

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,
Justice.

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: N10590 - 03

Motion: To controvert search warrant
and suppress physical evidence

ANDRE STENNETT

Defendant.

-----X

LAW OFFICE OF
THOMAS F. LIOTTI, ESQ. BY
MICHAEL ELBERT, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.

BY: JOSEPH BROGAN, A.D.A.
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: May 28, 2004

SEYMOUR ROTKER
JUSTICE SUPREME COURT
SUPREME COURT, QUEENS COUNTY

CRIMINAL TERM, PART K-19

-----X
THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No. N10590 - 03

ANDRE STENNETT

Defendant.

-----X

The following constitutes the opinion, decision and order of the court.

An indictment has been filed against the defendant accusing him *inter alia* of the crimes of criminal possession of a weapon in the third degree and criminal possession of marijuana in the second degree. The charge is that on January 14, 2003, defendant knowingly and unlawfully possessed firearms and marijuana in his residence located at 155-16 134th Avenue, Queens, New York.

Defendant, claiming to be aggrieved by an unlawful search and seizure, has moved to suppress firearms, rifles, marijuana and other property seized from his apartment on January 14, 2003, by Detective George Schreiner and other police officers while executing a search warrant.

In this case, the People assert that the seizure of the property from the defendant's apartment was pursuant to a valid search warrant and otherwise seized during a lawful search of the premises. The defendant initially moved before another Justice of the Court to controvert the search warrant authorizing entry into the premises. After argument before that Justice, the Court authorized a hearing to determine where the property was recovered from in the premises and whether the warrant was appropriately executed. Upon reargument, defendant's motion to controvert the search warrant was also granted.

The People have the burden, in the first instance, of going forward to show the legality of

police conduct. Defendant, however, bears the ultimate burden of proving by a preponderance of the evidence that the physical evidence should be suppressed.

A pretrial suppression hearing was conducted before me on March 23, 24 and May 26, 2004.

Testifying at this hearing was Detective George Schreiner.

I find his testimony to be credible.

I make the following findings of fact:

Detective George Schreiner, a seventeen and a half year veteran of the New York City Police Department, was assigned to the Queens Narcotic Division of the New York City Police Department and had been assigned to that unit for approximately eight years. On January 13, 2003, Detective Schreiner obtained a search warrant for the premises of 155-16 134th Avenue, Queens, New York, listed as a single family house.

The request was to search and seize marijuana and drug paraphernalia used to package marijuana and other materials relating to the purchase of marijuana.

The New York City Police Department had received information from the Maricopa County Police Department, State of Arizona, that a Federal Express package addressed to "Lisa Williams, 155-16 134th Avenue, Jamaica, New York, 11434" had been seized and found to contain approximately fifteen pounds of marijuana.

On or about January 9, 2003, Detective Schreiner went to the premises and took a photograph which revealed the building to be a one and a half story unit with one front entrance door. There were two mailboxes on either side of the front door and two doorbells. The photograph was taken for the purpose of identifying the premises to fellow officers who would be able to identify the location when and if a search warrant was executed.

Detective Schreiner ascertained from the New York City Tax Department that "James Sellers" was the tax payer for the house. He also learned from Con Edison that "James Sellers"

was the only subscriber listed for the premises. From an internet website he also learned that there was only one telephone subscriber at the premises.

Detective Schreiner had never been in the premises before and based upon his observation of the exterior of the building and other information he received, he assumed the house to be a single family residence.

Detective Schreiner and his fellow officers decided that a controlled delivery of marijuana to the premises would be made by an undercover police officer. If the package was accepted, it would be followed into the premises, and the warrant executed.

On January 14, 2003, the package was delivered by the undercover police officer at approximately 10:55A.M. The undercover then told his fellow officers that the person who accepted the package went upstairs to the left of the front door. The no knock warrant was then executed by officers breaking in the front door.

Only after entering the premises upon executing a search warrant did Detective Schreiner notice that there was a door apparently to an apartment on the lower level to the right of the front door.

Detective Schreiner and other officers went upstairs and observed the defendant, Andre Stennett, and saw in the kitchen area, the box of marijuana which had been delivered. The box was opened and the marijuana was inside. A search of the upstairs portion of the premises was conducted. United States currency was found in open view on top of a television stand. In a closed kitchen cabinet, one pound of marijuana was recovered. Numerous small Ziploc bags in open view were recovered from a couch. A .357 revolver and a semiautomatic rifle were recovered from a closed armoire in a bedroom. Two shotguns and a rifle were recovered, from a closed bag, behind a dresser, in a child's bedroom. From a small box in the armoire, numerous live rounds of ammunition were recovered. Cellular telephones were recovered, in open view, from the top of

a television stand and a lease agreement was recovered from a dresser drawer, in the bedroom.

I make the following conclusions of law:

Validity of Warrant Application for Area Specified

A defendant may challenge a search warrant on the ground that the affidavit contains perjury, People v. Alfinito, 16 N.Y.2d 181, 264 N.Y.S.2d 243 (1965). If the defendant makes a “substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request.” Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674 (1978); see also People v. Glen, 30 N.Y.2d 252, 331 N.Y.S.2d 656 (1972).

Here, defendant challenges the veracity of the affiant, Detective Schreiner, claiming that the affidavit contains perjury and/or a statement in reckless disregard for the truth, People v. Alfinito, *supra*. A hearing was held before this court to address defendant’s claims. It is defendant’s burden to prove by a preponderance of evidence that the facts stated by the detective were untrue or recklessly made. See Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978); People v. Dymond, 130 A.D.2d 799, 514 N.Y.S.2d 826 (3d Dept. 1987).

In the instant matter, the specific claim defendant asserts is that the detective represented to the court in his warrant application that the location at issue was a one-family residence and the location is actually a two-family dwelling. It is alleged by defendant that the detective was aware of this fact or recklessly disregarded it at the time of the warrant application. Thus, the first issue before this court is whether a false statement was intentionally, knowingly or recklessly made by

Detective Schreiner in his warrant application.¹

Notably, a warrant is presumed to be valid, therefore, the burden upon the People at a hearing on a motion to controvert a search warrant is minimal. See People v. Hanlon, 36 N.Y.2d 549, 369 N.Y.S.2d 677 (1975). This presumption attaches since there has already been a judicial review as to the warrant's justification. See People v. Castillo, 80 N.Y.2d 578, 585 (1992), *cert. denied* 507 U.S. 1033; People v. Hanlon, *supra*. The application for a search warrant "should not be read in hypertechnical manner [and] must be considered in the clear light of everyday experience and accorded all reasonable inferences." Hanlon, 36 N.Y.2d at 559.

In opposition to defendant's assertion that the detective was not truthful or was reckless in his statement that the premise to be searched was a one-family dwelling, the People rely upon People v. Mabrouk, 290 A.D.2d 235, 736 N.Y.S.2d 15 (1st Dept. 2002).² In Mabrouk, the court found that the search warrant affiant, Detective Rivera, properly relied upon information supplied by a registered informant and a recording industry investigator when applying for the warrant. The warrant was for the recovery of counterfeit compact discs from a "basement apartment of a multi-story brick apartment building at 2114 Daly Avenue." At the time he applied for the warrant, Detective Rivera had been told that there was a grey metal door which was the entrance to the basement. Furthermore, he was advised that behind the grey metal door were two white doors with cylinder locks off a hallway. The detective was informed that the defendant lived behind the doorway to the right and that behind the other white door was the place where the compact discs were kept.³

¹If an allegedly false statement is found in the warrant application then the next step in the court's analysis would be whether that statement was necessary for a finding of probable cause to exist to issue the warrant.

²Defendant's reliance upon People v. Rainey, 14 N.Y.2d 35 (1964) is misplaced. In Rainey, the officer knew prior to the warrant application that the location to be searched consisted of two separate residential apartments and intentionally misrepresented this fact to the Court. Here, the detective had no such knowledge until the actual execution of the warrant.

