COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff	**:**	**CASE NO. 2013 CR 00313**
vs.	**:**	**Judge McBride**
RICHARD S. ISAACS	**:**	**DECISION/ENTRY**
	:	

Jason Nagel, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Phillip D. Hoover, counsel for the defendant Richard S. Isaacs, 260 North Detroit Street, Xenia, Ohio 45385.

This cause is before the court for consideration of a motion to suppress filed by the defendant Richard S. Isaacs.

The court scheduled and held a hearing on the defendant's motion to suppress and the state's motion in limine on May 2, 2014. At the conclusion of the hearing, the court granted the state's motion in limine in all respects and the court took the issues raised by the motion to suppress under advisement.

Upon consideration of the motion to suppress, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

On November 11, 2012, Investigator Ken Mullis of the Union Township Police Department, who is currently assigned to the Clermont County Narcotics Unit, prepared a search warrant and the accompanying affidavit pursuant to his investigation of the defendant Richard Isaacs. The search warrant was signed by Judge James Shriver, who was a Clermont County Municipal Court judge at that time.[1]

The warrant allowed for the search of a business known as "The Main Event" (and also known as "Club 440") located at 817 US 50, Milford, Clermont County, Ohio.[2] The search warrant and accompanying affidavit indicated that cocaine and firearms and/or dangerous ordinances were believed to be on the subject premises.[3]

The search warrant states in pertinent part as follows: "I further state that there is not urgent necessity for said search to be conducted in the night season."[4] According to Investigator Mullis, the warrant was signed by Judge Shriver sometime between approximately 5:30 p.m. and 6:00 p.m.

After the warrant was signed, Investigator Mullis returned to the subject location and entry was gained into the property around 6:45 p.m. After several sweeps of the

[1] State's Exhibit 1.
[2] Id.
[3] Id.
[4] Id.

building for safety purposes, the main search was conducted. Investigator Mullis took 127 photographs during the search and the times the photographs were captured on his digital camera range from 7:35 p.m. to 10:41 p.m. on the evening in question.[5] The first photograph taken inside the premises was taken at 7:49 p.m.[6]

The defendant now moves the court to suppress all of the evidence obtained as a result of the search. The defendant argues that the search occurred during nighttime hours and that this was in violation of the plain language of the search warrant which stated that there was not urgent necessity to conduct the search in the night season.

LEGAL ANALYSIS

"The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures."[7] The guarantees of the Fourth Amendment and Article I, Section 14 are protected by use of the exclusionary rule.[8]

R.C. 2933.24(A) provides in relevant part that "[t]he command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night, in which case a search in the night may be ordered."

Additionally, Crim.R. 41(C) provides that "[t]he warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." Crim.R.

[5] State's Exhibit 2.
[6] Id.
[7] *State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶ 15.
[8] Id., citing *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

41(F) states that "[t]he term 'daytime' is used in this rule to mean the hours from 7:00 a.m. to 8:00 p.m."

In *State v. Eal*, 10th Dist. Franklin No. 11AP-460, 2012-Ohio-1373, the search warrant was executed at 7:50 p.m. and, after execution of the warrant, the officers continued to search the premises until approximately 9:30 p.m.[9] The defendant presented evidence at the suppression hearing that the sun set in Columbus, Ohio on the date of the search at 7:39 p.m.[10] The appellate court noted that the defendant did not cite, nor did the court find, any authority "to support his contention that courts should rely on the varying times of sunset rather than the clear mandates of Crim.R. 41 in determining when daytime ends."[11] The court held that "[t]he police properly executed the warrant during the daytime by doing so before 8:00 p.m."[12] The court also held that "* * * Crim.R. 41 is satisfied 'when the execution of the warrant limited to a daytime search is begun during the daylight hours, even though the police presence may thereafter continue into or through the night for the purpose of completing the search already begun.' "[13] The court concluded that "[t]he officer's (*sic*) search of defendant's residence continuing into the nighttime is irrelevant since their initial entry into the house and execution of the warrant occurred during the daytime."[14]

In the case at bar, the defendant presented evidence that the sun set in the local area on November 11, 2012 at 5:26 p.m.[15] However, this court concurs with the *Eal*

[9] *Eal*, supra, at ¶ 30.
[10] Id.
[11] Id. at ¶ 31.
[12] Id.
[13] Id. at ¶ 32, citing *State v. Susser*, 2nd Dist. Montgomery No. CA-11787, 1990 WL 197958 (Dec. 5, 1990), abrogated on other grounds by *State v. Teamer*, 82 Ohio St.3d 490, 491-492, 696 N.E.2d 1049 (1998), citing *State v. Valenzuela*, 130 N.H. 175, 536 A.2d 1252 (1987).
[14] Id.
[15] Defendant's Exhibit C.

court that there is no authority supporting the contention that courts should determine "daytime hours" by the varying times of sunset rather than the clear mandates of Crim.R. 41.

Furthermore, the testimony demonstrates that entry was gained pursuant to the search warrant at issue in the present case sometime around 6:45 p.m. on the day in question. Even without this testimony, the photographs taken by Investigator Mullis confirm that the warrant was executed at least by 7:49 p.m., which is when the first photograph of the interior of the premises was taken. As such, the search warrant was executed prior to 8:00 p.m. and, therefore, was executed during daytime hours.

Finally, as in the *Eal* case, the fact in the case at bar that the search continued during nighttime hours is irrelevant. The warrant was executed and the search began during the daytime as that term is defined by Crim.R. 41(F) and, as such, no violation of the mandates of the search warrant or of the protections afforded by the United States and Ohio Constitutions occurred in the case at bar.

The court would also note for the record that the exclusionary rule would not apply in the present circumstances even if the court had concluded that this was a nighttime search. Generally, " 'the exclusionary rule is not automatically invoked merely because the evidence to be admitted is obtained by officers during a nighttime search under a warrant which does not contain an 'appropriate provision' authorizing the warrant to be executed at night,' and evidence obtained in technical violation of Crim.R 41(C) need not be suppressed where there is no showing of bad faith conduct on the part of the officers executing the warrant, or where the search did not result in prejudice

to the defendant."[16] " 'Only a 'fundamental' violation of Rule 41 requires automatic suppression, and a violation is 'fundamental' only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards.'"[17] There was no prejudice to the defendant in the case at bar as a result of part of the search occurring in the evening hours, nor was there any bad faith conduct on the part of the officers executing the warrant. The officers executing the warrant engaged in several sweeps designed to ensure the safety of all of the officers present as well as the canine unit, after which they immediately conducted the search for evidence. As a result, there was no bad faith or prejudice which would have rendered this search unconstitutional even if it had been conducted exclusively in the night season.

CONCLUSION

The defendant's motion to suppress is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

[16] *State v. Humphrey*, 2nd Dist. Montgomery No. 25063, 2013-Ohio-40, ¶ 28, quoting, *State v. Coburn*, 4th Dist. Scioto No. 1744, 1990 WL 85151, *4 (May 31, 1990).
[17] Id., quoting, *Coburn*, supra, quoting, *United States v. Vassar*, 648 F.2d 507 (9th Cir.1980), certiorari denied 450 U.S. 928, 101 S.Ct. 1385, 67 L.Ed.2d 360 (1981).

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 13th day of May 2014 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride