[Cite as *State v. Scott*, 2003-Ohio-5011.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO	)	CASE NOS. 02 CA 108
	)	02 CA 123
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
SHAUNA BERRY SCOTT	)	
	)	
AND	)	
	)	
LESTER SCOTT	)	
	)	
DEFENDANTS-APPELLANTS	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeals from the Court of Common Pleas of Mahoning County, Ohio Case Nos.: 01-CR-1058A & 01-CR-1058
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Robert E. Duffrin Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant, Shauna Berry Scott:	Atty. Robert J. Rohrbaugh II D'Apolito & D'Apolito 4800 Market Street, Suite A Youngstown, Ohio 44512
For Defendant-Appellant, Lester Scott:	Atty. Thomas E. Zena 1032 Boardman-Canfield Road Youngstown, Ohio 44512
JUDGES:	

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 15, 2003

WAITE, P.J.

{¶1} In this consolidated appeal Appellants Shauna Berry Scott ("Ms. Berry") and Lester Scott ("Mr. Scott") argue that narcotics seized from their apartment were seized illegally and that the evidence should have been suppressed. Appellants challenge both the validity of the search warrant that police used to search their apartment and the manner of execution of the search warrant. We hold that the trial court correctly overruled Appellants' motions to suppress. The judgment entries now under appeal are affirmed in full.

{¶2} In September of 2001, Youngstown Police Officer Gerald Slattery received a tip from a confidential informant that individuals were selling crack cocaine out of a building located at 1644 Elm Street in Youngstown. Based on this information, police initiated an investigation. (2/6/02 Tr., p. 28.) Surveillance revealed considerable activity in and around that location, confirming the possibility of illegal narcotics sales. With the assistance of a confidential informant, police set up three controlled narcotics purchases. Officer Slattery summarized the transactions as follows:

{¶3} "[T]he informant was kept under constant surveillance. What we did was gave [sic] the informant a $20 bill, let her out of the vehicle while she walked up to the residence. * * * [S]he knocked on the first floor door where she was met by two subjects on different occasions * * * one Evalyn Hubbard and the other a Sandy last name unknown. At that time on the first floor they would walk around to the side door

of the building. She would open it up with a key and go u p to the second floor and come back down and give my informant a $20 rock of crack cocaine for the $20 bill that she gave her." (2/6/02 Tr., pp. 29-30.)

{¶4} Officer Slattery later obtained a search warrant for the premises known as 1644 Elm Street, 2nd floor. (Slattery Affidavit, State's Exh. 1.) That search warrant allowed the officers who executed the warrant to search all persons present. (Slattery Affidavit, State's Exh. 1, p. 2.)

{¶5} Police executed the warrant on October 19, 2001. They entered the building through a side door on the building's north side and proceeded directly to the second floor. Officer Slattery testified that this was the entrance through which his informant previously gained access. (2/6/02 Tr., p. 33.) This door had a sign on it identifying it as 1644 Elm St. (2/6/02 Tr., p. 42.) Although it is a multi-unit building, Officer Slattery testified that there was only one unit on the second floor. (2/6/02 Tr., p. 34.) Police seized illegal narcotics inside the second floor apartment and arrested Appellants, who were found to be living there.

{¶6} On October 25, 2001, a grand jury issued a six-count indictment charging Appellants with offenses relating to drug trafficking, possession and distribution. Specifically, the indictment alleged that Mr. Scott trafficked in and

possessed more than 25 but less than 100 grams of crack cocaine as prohibited under R.C. 2925.03(A)(2)(C)(4)(f) and 2925.11(A)(C)(4)(e). Ms. Berry was charged with trafficking in and possessing between one and five grams of crack cocaine in violation of R.C. 2925.03(A)(2)(C)(4)(c) and 2925.11(A)(C)(4)(c). Appellants were also jointly alleged to have possessed between five and ten grams of crack cocaine and a quantity of a Schedule III controlled substance known as tussionex (a prescription cough/cold medication) in violation of R.C. 2925.11(A)(C)(2)(b). With respect to the trafficking counts, the prosecution initially claimed that the underlying conduct occurred within 1,000 feet of a school, making the charge against Mr. Scott a felony of the first degree and the count against Ms. Berry a felony of the third degree. Count Six of the indictment set out a forfeiture specification for $80 dollars in U.S. currency allegedly related to illegal drug distribution.

