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NO. 26371

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Appellant, v. KEVIN RAY RAMIREZ, Defendant-
Appellee

APPEAL FROM THE CIRCUIT OF THE THIRD CIRCUIT
(CR. NO. 03-1-228K)

MEMORANDUM OPINION

(By: Foley, Acting C.J., Nakamura and Fujise, JJ.)

Plaintiff-Appellant State of Hawai'i (State) appeals from the January 8, 2004 Findings of Fact, Conclusions of Law and Order Regarding Defendant's Motion to Suppress Evidence (Order) filed in the Circuit Court of the Third Circuit.^{1/}

I.

On the morning of August 25, 2003, Hawai'i County Police Department (HPD) Detective Ernest Saldua (Det. Saldua), Officer Craig Higaki (Ofr. Higaki) of HPD's Criminal Intelligence Unit, and Special Response Team (SRT) Sergeant Samuel Kawamoto (Sgt. Kawamoto) met to discuss applying for and serving a search warrant on Defendant-Appellee Kevin Ray Ramirez's (Ramirez) residence. Officer Higaki suspected Ramirez of selling drugs

^{1/} The Honorable Ronald Ibarra presided.

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from his residence based on information provided by a confidential informant (C.I.) and a "controlled buy" that was done at Ramirez's residence within a few days prior to August 25, 2003.

Officer Higaki told Det. Saldua at that morning meeting that Ramirez was selling drugs out of his bedroom in the northern building of a two-building complex known as "Hooperville." Officer Higaki described the building as a two-bedroom residence with Ramirez occupying the first room on the right, a "Shaun Hooper" (Shaun) occupying the second bedroom, and that there was a storage area and a bathroom. He also told Det. Saldua that Ramirez had a monitor with a camera facing the roadway.

On the afternoon of August 25, 2003, Det. Saldua applied for a search warrant. The affidavit supporting the application consisted of information given to him by Ofr. Higaki about and from the C.I. and a description of the controlled buy, along with information regarding Ofr. Higaki's training and experience in dealing with and identifying drugs and drug paraphernalia.

Detective Saldua was informed that the Hooper family "owned and occupied" the property in which Ramirez resided. He had been in the building "years before" when two of the Hooper sons were living in the subject building and thought one of the Hooper sons might still be living in the second bedroom. He did

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not have any information regarding whether Ramirez was renting a portion of the house from the Hoopers. He did know that Ramirez called "Elston Hooper," the patriarch of the family, "uncle," and that Ramirez had been married to "one of the daughters" before she died. His affidavit did not mention any of the foregoing, nor that any other person occupied the building to be searched, nor that Ramirez's door was locked.

Based on Det. Saldua's affidavit, District Court Judge Colin Love issued a search warrant on the afternoon of August 25, 2003. The search warrant included the following description of the property and scope of the search warrant:

YOU ARE COMMANDED forthwith to SEARCH:

A single story wooden dwelling natural wood in color with corrugated metal roofing which is the second residence ten (10) feet north of the main residence which is occupied by KEVIN RAMIREZ which is located by traveling .3 miles north on Hooper Villa Road from the intersection of the Old Mamalahoa Highway to the point where the road makes a 90 degree turn in the easterly direction; that the residence is on the west side of Hooper Villa Road as the road turns east; that the residence is set back approximately one hundred (100) feet from Hooper Villa Road; that between the roadway is an open carport/garage; that the residence can be accessed by a gravel/dirt driveway, which runs in the westerly direction from Hooper Villa Road, Honalo, North Kona, Hawaii; to include all rooms, attics, basements, and other parts; therein, the surrounding grounds, and any garages, storages [sic.] rooms, outbuildings of any kind, garbage cans, and containers under the control of KEVIN RAMIREZ;

(Underline emphasis added.)

At 4:30 a.m. on August 26, 2003, members of HPD's SRT were briefed in preparing to execute the search warrant. For safety reasons, SRT officers execute warrants in situations that may be dangerous. They were briefed that Ramirez occupied the

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first bedroom, that Shaun occupied the second bedroom on the right, and that there was only one entrance/exit. They were also told of a surveillance camera owned by Ramirez, positioned at the outside/front of the home.

At about 6:15 a.m. on August 26, 2003, HPD SRT executed the search warrant. Upon arriving at the house, they found it had only one entrance and, prior to entering the structure, knocked and announced their presence. After receiving no answer, they opened the unlocked door, entered the house and proceeded to the first bedroom door which was found closed and locked. There was no other door to Ramirez's bedroom.

The officers then knocked and announced their presence while battering down the door to Ramirez's room over a period of two minutes. Ramirez's solid core door was secured by three deadbolt locks. Ramirez's bedroom did not contain a separate bathroom, kitchen, or door to the outside of the house. There was a separate bathroom down the hall and an area with a counter and burner where Ramirez did his cooking. A video monitor connected to the security camera positioned over the entrance to the building was found in Ramirez's room. No other monitor was found in the house.

