IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	**NO. 2020-0495**
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
LEANDRE JORDAN	:	Court of Appeals Case Number C-180559, C-180560
Defendant-Appellant	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE

Joseph T. Deters (0012084P)
Prosecuting Attorney
Philip R. Cummings (0041497P)
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3012
Fax No. (513) 946-3021
phil.cummings@hcpros.org

COUNSEL FOR PLAINTIFF-APPELLEE,
STATE OF OHIO

Raymond T. Faller (0013328)
Hamilton County Public Defender
Sarah E. Nelson (0097061)
Assistant Public Defender
Counsel of Record
230 East Ninth Street, Second Floor
Cincinnati, Ohio 45202
(513) 946-3665
Fax No. (513) 946-3840
snelson@cms.hamilton-co.org

COUNSEL FOR DEFENDANT-
APPELLANT

Ron O'Brien (0017245)
Franklin County Prosecuting Attorney
Steven L. Taylor (0043876)
Counsel of Record
Chief Counsel, Appellate Division
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 525-3555
Fax No. (614) 525-6103
staylor@franklincountyohio.gov

COUNSEL FOR AMICUS CURIAE
OHIO PROSECUTING ATTORNEYS ASSN.

Office of the Ohio Public Defender
Patrick T. Clark (0094087)
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
Fax No. (614) 752-5167
patrick.clark@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE
OHIO PUBLIC DEFENDER

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES:

TABLE OF AUTHORITIES (CONT'D)

PAGE

ARTICLES:

AMENDMENTS:

CRIMINAL RULES:

STATUTES:

STATEMENT OF THE CASE

On December 28, 2016, Defendant-Appellant Leandre Jordan was indicted on four counts: Trafficking in Heroin, a felony of the third degree, Aggravated Trafficking in Drugs (Fentanyl), a felony of the third degree, Possession of Heroin, a felony of the fourth degree, and Aggravated Possession of Drugs (Fentanyl), a felony of the fifth degree. (T.d. 1, C-1800560)

On April 20, 2017, Jordan was indicted on two additional counts arising from the same circumstances: Trafficking in Cocaine, and Possession of Cocaine, both felonies of the first degree and carrying a major drug offender specification. (T.d. 1; C-1800559)

The trial court granted the state's motion to join the indictments for trial. (T.d. 30, C-1800560; T.d. 18, C-1800559) Jordan filed a motion to suppress ("MTS") evidence on both cases. (T.d. 57, C-1800560; T.d. 38, C-1800559) After a hearing, the trial court denied the motions. (T.d. 60, C-1800560; T.d. 40, C-1800559)

A jury convicted Jordan on all counts, under indictment number B1607185-A, and on Possession of Cocaine, under indictment number B1702130-A. Jordan was acquitted on Trafficking in Cocaine under the latter indictment number. (T.d. 72-75, 81, C-1800560; T.d. 54, 55, 61, 64, C-1800559) Jordan was sentenced to an aggregate mandatory prison term of 11 years. (T.d. 81, C-1800560; T.d. 64, C-1800559)

The Court of Appeals affirmed. *State v. Jordan*, 2020-Ohio-689, 145 N.E.3d 357 (1st Dist.) This Court accepted Jordan's appeal on this Proposition of Law:

> 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.

STATEMENT OF THE FACTS

On December 12, 2016, Cincinnati Police Detective Mark Longworth, a nineteen-year veteran of the police force, was called to investigate a burglary that occurred at 757 Wilbud Drive in Price Hill, the home of James and Emiko Locke. (T.p. 153-155; MTS State's Exhibit 1) Longworth determined that the burglar had entered the home through a bedroom window at the back of the house. (T.p. 154, 156; State's Exhibits 2A, 2B) A safe containing $40,000 and personal papers were stolen from the same bedroom. (T.p. 154, 156, 157; State's Exhibit 4) Nothing else of value was taken from the home. (T.p. 157)

The Locke's believed the burglary occurred during a short period in the afternoon while no one was at home, between 4:15 p.m. and 4:30 p.m. (T.p. 159, 195, 196; State's Exhibit 4) [1] The Lockes reported the incident to police at about 4:37 p.m. (State's Exhibit 1)

