

STATE OF TENNESSEE V. LINDSEY BROOKE
LOWE*

JENNIFER HARTSELL STOCKDALE AND LOVIN MIDDLETON-
DUNN

On September 12, 2011, the Defendant, Lindsey Lowe, gave birth to twin boys. She had concealed her pregnancy from her family and fiancé and gave birth to the twins, unassisted, in her bathroom. After the births, she placed her hand over each infant's mouth to stifle his cries and smothered each infant to death. She hid both bodies in her laundry basket. Lowe called in sick to work on the following day but reported to work as usual on September 14. After the Defendant left for work, her mother discovered one of the bodies in the laundry basket. Lowe's father contacted police, who came to the residence and determined that the infant was dead.

After Mr. Lowe reportedly consented to police searching the house, Detective David Harrell was instructed to obtain a search warrant. He prepared the necessary paperwork, including three copies of the proposed warrant, and went before Judge C.J. Rogers at the Circuit Court in Sumner County. Judge Rogers signed and issued three copies of the search warrant at 11:35 AM. Two copies of the search warrant stated that the date and time at which the warrant was delivered was "11:35 o'clock AM, on this 14 day of Sept[.], 2011," but the third copy stated that the time of delivery was "11:35 o'clock PM, on this 13 day Sept[.], 2011."¹ At 12:34 PM, after obtaining the warrant, police began searching the Lowe residence. They collected a laundry basket and its contents, bloody linens and clothing, a thumb drive from the Defendant's bedroom, and several computers and computer components. They also took photographs and conducted testing for the presence of blood in the Defendant's bedroom and bathroom. Once the search was complete, Detective Harrell left one of the copies of the warrant marked "AM" on the kitchen counter. The copy containing the "PM" notation was returned and filed with the trial court on September 21, 2011.

While Detective Harrell obtained a warrant to search the Defendant's home, Detective Malach traveled to the Defendant's place of employment. He testified that the Defendant was in a good mood when he first arrived and stated she did not know why he was there. After telling her that police found the laundry basket, her mood became more serious. He explained that he wanted her cooperation in ascertaining what happened and for her to come to the police station with him, but it was her choice whether to do so. He "went over" her Miranda rights at this time and stated that, if she chose to go with him, he would formally provide her Miranda rights at the station. The Defendant agreed to accompany Detective Malach to the station. During the ride, she was not handcuffed and rode in the front passenger seat of his patrol car. They talked about "normal" things during

* *State v. Lowe*, 552 S.W.3d 842 (Tenn. 2018).

¹ *State v. Lowe*, 552 S.W.3d 842, 849 (Tenn. 2018).

the drive, not discussing any matters related to the dead infant the officers had discovered. When they arrived at the station, Detective Malach asked the Defendant to wait on a bench in the hallway. She remained on the bench for thirty minutes, unrestrained and unaccompanied, with her purse and cell phone. Detective Malach videotaped his ensuing interview of the Defendant. He read the Defendant her Miranda rights, which she orally waived. She asked if she should have an attorney and, after being told that it was not mandatory, she agreed to proceed with the interview without an attorney present. The Defendant confessed to smothering the two infants, placing their bodies in a laundry basket, and cleaning up the bathroom before her sister used it.

Prior to trial, the Defendant moved to suppress the evidence obtained pursuant to the search warrant as well as her statement to Detective Malach. After holding evidentiary hearings, the trial court denied both motions. The jury subsequently convicted the Defendant on all counts, and the trial court sentenced her to two terms of life imprisonment and two terms of twenty-five years. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment.

The Tennessee Supreme Court granted the Defendant's application for permission to appeal to address the following issues: 1) whether the Exclusionary Rule Reform Act (the "ERRA") violates the Tennessee Constitution; 2) whether the trial court erred by relying on the ERRA to deny the Defendant's motion to suppress the evidence gathered at her house; 3) whether the trial court erred by ruling inadmissible certain expert testimony proffered by the Defense during the evidentiary hearings; 4) whether the trial court erred by denying the Defendant's motion to suppress her statement; and 5) whether the trial court erred by prohibiting the Defendant's expert witness from testifying at trial about the reliability of her responses to the Detective's questions. Additionally, the Court directed the parties to address whether the good-faith exception to the exclusionary rule should be expanded to include clerical errors made by the issuing magistrate when the search at issue is otherwise constitutional.