{¶7} Appellants filed motions asking the trial court to suppress the evidence seized pursuant to the warrant. They maintained that the search exceeded the scope of the warrant and that the warrant lacked the particularity required under the Fourth Amendment of the United States Constitution. (2/1/02 Motion to Suppress.) According to Appellants, their building was divided into two apartments and had two addresses. One of the building's entrances was located at 1642 Elm Street. This

entrance was at the front of the building and permitted access to the first floor apartment. The other entrance was at the side of the building and was listed as1644 Elm Street. This door led to Appellants' second floor apartment. Appellants argued that those addresses and entrances are distinct and, although the warrant alleged that the drug transactions occurred on the second floor of 1644 Elm Street, police actually entered the building at 1642 Elm Street to execute the warrant. Consequently, according to Appellants, the search exceeded the scope of the warrant.

{¶8} Appellants also argued that the police did not actually search the second floor of 1644 Elm Street. Appellants contend that their apartment started on the second floor and extended to the third floor. They argued that 1644 Elm Street exclusively referred to their apartment. According to their theory, the second floor of 1644 Elm Street actually referred to the second story of their apartment--in other words, the third floor of the building. They contend that the first floor of their apartment was actually searched, even though the search warrant was issued to search the second floor of their apartment.

{¶9} After a hearing, the trial court filed judgment entries denying Appellants' motions to suppress. The court concluded that the police entered through both the 1642 and 1644 Elm Street addresses. (2/12/02 J.E., p. 1.) According to the court,

police found Evalyn Hubbard and Sandy when they entered 1642 Elm Street. Police found Appellants in the second floor unit of 1644 Elm Street, where the informants claimed the illegal narcotics transactions occurred. Appellants subsequently pleaded no contest to the charges, and on June 7, 2002, the trial court sentenced Mr. Scott to concurrent three-year terms on all counts and Ms. Berry to a one-year term of community control. Mr. Scott filed his notice of appeal to this Court on June 24, 2002, while Ms. Berry submitted her notice of appeal on June 11, 2002. On May 20, 2003, after determining that the two appeals presented identical issues, this Court entered an order consolidating the cases.

{¶10} Appellants' sole assignment of error states:

{¶11} "THE TRIAL COURT COMMITTED SUBSTANTIAL, PREJUDICIAL AND THUS, REVERSIBLE ERROR IN OVERRULING DEFENDANTS' MOTION TO SUPPRESS."

{¶12} Appellants contend that the trial court should have granted their motions to suppress on two grounds. First, they claim that the officer who swore out the affidavit in support of the search warrant materially and deliberately misstated the supporting facts, in contravention to the Fourth Amendment. See, *Franks v. Delaware*

(1978), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667. Second, Appellants argue that the search exceeded the scope of the warrant.

{¶13} Appellee contends that the motions to suppress were properly denied. Appellee notes that the record contains no factual support for Appellants' claim that Officer Slattery misrepresented the facts of the case for purposes of obtaining the warrant. Appellee further counters that the warrant was grounded on reliable information and was sufficiently and reasonably tailored to meet the needs of the investigation.

{¶14} In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings but conduct a de novo review of the legal principles involved and their proper application to the facts. *Ornelas v. United States* (1996), 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911. The hallmark of any Fourth Amendment analysis is, "the reasonableness in all the circumstances of a particular governmental invasion of a citizen's personal security." *State v. Lozada* (2001), 92 Ohio St.3d 74, 78, 748 N.E.2d 520, and *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 108-109, 98 S.Ct. 330, 332, 54 L. Ed. 2d 331, 335. Our Supreme Court has indicated that the reasonableness of a particular police procedure depends, "on a balance between the public interest and the individual's right to personal security free from

arbitrary interference by law officers." *State v. Evans*, (1993), 67 Ohio St.3d 405, 410, 618 N.E.2d 162; quoting *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 878, 95 S.Ct. 2574, 2579, 45 L. Ed. 2d 607, 614-615. Typically, when police conduct a search in good faith reliance on a facially valid warrant, it will be treated as presumptively reasonable. *United States v. Leon* (1984), 468 U.S. 897, 922, 104 S.Ct. 3408, 82 L.Ed.2d 677.