Detective Longworth considered the burglary unusual. He testified, "But the burglary was unusual in that really only the safe was taken, and the safe contained $40,000, that only a couple people, according to the victim, knew was in the safe, being the location of the safe and the contents of the safe." (T.p. 157) Besides Mr. and Mrs. Locke, the Locke's son Michael and Demarco Daniels, their godson, knew about the contents of the safe. (T.p. 157)

Mr. and Mrs. Locke suspected that Michael, who did not live with them, and "Dre," Michael's friend, were involved in the burglary. (T.p. 158, 160) Michael had been thrown out of the house by his parents and "had just recently come back around." (T.p. 158) The Locke's reported to Detective Longworth that "on the day of the burglary, right about when this burglary occurred, he [Michael] had been calling them on the phone trying to ascertain whether or not they [the Lockes] were home, and they were very suspicious of this." (T.p. 158; *see also* T.p. 159) The Lockes said that Michael had called them several times after they left home and before

[1] It is unclear from the record which member or members of the family were gone all day. (*See* T.p. 195-196)

they returned home on the day of the burglary. (T.p. 159) Longworth testified that Michael's cell phone showed that he, in fact, had called his parents at 4:23 p.m. and 4:29 p.m. that day. (T.p. 166-167, 203; State's Exhibit 4) Minutes later, Michael called Jordan at 4:36 p.m. and again at 4:49 p.m. Finally, Jordan called Michael at 5:03 p.m. (T.p. 197-198, 225; State's Exhibit 4)

The Lockes told Detective Longworth that Michael came to the house right after they arrived home and discovered the burglary and that he was "kind of fishing around for information about what had happened, what they knew." (T.p. 163) And while Michael was there, a neighbor came over and told the Lockes about a suspicious car he had seen on the street and in front of the Lockes' house at about 4:30 p.m., which was "at or near the time of the break-in." (T.p. 161, 163; State's Exhibit 1) When the neighbor described the vehicle as "suspicious" and said it was a cream colored Chrysler 300, Michael became upset and "yelled at the kid [the neighbor] and told him to get out." (T.p. 163) The Lockes told Longworth that the neighbor had described the vehicle driven by "Dre," with whom "Michael had been hanging out a lot recently," and whom they had met before. (T.p. 158, 159, 160, 161, 165) They said that "Dre," who turned out to be Leandre Jordan, was a barber who worked on Warsaw Avenue across from Kroger and parked in the area. (T.p. 158, 159, 160, 162, 1640165, 182, 206)

Detective Longworth located the Chrysler 300, which he described as "unique," in the back of the Kroger parking lot across the street from the barber shop. (T.p. 159-160, 163, 185; State's Exhibit 3) It was registered to Jordan's mother. (T.p. 160, 175; *see also* T.p. 164) Longworth also determined the Jordan was the operator of the vehicle. (T.p. 160, 171) He took a photograph of the vehicle and confirmed with the Lockes, Michael, and the neighbor that it was Jordan's vehicle. (T.p. 167; State's Exhibit 3)

Michael Locke was reluctant to talk about "Dre" with Detective Longworth. (T.p. 164) But Michael did say that he had been with Jordan on the day of the burglary and that Jordan "drove the car in question." Michael did not admit to burglarizing his parents' home. (T.p. 165-166, 168, 182-183, 196-197; State's Exhibit 4)

In the days between the burglary and December 20, 2016, Detective Longworth placed Jordan under surveillance and watched him come and go from the barber shop and the Chrysler 300. (T.p. 171, 187) Longworth testified, "And I had been watching that car for several days beforehand, and he [Jordan] would always park there across from his place of employment." (T.p. 171) Longworth also said, "* * * but he would park there every day. Like this was his workplace. So imagine if you work somewhere, like you park the same (sic) place every day; we would watch him." (T.p. 187)

On December 20, 2016, Detective Longworth arrested Jordan. (T.p. 169, 199) Longworth testified, "There was a warrantless arrest based on probable cause." (T.p. 204) Longworth recovered Jordan's girlfriend's identification from Jordan's pocket and keys bearing an apartment number. (T.p. 169-170, 202-203) Longworth determined that Jordan was staying with his girlfriend at 5509 Belmont, apartment 208, and obtained a search warrant for this address, wherein police recovered the drugs that are the subject of the instant charges. (T.p. 170, 192, 198; State's Exhibit 4)

At the hearing, Jordan testified that he was 35 years old and worked at a barbershop on Warsaw Avenue in December 2016. (T.p. 208, 217) Jordan admitted that he was Michael Locke's barber, that they had each other's phone numbers, and that they spoke "frequently at times." (T.p. 220, 225) He admitted that he went by the name, "Dre." (T.p. 224)

Jordan admitted that between the day of the burglary on December 12 and the date of his arrest on December 20, he drove his mother's car, a white Chrysler 300, to work and parked it in front of the barbershop or in a nearby parking lot. (T.p. 215-218) Jordan said he also had "numerous" cars, including a black Lexus, which he had recently purchased. (T.p. 209-210, 215, 216-217)

Jordan admitted that Michael came into the barbershop on December 12, the day of the burglary. (T.p. 221) Jordan testified, "I remember that he [Michael] came to the barbershop on that day on December 12, yes. * * * Because I know, from interviewing, the detective said that Michael Locke said that he was at the barbershop on that day." (T.p. 221) Jordan first denied that Michael had ever been in "the white car." (T.p. 221) Then he admitted that Michael had been in the car before on an occasion when Jordan had dropped him off on Wilbud. (T.p. 221-222)

Jordan admitted that he knew that Michael's parents had kicked him out of the house. (T.p. 222-223) Police questioned Jordan about the burglary. Jordan testified, "I told them [police] I knew nothing about it. I told them that Michael actually had told me that his parents had him thinking that he was a prime suspect in the burglary, but I told him I didn't know anything whatsoever about the burglary." (T.p. 213) When confronted with the cell phone records showing that he and Michael were communicating around the time of the burglary, Jordan testified, "I don't have no recollection of me communicating with Michael Locke on the phone that day." (T.p. 219-220, 224)

Jordan testified that he was approached by Detective Longworth and another officer and arrested. (T.p. 210-211) Longworth removed Jordan's wallet from his pocket and found Jordan's identification and the identification of Angel Madison, his girlfriend on Belmont. (T.p. 211-212, 215)

The trial court overruled Jordan's motion to suppress. (T.p. 232-233) The trial judge stated that he based his decision on Longworth's "report of the burglary, his conversations with Michael Locke, the telephone conversations on his cell phone, and the fact that Mr. Jordan himself acknowledges the fact that he drove both cars * * * ." (T.p. 232)

RESPONSE TO APPELLANT'S PROPOSITION OF LAW

PROPOSITION OF LAW: THE AUTHORITY OF POLICE TO ARREST ON PROBABLE CAUSE WITHOUT A WARRANT IN A PUBLIC PLACE IS NOT CONDITIONED ON PROOF OF EXIGENT CIRCUMSTANCES. SUCH AN ARREST DOES NOT VIOLATE THE FOURTH AMENDMENT AND WARRANTLESS FELONY ARRESTS BASED ON PROBABLE CAUSE ARE EXPLICITLY PERMITTED IN OHIO. R.C. 2935.04.

Jordan asks this Court to burden law enforcement by imposing an exigency requirement to delayed warrantless arrests under R.C. 2935.07. This Court and the United States Supreme Court have rejected imposition of such a requirement. And Jordan presents no compelling case to do so now.

This Court has long held that a warrantless arrest that is based upon probable cause and occurs in a public place does not violate the Fourth Amendment. *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, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). *See also Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). And this Court has held that in felony cases, Article 1, Section 14 of the Ohio Constitution provides the same protection as the Fourth Amendment to the United States Constitution. *See State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, ¶ 16, citing *State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, ¶ 12. Additionally, R.C. 2935.04 explicitly permits warrantless arrests for felonies. *See Brown* at ¶ 66. R.C. 2935.04 provides as follows:

> 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.