The Court first considered whether the ERRA unconstitutionally violated the Tennessee Constitution's Separation of Powers Clause. The Court found that the ERRA was not, as the State had urged, an attempt to "supplement" Tennessee Rule of Criminal Procedure 41; rather, the ERRA represented an "impermissible encroachment" by the legislature upon the Court's authority and responsibility to adopt exceptions to the exclusionary rule.² Because the ERRA specifically conflicted with the Court's exclusionary rule holdings, as well as with the express language of Rule 41 promulgated by the Court, the Court held that the ERRA violated the Tennessee Constitution's Separation of Powers Clause. The Court therefore concluded that the trial court erred when it denied the Defendant's motion to suppress in reliance on the ERRA.

The Court next considered whether Tennessee courts should apply the exclusionary rule to suppress evidence gathered at the Lowe residence under a search warrant with technical defects not conforming to the requirements of Rule 41. After noting that the Court recently had adopted a good-faith exception to the exclusionary rule in a case where the law enforcement officer executed a warrant in good faith but the warrant later was determined to be invalid by a technical defect, the Court expanded the good-faith

² *Id.* at 857.

exception to the exclusionary rule to include clerical errors made by a magistrate issuing a search warrant when the search in question is otherwise constitutional. In applying the expanded good-faith exception, the Court held that evidence gathered at the Lowe residence pursuant to the search warrant should not have been suppressed pursuant to the exclusionary rule, despite technical defects in the search warrant; the defects were the result of a magistrate's good faith error incorrectly indicating on one of three copies of the warrant that it was issued at 11:35 PM rather than 11:35 AM, and the search was otherwise constitutional. The Court therefore affirmed, but on different grounds, the trial court's denial of the Defendant's motion to suppress the evidence gathered from the Lowe residence.

Regarding the other issues brought on appeal, the Court held that, although the trial court should have permitted defense counsel to proffer the testimony in a question and answer format, the court did not err when it ruled inadmissible the defense expert's testimony at the hearing on the Defendant's motion to suppress because the record contained "a sufficient summation of Dr. Auble's expected testimony"³ that the Court could determine whether the ruling was appropriate. The Court also agreed with the lower courts that the Defendant was not in custody at the time she made her statement to Detective Malach so any alleged defects in the administration of her Miranda rights were moot, and the trial court did not commit reversible error in finding certain proffered expert testimony by a defense witness inadmissible on grounds that the foundation of the witness's testimony turned on his unsubstantiated opinion about what Detective Malach was thinking during his interview of the Defendant.

A valid search warrant must comply with the United States Constitution, the Tennessee Constitution, and Tennessee statutory requirements. Under both the Tennessee and federal constitutions, when a search is declared to be illegal, the evidence obtained as a result of the search cannot be used by the State pursuant to the exclusionary rule. Tennessee Rule of Criminal Procedure 41, adopted in 1978, sets forth precise requirements for issuing a search warrant, including a requirement that the magistrate "shall endorse on the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution."⁴ If a magistrate does not comply, Rule 41—as it existed at the time the search warrant was issued in Lowe's case—directed a court to grant an aggrieved party's motion to suppress the evidence seized as a result of the noncompliant warrant.

In *United States v. Leon*,⁵ the United States Supreme Court created a good-faith exception to the exclusionary rule. This exception permits the State to use evidence if it was seized in reasonable, good-faith reliance upon a search warrant subsequently found to be defective. Under the federal good-faith exception, judges have broad discretion to decide if police intentionally violated a suspect's rights or acted in objective good faith believing they had taken all steps required for a valid warrant and acted within its scope.

For years, Tennessee courts refused to adopt the good-faith exception created by the United States Supreme Court in *Leon*, maintaining that Tennessee's constitution affords its citizens greater search and seizure protection than does the United States Constitution.

³ *Id.* at 864-65.

⁴ Tenn. R. Crim. P. 41(2)(D).

⁵ 468 U.S. 897 (1984).