{¶15} Appellants initially propose that Officer Slattery misled the Municipal Court Judge who issued the warrant. Under *Franks v. Delaware*, supra, a search warrant that appears sufficient may be attacked if the defendant can demonstrate that the issuing magistrate or judge, "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Franks*, 438 U.S. at 155-156, 98 S.Ct. 2674, 57 L.Ed.2d 667; see also *State v. George* (1989), 45 Ohio St.3d 325, 331, 544 N.E. 2d 690. The record reveals absolutely no factual or legal support for such a claim.

{¶16} Generally, a challenge of the veracity of a warrant's supporting affidavit is made through a *Franks* Motion, named for the aforementioned case of *Franks v. Delaware*. Such a motion attacks the validity of the affidavit with a, "substantial preliminary showing of a knowing, intentional, or reckless falsity," accompanied by an

offer of proof. *State v. Smith*, 9th Dist. No. C.A. 21069, 2003-Ohio-1306, quoting *State v. Roberts* (1980), 62 Ohio St.2d 170, 178, 405 N.E.2d 247. The record in this case reflects that Appellants neglected to challenge the warrant on these grounds. Therefore, they have waived the right to appeal the issue. A motion to suppress must include its legal and factual grounds with sufficient particularity to place the prosecutor and court on notice of the issues to be addressed. *State v. Shindler* (1994), 70 Ohio St.3d 54, 58, 636 N.E.2d 319. Issues not raised in the suppression motion or at the hearing are not properly asserted for the first time on appeal. *State v. Wilson*, 9th Dist. No. 02CA13-M, 2003-Ohio-540. Appellants did not attempt to amend their original motion to suppress either orally or in writing to include this additional issue, leaving Appellee without any clear opportunity to defend against the alleged *Franks* violation.

{¶17} We also note that Appellants failed to attack the credibility of Officer Slattery's affidavit at the evidentiary hearing on their motion to suppress. Furthermore, our review of the record does not reveal any material inconsistencies between the officer's affidavit and his testimony during the evidentiary hearing. Both the affidavit and the testimony reflect testimony that the drug transactions took place at 1644 Elm Street, which is a second floor apartment. Officer Slattery's testimony certainly provided more detail about the transactions and the layout of the property than was

contained in the affidavit, but the details do not in any way contradict the statements in the affidavit.

{¶18} Appellants alternatively propose that the trial court should have granted their motion to suppress because the search of their apartment exceeded the scope of the warrant. Appellants maintain that the warrant clearly specified the premises to be searched as 1644 Elm Street, 2nd floor. Appellants claim that the police instead searched 1642 Elm Street. Appellants insist that according to the warrant affidavit, the informant's transactions involved other individuals. Consequently, Appellants claim, their residence should not have been subject to the search.

{¶19} Appellants are mistaken here in two respects. First, the record does not support their claim that the police executed the warrant in the wrong unit or address. Appellants' argument is predicated on the testimony of Akaia Hutchins, a youngster who evidently resides in the upstairs apartment of 1644 Elm Street. Hutchins testified that Sandy and Evalyn lived on the first floor of 1642 Elm Street. (2/6/02 Tr., p. 62.) Hutchins also testified that the second floor of that building has the address of 1644 Elm Street. (2/6/02 Tr., pp. 63-65.) That testimony is consistent with the warrant and its supporting affidavit. Moreover, as the affidavit underscored, the issue was not where the various individuals involved in this scenario resided, but where the drug deal

took place. According to the affidavit, Sandy and Evalyn had to enter the second floor apartment through a separate side entrance and ascend to the second floor to secure the narcotics. Based on the record before us, it appears that the warrant sufficiently identified the correct address as 1644 Elm Street, 2nd floor.

{¶20} The record does not support the trial court's finding that the police forcibly entered 1642 Elm Street. Even assuming arguendo that this did occur, the warrant itself clearly described the premises to be searched with sufficient particularity to reasonably direct the officers to the correct location. If the officers initially entered the wrong door, it was not due to the wording of the search warrant.