Here, Jordan accepts the premise that police had probable cause to arrest him for being complicit in the burglary: 1) the Lockes' home was burglarized between about 4:15 and 4:37 p.m., while no one was home; 2) entry was made into a bedroom at the back of the house, and a safe containing $40,000 was stolen from the same bedroom, while no other valuables in the house were disturbed; 3) only two other people – the Lockes' son Michael Locke and their godson Demarco Daniels – knew about the money in the safe; 4) Michael, who recently had been thrown out of the house by his parents and "had just recently come back around," called his parents at 4:23 p.m. and 4:29 p.m. to see if anyone was home; 5) right after the Lockes came home to discover the burglary, Michael came over and was fishing for information about what had happened and what his parents knew; 6) a neighbor reported that after Mrs. Locke left, a cream-colored Chrysler 300 pulled from the dead-end and stopped in front of the Locke's house; 7) Michael became upset at the neighbor when he relayed this information, and he yelled at him to get out; 8) the vehicle the neighbor described matched the vehicle driven by Michaels' friend "Dre," (Leandre Jordan); 9) the Lockes told Longworth that "Dre" was a barber who worked on Warsaw Avenue across from Kroger and drove a cream-colored Chrysler 300; 10) Michael's cell phone showed that he called Jordan at 4:36 p.m., seven minutes after calling his parents twice to see if they were home, and again at 4:49 p.m., and that Jordan called Michael soon after at 5:03 p.m.; 11) Longworth located the vehicle matching the description in the Kroger parking lot across the street from the barber shop and found it was registered to Jordan's mother; 12) Longworth showed a photograph of the vehicle to the Lockes, Michael, and the neighbor, who all said it appeared to be Jordan's; 13) in the days before Jordan's arrest, Longworth watched Jordan drive it to and from the barbershop; and, 14) Longworth interviewed a reluctant Michael

Locke, who said he had been with Jordan on the day of the burglary and that Jordan drove the car in question.

But despite the existence of probable cause, Jordan contends his delayed arrest was unreasonable and potentially unconstitutional because it was not based on "exigent circumstances." Jordan asks this Court to impose a second condition upon delayed warrantless public arrests. Not only must police have probable cause for the arrest – they must also demonstrate exigent circumstances to justify the delay if it seemed practicable under the circumstances to obtain a warrant. Jordan argues that such a condition must be placed on delayed probable cause arrests under R.C. 2935.04 to preserve the "integrity of the warrant requirement."

However, the sine qua non of the Fourth Amendment is "probable cause" – not the warrant itself. Common-law long held that a warrantless arrest in a public place is valid under the Fourth Amendment when the arresting officer had probable cause to believe the suspect is a felon. *See Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (citing *Watson*); *New York v. Harris*, 495 U.S. 14, 17-18 (1990). "[I]t ha[s] *long been settled* that a warrantless arrest in a public place [is] permissible as long as the arresting officer had probable cause * * *." (citing *Watson*)

The integrity of the warrant requirement remains intact for felony arrests in a suspect's home. But courts have recognized that there is a fundamental difference between entry of private premises as opposed to public arrests. *See Payton v. New York*, 445 U.S. 573, 590 (1980) (requiring arrest warrant for entry of private premises to arrest resident unless there are exigent circumstances; distinguishing public arrests); *Florida v. White*, 526 U.S. 559, 565 (1999) (citing *Watson*).

As for Jordan's desire to burden law enforcement with justifying a "delay" in every case, it is noted that courts have traditionally deferred to police discretion in the timing of an arrest. *United States v. Winchenbach*, 197 F.3d 548 (1st. Cir. 1999). Here, police kept Jordan under surveillance after they arguably had probable cause to arrest him. This is not constitutionally unreasonable – it is simply good police work. *Watson*, supra at 431. "Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury." (Powell, J., concurring).

Jordan's position is a minority one in Ohio[2] and is based on discredited decisions like *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845 (2nd Dist.), and *State v. Heston*, 29 Ohio St.2d 152 (1972). In *VanNoy*, the Second District Court of Appeals held that a warrantless arrest "must not only be supported by probable case, but it must also be shown that obtaining an arrest warrant beforehand was impracticable under the circumstances, i.e., that exigent circumstances exist." *Id*. at ¶ 23, citing *Heston*. In *Heston*, this Court found that a warrantless arrest may be made when a police officer has probable cause to believe that a felony has taken place and the circumstances must be such as to make it impracticable to secure a warrant. *Id*. at 155.