³Upon execution of the warrant another doorway was discovered immediately behind the grey door which was an occupied apartment but which was not searched and its existence was

Before obtaining the search warrant, the detective in Mabrouk had verified that there was only one apartment in the basement of the location to be searched. Nevertheless, the basement actually contained three apartments. Just like in the instant matter, the detective had never been in the basement himself. The Mabrouk Court held that at the time the detective applied for the warrant he did not believe there was more than one apartment in the basement, despite the fact that he was aware that there were separate doors in the hallway of the basement. In the instant matter, the warrant affiant did not have any knowledge of separate doorways or a separate apartment in the premise until execution of the warrant. The court in Mabrouk held that there was no evidence in the record that the detective knew or should have known there was more than one apartment in the basement at the time of the warrant application and found that the warrant was not overbroad or invalid. This court applies the same rationale to the facts presented.

In People v. Germaine, Sr., 87 A.D.2d 848, 449 N.Y.S.2d 508 (2d Dept. 1982), one of the defendant's contentions was that the search warrant had failed to sufficiently describe the premises to be searched. However, upon addressing this issue, the court noted that the warrant application "conformed with the outside appearances of the building in question, and there was no indication of any apparently illegal conversion of the house into a two-family structure with dual occupancy of the premises" and the warrant was upheld. Germaine, supra, at 849. In Germaine, the location to be searched was described as "a two-story frame dwelling house, white shingle, blue/green trim, located on the South/East corner of Windward Lane, with attached garage, swimming pool in rear yard, enclosed by cyclone fence." Similarly here, the description of the premise provided in the warrant application substantially conformed with the outside appearance of the house.

A warrant describing premises as a one-family, three story dwelling was upheld as valid in People v. Fiore, 46 A.D.2d 814, 361 N.Y.S.2d 209 (2d Dept. 1974), even though it was later discovered that the location was actually a multiple dwelling. In Fiore, the premise was listed with all utilities as one-family dwelling; it had no mailboxes or listings of tenants; it did not have any numbered apartments; the owner of premises paid all bills; and only two telephone numbers were

unknown until the actual warrant execution.

assigned to house, one for owner and other for owner's brother. Here, only one telephone number was assigned, there were no apartment numbers on the house and, just like in Fiore, this court finds that the premise to be searched was defined with sufficient particularity.

In the present case, the detective viewed the house at issue from the outside and it appeared to be a one and a half single family residence. Detective Schreiner determined from Con Edison, a web internet site and the New York City Tax Department that the premise was a one family house and the owner was “James Sellers” prior to obtaining the warrant. Nothing in the detective’s testimony or affidavit in support of this warrant supports a finding by this court that the detective intentionally, knowingly or recklessly made a false statement. The validity of the warrant turns upon the information available to the police when they acted. See People v. Otero, 177 A.D.2d 284, 575 N.Y.S.2d 862, *app denied*, 79 N.Y.2d 862 (1992) (affidavit by officer in warrant application did not show that police knew or should have known that second floor was divided into separate living spaces).

Furthermore, the officers did not know that this location, which appeared to be a one-family dwelling, actually contained two apartments until they physically entered the location to execute the warrant. The detective had never entered the location prior to his search warrant application. Thus, no intentional or knowingly false statements were made, nor were any statements made in reckless disregard for the truth in the warrant application. The detective reasonably conducted a search prior to applying for the warrant to determine the type of premise to be searched and his conduct did not amount to reckless behavior. Moreover, the court finds his testimony credible and nothing in the testimony warrants this court to find that he intentionally made false statements at the time of the warrant application.

Additionally, although there may have been two mail boxes or doorbells at the search location, this does not change the court’s finding since these were just some factors the court considered in reviewing all the information available to the detective at the time the warrant application was made. Significantly, defendant has not established that the detective observed the mailboxes or doorbells nor has it been established as to how long they were located at the premises.