For example, in 2010, in *State v. Hayes*,⁶ the Tennessee Court of Criminal Appeals invalidated a search warrant that incorrectly indicated it was issued at 10:35 PM rather than at 10:35 AM, finding that the warrant failed to strictly comply with the search warrant requirement that the endorsed date and time of issuance be correct. The court's decision was consistent with the court's prior strict interpretation of Rule 41.

In 2011, the Tennessee legislature created a statutory good-faith exception that applied only in cases involving "clerical errors" or "clerical omissions." Effective July 1, 2011, under the ERRA,⁷ evidence obtained by a search warrant would not be suppressed if the court determined the violation was a result of a good-faith mistake or a technical violation of the law made by a law enforcement officer, court official, or the issuing magistrate. The ERRA significantly weakened the protections afforded by the exclusionary rule in Tennessee.

In applying the ERRA in *State v. Pruitt*,⁸ Tennessee's highest court allowed the introduction of evidence in a defendant's murder trial that had been obtained based on search warrant containing two different dates in violation of Tennessee Rule of Criminal Procedure 41. The executing officer testified that the warrant was not executed until magistrate was finished issuing it, testimony the trial court found credible. The Tennessee Supreme Court agreed, describing the error as "a textbook example of unintentional clerical error made during the preparation of a search warrant."⁹

Five years later, the Tennessee Supreme Court signaled its willingness to consider a common law good-faith exception to the exclusionary rule in *State v. Reynolds*,¹⁰ where police took a warrantless blood draw without the defendant's consent following an accident that resulted in two fatalities and injuries to defendant and the other passenger. While agreeing with the lower courts that the warrantless blood draw violated the Fourth Amendment and Tennessee Constitution's prohibition against unreasonable search and seizure, the Supreme Court adopted a narrow good-faith exception to the exclusionary rule, preventing exclusion of evidence obtained in violation of a suspect's constitutional rights when law enforcement officers act "in objectively reasonable good-faith reliance" on binding appellate precedent that specifically authorizes a particular police practice which is later overruled.¹¹ Applying this newly adopted good-faith exception, the Court held that the *Reynolds* draw came within the exception because the deputy reasonably relied on binding precedent in effect at time of accident. Notable was the dissenting opinion of Justice Sharon G. Lee, writing that the adoption of the good-faith exception to the exclusionary rule "erodes our citizens' rights to be free from unreasonable searches and seizures as guaranteed by the United States and Tennessee Constitutions."¹² Justice Lee further wrote: "Although the United States Supreme Court has adopted a good-faith

⁶ 337 S.W.3d 235 (Tenn. Crim. App. 2010), *perm. app. denied* (Feb. 17, 2011).

⁷ Tenn. Code Ann. § 40-6-108.

⁸ 510 S.W.3d 398, 417 (Tenn. 2016).

⁹ *Id.* at 418.

¹⁰ 504 S.W. 3d 283 (Tenn. 2016).

¹¹ *Id.* at 314.

¹² *Id.* at 315.

exception, we have the authority to provide the citizens of our state with greater protections, and I submit we should do so in this case.”¹³

Just over a month after *Reynolds*¹⁴ came the highly-publicized case of *State v. Davidson*, in which Davidson was sentenced to death for the brutal murders of Channon Christian and Christopher Newson in Knoxville, Tennessee. In *Davidson*, the lead investigator accidentally cut off his signature when faxing a search warrant affidavit for Davidson’s residence, and the magistrate did not notice the missing signature. After the investigator took an oath and swore to the contents of the affidavit before the magistrate, the magistrate signed the warrant, which law enforcement officers then used to search Davidson’s house. There they discovered Christian’s body inside a trash can in Davidson’s kitchen.

Noting that neither the Fourth Amendment of the United States Constitution nor Article I, Section 7 of the Tennessee Constitution requires an affidavit, the Tennessee Supreme Court found that the warrant was valid under both the state and federal constitutions. The Court acknowledged, however, that the warrant violated the affidavit requirements of Tennessee Code Annotated §§ 40-6-103 and 40-6-104 and Tennessee Rule of Criminal Procedure 41(c)(1), which require an affidavit containing the signature of the affiant. Adopting and applying a common law good-faith exception to the exclusionary rule in cases where “an officer has complied with constitutional requirements to obtain a warrant, but in good faith failed to comply with the state statutory and rule affidavit requirements[,]”¹⁵ the Court, in an opinion authored by Justice Sharon G. Lee, found that the trial court had not erred in denying Davidson’s motion to suppress the evidence obtained from the search of his house. In a footnote, the Court noted that Justice Lee had dissented in *Reynolds* “on the basis that a good-faith exception was not appropriate to excuse a constitutional violation but agrees that Rule 41(g) cannot be read to divest this Court of its power to develop and adapt common law principles and their application.”¹⁶

After *Reynolds* and *Davidson*, and with the composition of the Court shifting from a panel of predominantly Democratic appointees to one with a majority of Republican appointees, the Court seemed poised then, in *Lowe*, to embrace a wholesale good-faith exception. After determining in *Lowe* that the ERRA violated the Tennessee Constitution’s Separation of Powers clause, the Tennessee Supreme Court created a good-faith exception to the exclusionary rule where “a good-faith clerical error” of an issuing magistrate resulted in technical defects in the search warrant when the search is otherwise constitutional. In applying that exception, the Court declined to suppress the evidence found at Lowe’s residence due to “an inconsequential variation between three copies of a search warrant required pursuant to Rule 41.”¹⁷ On the same day, the Court decided the Williamson County case of Angela Faye Daniel, who was not given a copy of the search warrant authorizing her blood to be drawn. Noting the Court’s “recent willingness to create narrow good-faith exceptions to Rule 41’s exclusionary rule where the deviations from that Rule’s

¹³ *Id.* at 319.

¹⁴ 509 S.W.3d 156 (Tenn. 2016).

¹⁵ *Davidson*, 509 S.W.3d at 186.

¹⁶ *Id.* at 246 n.4.

¹⁷ *Lowe*, 552 S.W.3d at 859.

stringent requirements are inadvertent, inconsequential, and clearly resulted in no prejudice to the defendant,”¹⁸ the Tennessee Supreme Court reversed the trial court’s decision to exclude evidence obtained from the blood sample, finding that a good-faith exception to the exclusionary rule applied, even though the defendant was not given a copy of the warrant as required by Rule 41. The Court noted that the officer’s failure to give the defendant a copy of the search warrant was due to an inadvertent oversight and the technical noncompliance did not prejudice Daniels.

In *Lowe*, the error arose during the preparation of the search warrant; in *Daniels*, the error arose after the warrant was issued. In *Lowe*, the error was the inadvertent clerical error of the issuing magistrate; in *Daniels*, the error was the inadvertent clerical error of the executing officer. In both cases, the Court found that the search was otherwise constitutional and the defendant was not prejudiced as a result of the technically noncompliant search warrant. The Court’s adoption of these good-faith exceptions to the exclusionary rule brings state common law more in line with the federal good-faith exception created in *Leon*.

Although the state’s highest court did not embrace a wholesale good-faith exception in *Lowe*, the *Reynolds*, *Davidson*, *Lowe*, and *Daniels* decisions taken together, all carving out good-faith exceptions to the exclusionary rule without relying on the ERRA, underscore the Court’s willingness to move in that direction. Notably, effective July 1, 2018, on the eve of the *Lowe* and *Daniels* decisions, the Tennessee Supreme Court amended Rule 41 to grant trial courts the discretion to determine whether to exclude evidence gathered pursuant to a search warrant that fails to comply with Rule 41.¹⁹

After *Lowe* and the amendment to Rule 41, the Tennessee criminal defense bar likely is taking notice, as it appears that Tennesseans can no longer boast that their state constitution and statutory law provide greater protections for citizens to be free from unreasonable searches and seizures than those protections guaranteed by the United States Constitution.

¹⁸ *State v. Daniel*, 552 S.W.3d 832, 838 (Tenn. 2018).

¹⁹ Specifically, the 2018 amendment removes the word “shall” and inserts “may” in the section of the rule regarding the exclusion of evidence. See Tenn. R. Crim. P. 41 & Advisory Commission Comment (2018).