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Ramirez was subsequently arrested and indicted for ten drug and firearms charges based on the items found during the search of his bedroom.^{2/} Ramirez moved to suppress the evidence collected during the execution of the search warrant. After hearing the evidence presented and the arguments made by counsel, the court granted Ramirez's motion, concluding, *inter alia*,

14. The police officer's failure to realize the overbreadth of the search warrant was not objectively understandable and reasonable, and therefore the police officers violated the constitutional protection against unreasonable government searches under the Fourth Amendment to the United States Constitution and Art. I, § 7 of the Hawai'i Constitution.

.....

18. In the instant case the simultaneous announcement of the entering police officers with the battering in of the door to the bedroom/subunit of RAMIREZ was not a proper "knock and announce" and was improper under Haw. Revised Stat. §§803-37 [sic]. State v. Garcia, 77 Haw. 461, 887 P.2d 671 (Haw. App. 1995); State v. Quesnel, 79 Haw. 185, 900 P.2d 182 (Haw. App. 1995); State v. Monay, 85 Haw. 282, 943 P.2d 908 (1997).

The State timely noted its appeal from this Order. This appeal was assigned to this court on November 23, 2004.

II.

- A. *The search warrant sufficiently described the place to be searched and as such was not overbroad.*

^{2/} In the second bedroom the police officers found Shaun's girlfriend Rita Reeves. A second warrant was obtained before searching this bedroom. The validity and execution of this warrant is not a subject of this appeal.

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Claiming that they are "not completely supported by the record", the State takes issue^{3/} with the following conclusions of law:

12. The target structure was a multiple-occupancy building for all times relevant herein.
13. Under the circumstances of the instant case the bedroom of RAMIREZ qualifies as a separate residential unit in the target structure. State v. Anderson, 84 Haw. at 470-471, 935 P.2d at 1015-1016.
14. The police officers' failure to realize the overbreadth of the search warrant was not objectively understandable and reasonable, and therefore the police officers violated the constitutional protection against unreasonable government searches under the Fourth Amendment to the United States Constitution and Art. I, § 7 of the Hawai'i Constitution.

We agree.

It is well-settled that the movant in a motion to suppress has the burden to prove, by a preponderance of the evidence, that the seizure was illegal and that his or her own Fourth Amendment rights were violated by the search. State v. Anderson, 84 Hawai'i 462, 467, 935 P.2d 1007, 1012 (1997),

^{3/} The State also appears to take issue with the trial court's finding that the information provided by the confidential informant (C.I.) was not corroborated by any independent source and argues that the issuance of the search warrant in the instant case was valid because the information provided by the C.I. was credible under the two-prong Aquilar-Spinelli test adopted by the Hawai'i Supreme Court in State v. Kalai, 56 Haw. 266, 537 P.2d 8 (1975). The State's argument is flawed for two reasons.

Initially, it is noted that the Appellant's First Amended Opening Brief is in non-compliance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4)(C) as, while it argues that "findings of fact" numbers 21, 22, and 23 are clearly in error, it failed to properly designate findings 22 and 23 in its points of error portion of its brief. Counsel is reminded that non-compliance with court rules will lead to sanctions. HRAP Rule 51.

In any event, these findings are not essential to the court's decision to suppress the evidence in this case as the circuit court neither found the C.I. unreliable nor determined that the search warrant was invalid because of the unreliability of the C.I.

quoting State v. Abordo, 61 Haw. 117, 120-21, 596 P.2d 773, 775 (1979). On appeal, we review the conclusions of law entered by the trial court *de novo*. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994).

There is no definition of a "multiple-occupancy dwelling" in Hawai'i. Nevertheless, save that Shaun lived in the second bedroom in the target structure and that Ramirez lived in the first bedroom which he locked, the circuit court found no fact which supports the conclusion that the residence was a multiple occupancy dwelling. The evidence established that Ramirez's bedroom did not have direct access to the outside nor did it have its own bathroom or kitchen. There was no evidence it had its own street address, mail box, or door bell. Besides the evidence that Ramirez's bedroom door had locks on it and was locked at the time the warrant was executed, there was no evidence that Ramirez maintained exclusive control over his bedroom.

However, the mere fact that other occupants reside in a structure or even that those other occupants locked their own bedroom doors, "does not, by itself, automatically elevate the bedroom to the status of a separate residential unit." Anderson, 84 Hawai'i at 469, 935 P.2d at 1014, citing United States v. Kyles, 40 F.3d 519, 524 (2d Cir. 1994) (that defendant was only

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person with key to the bedroom "did not, by itself elevate the bedroom to the status of a separate residential unit."). Thus, the fact that Shaun and Ramirez lived in separate bedrooms in the target structure, without more, did not establish that the structure was a multiple occupancy dwelling.

The circuit court's conclusion that the failure of the police to "realize" that the warrant was overbroad was also in error for at a minimum, the warrant was not in fact overbroad.