In any event, without more, these factors alone does not establish that the location was a two-family residence despite defendant's assertions to the contrary. Defendant has not met his burden. The information known to the detective at the time of the warrant application indicated that the premise was a one-family dwelling.⁴

Property Recovered Upon Execution of Warrant

The court now addresses defendant's contention that the guns recovered upon execution of the warrant should be suppressed. It is well-established that when in the course of a lawful execution of a warrant, as we have here, an officer discovers property in plain view, it may be seized. This is true even though the property may not be described in the warrant, provided the officer has lawful access to the property, and the property's incriminating character is immediately apparent. See People v. Brown, 96 N.Y.2d 80, 89, 725 N.Y.S.2d 601 (2001).

Defendant now argues that the guns not specifically enumerated in the warrant must be suppressed since their recovery is improper.

Initially, the warrant is not overbroad since it specifically authorizes certain property to be searched for, such as: "drug paraphernalia, including, but not limited to, scales, plastic bags, envelopes, records of drug transactions, records or ownership use of subject location, and such U.S. currency used to purchase marijuana."

The Fourth Amendment prohibits "unreasonable searches and seizures," US Const 4th Amend. Several narrow exceptions to warrantless seizures have been developed. One such exception is the plain view doctrine. See Coolidge V. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971). This doctrine states that the police should be able to seize evidence which is in plain view if they had a right to be where they were when they observed it. See Brown, *supra*, at 88-89;

⁴It is also noted by this court that upon execution of the warrant, the area ultimately searched only consisted of the upstairs where the undercover officer observed the defendant go after receiving delivery of the marijuana package.

citing, People v. Diaz, 81 N.Y.2d 106, 595 N.Y.S.2d 940 (1993); People v. Blasich, 73 N.Y.2d 673, 677, 543 N.Y.S.2d 40 (1989).

In Brown, *supra*, one of the issues the Court of Appeals addressed was the validity of the seizure of guns that were recovered, which were not items enumerated in the search warrant. The Court applied the plain view doctrine and held that the items were admissible. In Brown, a .357 magnum was found wrapped in cloth and hidden in a jar underneath the defendant's bathroom sink; a revolver, wrapped in plastic, was found inside a floor vent in the rear bedroom of the defendant's trailer. Brown, *supra*, at 83. The warrant at issue authorized a search for a tractor ignition key; a VIN plate, a steel chain, a top link bar and any "other property the possession of which would be considered contraband."⁵ The investigation in Brown related to an allegation of a stolen tractor.

The Brown Court applied the plain view doctrine of Diaz, *supra*, to determine if the guns were admissible even though they were not specifically listed in the warrant. Thus, the three elements of the plain view doctrine which could potentially permit admissibility of these items were analyzed: (1) whether the police were lawfully in a position to observe the item; (2) whether the police had lawful access to the item itself when they seized it; and (3) whether the incriminating character of the item was immediately apparent. Brown, *supra*, at 89. Therefore, the issue was whether the police were authorized to be where they were when they observed these guns. The Brown Court answered these questions affirmatively since the police were acting pursuant to the warrant which gave them this authority.

Under circumstances where the items recovered during the execution of a search warrant are not specifically listed in the warrant as items subject to seizure, the burden is upon the People to establish that the officers who executed the warrant found the items in a place where one would reasonably expect to look while searching for an object which is particularly described. Additionally, another factor considered is whether the objects seized, which were not specifically

⁵The portion of the warrant in Brown which authorized the search for "any other property the possession of which would be considered contraband" was deemed overbroad and severed from the valid portion of the warrant.

enumerated in the warrant, were found before all of the specifically described items were recovered.

Here, we find that the People have met their burden. The warrant authorized the seizure of drug paraphernalia, including scales, envelopes, and records of drug transactions. It does not appear that these items, though authorized for recovery, were found. Thus, the search by the officers did not exceed the warrant's scope and intensity. Furthermore, the areas where the guns were recovered, in the armoire or in the duffel bag were reasonable locations where drugs, documents, scales or other authorized drug paraphernalia may have been found. Therefore, applying the plain view doctrine, the officers were in a lawful position to observe the guns and ammunition and the incriminating nature of the items was readily apparent.

Accordingly, defendant's motion to suppress the property seized from his residence is denied.

Kew Gardens, New York
Dated: May 28, 2004

SEYMOUR ROTKER
JUSTICE SUPREME COURT