{¶21} In determining whether a search exceeded the scope of a warrant, the first inquiry is whether the place searched reasonably appeared to be the place described in the warrant. *State v. Pitts* (Nov. 6, 2000), 4th Dist. No. 99 CA 2675. The Fourth Amendment to the United States Constitution only approves of warrants, "particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment's particularity requirement was intended to prevent the abusive general or exploratory searches to which this country's colonial settlers were frequently subjected. *Maryland v. Garrison* (1987), 480 U.S. 79, 80, 107 S.Ct.

1013, 94 L.Ed.2d 72; and *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564.

{¶22} To determine whether a warrant's property description is constitutionally valid, the trial court must ascertain, "whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched." *State v. Pruitt* (1994), 97 Ohio App.3d 258, 261, 646 N.E.2d 547, and *United States v. Durk* (6th Cir. 1998), 149 F.3d 464, 465. Nevertheless, as the Court noted in *Durk*, a mistake in the subject property's description does not automatically invalidate a search warrant. *See also, United States v. Bedford* (3rd Cir. 1975), 519 F.2d 650, 655 (question of search warrant particularity, "is one of practical accuracy rather than technical nicety").

{¶23} In *Durk*, the search warrant specified that the officers search a red brick ranch home located at 4612 Fulton that was approximately three houses to the east of Grandview. When they executed the warrant, though, the officers searched a home at 4216 Fulton, located three houses to the west of Grandview. The defendant moved to suppress the evidence seized in the search on the grounds that the warrant did not describe with particularity the place to be searched. Specifically, the defendant argued

that the house numbers had been transposed from 4216 to 4612 and that the description of the house was, "three houses to the east of Grandview," when in fact the house was, "three houses to the west of Grandview." Id. at 465. The reviewing court concluded that the warrant did not run afoul of the Fourth Amendment because it sufficiently described the residence, despite its inaccuracies. The Court further reasoned the warrant correctly described the building to be searched, offering details unique to the dwelling, distinct from its address, including a fairly complete description of an outbuilding. Id.

{¶24} In other words, while the warrant might have specified the wrong address, the description of the premises to be searched was sufficiently detailed to satisfy the Court that the right address and premises was searched. A search warrant needs to describe the premises to be searched with sufficient particularity, "to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched." *Pruitt*, supra, at 216-262; *State v. Dalpiaz* (2002), 151 Ohio App.3d 257, 263, 783 N.E.2d 976 (warrant must specify that search include curtilage and outbuildings); *United States v. Pelayo-Landero* (6th Cir. 2002), 285 F.3d 491 (particularity requirement met where warrant included explicit directions to the search

location); and *United States v. Dorrough* (10th Cir. 1991), 927 F.2d 498, 500 (requisite specificity of the description turns on the facts of each case).

{¶25} Likewise, in searches involving multi-unit buildings, like the one in the instant case, the warrant must describe the targeted unit with sufficient particularity to prevent a general search of all units. *State v. Smith*, 8th Dist. No. 79749, 2002-Ohio-1069; citing *United States v. Votteller* (6th Cir. 1976), 544 F.2d 1355. According to Appellants, police searched the wrong second floor unit. The facts belie this claim. Appellants ignore the fact that police were well acquainted with this building at the time they executed this warrant. The record reflects that Officer Slattery, who helped execute the warrant, was the one who secured it in the first place. After obtaining information from a confidential informant that narcotics transactions were taking place out of the second floor of the building described in the affidavit, Officer Slattery began conducting surveillance at that location. His surveillance confirmed that there was a great deal of what he characterized as “traffic” at that location, which prompted him to further his investigation by attempting controlled narcotics purchases. (2/6/02 Tr., pp. 29-30.) As the following passage from his affidavit demonstrates, Officer Slattery actually witnessed more than one of his informant’s narcotics transactions unfold:

{¶26} "During the week of September 17th, 2001, Officers Slattery and Brindisi met with a reliable informant and made a purchase of Crack cocaine from Sandy (LNU) at 1644 Elm 2nd floor, under the controlled conditions to wit; officers met with and searched the informant with negative results. Officers then kept the informant under constant observation to and from the location. Upon returning, the informant turned over to officers suspected Crack cocaine. The informant was searched a second time with negative results.