Both *VanNoy* and *Heston* were decided prior to *U.S. v. Watson*.

In *Watson*, the United States Supreme Court specifically refused to find an exigency requirement for warrantless arrests made with probable cause, finding:

> This is the rule Congress has long directed its principal law enforcement officers to follow. Congress has plainly decided against conditioning warrantless arrest

[2] Most districts follow *Watson* and *Brown*. *See State v. Taylor*, 10th Dist. No. 18AP-7, 2019-Ohio-2018, ¶ 14; *State v. Davis*, 3rd Dist. No. 1-08-62, 2009-Ohio-2527, ¶ 6; *State v. Murta*, 4th Dist.No. 1441, 1980 WL 351069, *2; *State v. Hovatter*, 5th Dist. No. 17-CA-37, 2018-Ohio-2254, ¶¶ 16-17; *State v. Torres*, 6th Dist. No. C.A. WD-85-64, 1986 WL 9097, *3; *State v. Fornore*, 7th Dist. No. 11 CO 36, 2012-Ohio-5339, ¶ 27; *Morrison v. Horseshoe Casino*, 8th Dist. No. 108644, 2020-Ohio-4131, ¶ 45; *State v. Gedeon*, 9th Dist. No. 29153, 2019-Ohio-3348, ¶ 31; *State v. Everett*, 11th Dist. No. 2018-L-142, 2019-Ohio-2397, ¶ 29; *State v. Ingram*, 20 Ohio App.3d 55, 57 (12th Dist. 1984).

> power on proof of exigent circumstances. Law 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. But we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

Jordan proposes a "totality of the circumstances" analysis be undertaken for every delayed warrantless arrest. But it is not constitutionally required, and it would lead to prolonged litigation, and inconsistent results. Police could claim they acted in good-faith because the law has long permitted warrantless public arrests based on probable case. *See State v.* Dibble, ___ Ohio St.3d ___, 2020-Ohio-546. Current law provides a bright-line rule that is easy to apply. Imposition of an exigency requirement is exactly the type of burden *Watson* cautioned against. Indeed, the exigency requirement would be a solution in search of a problem. Remember, for purposes of this appeal, probable cause is presumed. And contrary to Jordan's analogy to search warrants, probable cause to arrest does not go stale. Arrest warrants can remain open for years before they are executed. The probable cause upon which they are based is not rendered less efficacious by the passage of time. *See United States v. Haldorson*, 941 F.3d 284, 292. *See also, United States v. Bizier*, 111 F.3d 214, 219 (1st Cir. 1997) (Probable cause to support an arrest normally does not grow stale"; it "would grow stale only if it emerges that it was based on since discredited information.")

No constitutional prejudice inures to the arrestee as the law requires they promptly be brought before a neutral magistrate for a judicial review of probable cause. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49, 59 USLW 4413 (1991); Ohio Crim. R. 4, 5.

CONCLUSION

This Court should leave to the legislature whether to impose a pre-arrest warrant or exigency requirement upon R.C. 2935.04. This Court has made clear in *Brown* that warrantless public arrests based on probable cause are constitutionally valid. The search of Jordan incident to his arrest was likewise so. Jordan's proposition of law is properly rejected and the Court of Appeals' judgment below properly affirmed.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney

/s/Philip R. Cummings
Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3012
Phil.Cummings@hcpros.org

Attorneys for Plaintiff-Appellee, State of Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief, via email, to Sarah E. Nelson (0097061), Assistant Public Defender, counsel of record, at snelson@cms.hamilton-co.org; to Steven L. Taylor (0043876), Assistant Prosecuting Attorney, counsel of record, at staylor@franklincountyohio.gov; and to Patrick T. Clark (0094087), Assistant State Public Defender, counsel of record, at patrick.clark@opd.ohio.gov, this 15th day of October, 2020.

/s/Philip R. Cummings
Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney