This matter came on upon Defendant's Motion to Suppress, and the Court being fully advised in the premises after a hearing, overrules the motion.

Robert H. Gorman, Judge
Hamilton County Court of Common Pleas

APPENDIX G:
R.C. 2935.04
(Current Version)

Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2935. Arrest, Citation, and Disposition Alternatives (Refs & Annos)
Arrest

R.C. § 2935.04

2935.04 When any person may arrest

Currentness

When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 13432-2)

Notes of Decisions (42)

R.C. § 2935.04, OH ST § 2935.04
Current through File 40 of the 133rd General Assembly (2019-2020).

End of Document

APPENDIX H:
Article I, Section 14 of the Ohio Constitution

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article I. Bill of Rights (Refs & Annos)

OH Const. Art. I, § 14

O Const I Sec. 14 Search and seizure

Currentness

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

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

(Article I, Sec. 1 to Article I, Sec. 9)

Notes of Decisions (7859)

Const. Art. I, § 14, OH CONST Art. I, § 14
Current through File 40 of the 133rd General Assembly (2019-2020).

End of Document

APPENDIX I:
Fourth Amendment to the United States Constitution

United States Code Annotated
Constitution of the United States
Annotated
Amendment IV. Searches and Seizures; Warrants

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants

Amendment IV. Searches and Seizures; Warrants

Currentness

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 be searched, and the persons or things to be seized.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for this amendment.>

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants, USCA CONST Amend. IV-Search and Seizure; Warrants
Current through P.L. 116-158.

End of Document