{¶27} "During the week of September 24th, 2001, Officers Slattery and Mosca met with the same reliable informant and made a purchase of Crack cocaine from Sandy (LNU) at 1644 Elm 2nd floor, under the same controlled conditions described in the previous paragraph. Upon returning, the informant turned over to officers suspected Crack cocaine. The informant was searched a second time with negative results." (Slattery Affidavit, State's Exh. 1, ¶3 ff.)

{¶28} At the suppression hearing, Officer Slattery noted that, "[a]ll the buys came from one of the two subjects going up to the second floor to get suspected – well, what turned out to be the crack cocaine and brought it down." (2/6/02 Tr., pp. 31-32.)

{¶29} Based on this information, Officer Slattery obtained a search warrant and, along with other officers, conducted a search of the premises where, based on his observations and information received from a reliable informant, he believed illegal narcotics were being transacted. In his affidavit, Officer Slattery described the premises he sought to search as follows:

{¶30} "[A] private residence, modest in size and a 3 story, brick frame structure, brown in color, trimmed in beige and green, located on Elm, as the 1st residential structure, south of Saranac, on the west side of the street, also to include the curtilage, outbuildings, vehicles and appurtenances and for mailing purposes is known as 1644 Elm 2nd floor in the City of Youngstown, Mahoning County, Ohio, and persons therein, there is now concealed a certain person or property, NAMELY: Crack cocaine and other drugs of abuse as defined by O.R.C. 3719.011(A); paraphernalia utilized in the use and distribution of such drugs, including pipes, syringes, hearing devices, cutting instruments and agents and packaging materials; radios; scanners; portable telephones, beepers, records, ledgers, address books, receipts an (sic) cancelled checks; evidence of the ownership and possession of drugs of abuse, including mail, photographs and clothing; fruits of drug trafficking, including cash and jewelry, and firearms; all of which is evidence of violations of O.R.C. 2933.42 and

conspiracy to commit aggravated trafficking in drugs, O.R.C. 2923.01 and 2925.03; aggravated trafficking in drugs, O.R.C. 2926.03; drug abuse, O.R.C. 2925.11; and possessing criminal tools, O.R.C. 2923.24." (Slattery Affidavit, State's Exh. 1, p. 1).

{¶31} This description is sufficiently detailed to apprise the executing officers of the right location. The fact that Officer Slattery was also present during the warrant's execution further damages Appellants' claim that they searched the wrong place. See, *State v. Davis* (Aug. 12, 1991), 2nd Dist. No. 12321 (fact that investigating officer also participated in warrant's execution should be taken into account in evaluating adequacy of the property's description); see, also, *State v. Schanefelt* (Idaho App.1988), 765 P. 2d 154 and *United States v. Gahagan* (C.A.6, 1989), 865 F.2d 1460.

{¶32} Appellants contend that the place described in the affidavit was not the place searched because the second floor of 1644 Elm Street was actually the third floor of the building. Appellants argue that the warrant should have been issued for 1644 Elm first floor if the officers wanted to search the lower level of Appellants' second floor apartment. Although Appellants' interpretation of the meaning of "1644 Elm 2nd floor" is certainly a possible meaning, it is not a reasonable or practical interpretation of the warrant. There is no question that the entrance to 1644 Elm

Street was on the street level, or first floor level, of the building. Therefore, a reasonable interpretation of "2nd floor" in this context would mean the next floor above street level. As explained above, a warrant needs to be reasonable, and does not necessarily need to account for every possible interpretation of the words and phrases used in the warrant.

{¶33} Under the circumstances of this case, we hold that the police search did not exceed the scope of the warrant, that the warrant described the property to be searched with sufficient particularity to meet constitutional muster, and that facts described in the warrant and accompanying affidavit are consistent with the facts revealed at the suppression hearing. The trial court properly denied Appellants' motions to suppress the evidence derived from the search warrant. We overrule Appellants' assignment of error, and affirm the judgment of the trial court in full.

Judgment affirmed.

Donofrio and DeGenaro, JJ., concur..