The standard for determining whether a search warrant meets the requirement of particularity "is one of practical accuracy rather than technical nicety[,]" *United States v. Goodman*, 312 F.Supp. 556, 557 (N.D.Ind. 1970) (quoting *United States v. Gomez*, 42 F.R.D. 347 (S.D.N.Y. 1967)), and it is not necessary that the description of the place to be searched be as specific as in a recorded deed. *Morales v. State*, 44 Wis.2d 96, 170 N.W.2d 684, 689 (1969). "It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended[,]" *Steele v. United States*, 267 U.S. 498, 503, 45 S.Ct. 414, 416, 69 L.Ed. 757 (1925), and "distinguish it from other places in the community." *Ex parte Flores*, 452 S.W.2d 443, 444 (Tex.Crim.App.1970).

Where a search warrant is directed at a multiple-dwelling or multiple-office building, the warrant will generally be held invalid unless it describes the *particular* room or sub-unit to be searched with sufficient definiteness to preclude a search of other units in the building occupied by innocent persons. Annotation, *Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multiple-Occupancy Structure*, 11 A.L.R.3d 1330, 1333, at § 3 (1967 & Supp. 1995); 68 Am.Jur.2d *Searches and Seizures* § 138, at 758-59 (1993 & Supp.1996); 1 J. Cook, *Constitutional Rights of the Accused* (hereafter *Cook*) § 3:3 at 316-19 (2d ed. 1985 & Supp.1995). This requirement ensures compliance with the constitutional mandate of particularity.

State v. Matsunaga, 82 Hawai'i 162, 166-67, 920 P.2d 376, 380-81 (App. 1996) (*italic emphasis in original*), cert. denied, 82 Hawai'i 360, 922 P.2d 973. Here, the evidence presented failed to establish that the target structure was a "multiple occupancy"

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building. Consequently, the warrant did not need to limit itself to particular parts of the house.

B. *As the police properly knocked and announced their presence at the outer door, they were not required to repeat the process before breaking in Ramirez's bedroom door.*

The State also challenges the circuit court's conclusion^{4/} that "the simultaneous announcement of the entering police officers with the battering in of the door to the bedroom/subunit of RAMIREZ was not a proper 'knock and announce' and was improper under Haw. Revised Stat. §§803-37 [sic]." Conclusions of law are reviewed *de novo*. State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996).

The evidence presented established that the police, upon arriving at the house, found the house had only one entrance and that door was unlocked. They could see the surveillance camera that they believed to be owned by Ramirez, positioned at the outside/front of the structure. Prior to entering the structure, the police knocked and announced their presence. After receiving no answer, they opened the unlocked door, entered the house and proceeded to the first bedroom door which was found closed and secured by three locks. They again announced their

^{4/} Ramirez did not base his motion to suppress, nor did the circuit court rule, on the appropriateness of the knock and announce performed on the entry to the structure. Thus, challenge to the entry into the structure has not been preserved and this court's review is limited to the entry into Ramirez's bedroom only.

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presence and pounded on the bedroom door as Ramirez had still not opened it, eventually breaking down the door approximately two minutes later.

The Intermediate Court of Appeals (ICA) in State v. Balberdi, 90 Hawai'i 16, 975 P.2d 773 (App. 1999) ruled that police officers were not required, under Hawaii Revised Statutes (HRS) § 803-37, to separately "knock and announce" in serving a search warrant on a closed bedroom door after they had "knocked and announced" their presence on the outer door of a suspect's house.

The ICA stated:

HRS § 803-37 states that once inside a building, police officers "may" demand that a "closed place" be opened, and, if refused, the officer "may" break it open. In contrast, the initial portion of the statute provides that if the officer encounters a closed door upon *initial* entry, the officer "must" declare his office and his business and demand entrance. According to the Hawai'i Supreme Court:

In the past, this court has subscribed to the proposition that, where the verbs "shall" and "may" are used in the same statute, especially where they are used in close juxtaposition, we infer that the legislature realized the difference in meaning and intended that the verbs used should carry with them their ordinary meanings. Not surprisingly, we have therefore construed the close proximity of the contrasting verbs "may" and "shall" to require a *mandatory* effect for the term "shall." Thus, the converse would seem to follow, namely, that the close proximity of the contrasting verbs "may" and "shall" requires a *non-mandatory*, i.e., a discretionary, construction of the term "may."

Balberdi, 90 Hawai'i at 22, 975 P.2d at 779 (italic emphasis in original) quoting from State v. Cornelio, 84 Hawai'i 476, 493, 935 P.2d 1021, 1038 (1997) (emphasis in original and ellipses,

citation and internal block quote format omitted). The ICA went on to conclude,

compliance with the "knock and announce" at the *outer* door before entering was sufficient, and once inside, officers were not required to comply again before entering Defendant's closed bedroom. Requiring police officers to "knock and announce" at every closed inner door would not further the purpose underlying HRS § 803-37 as enunciated by the *Garcia* court, namely, "notify[ing] the person inside of the presence of the police and of the impending intrusion, giv[ing] that person time to respond, avoid[ing] violence, and protect[ing] privacy as much as possible." *Id.* at 468, 887 P.2d at 678 (citations, quotation marks, brackets, and footnote omitted). We conclude that this purpose was satisfied by the police officers' initial "knock and announce" at the outer door of the residence.

Balberdi 90 Hawai'i at 23, 975 P.2d at 780 (*italic emphasis in original*).

In the instant case, the circuit court erred in its conclusion that HPD officers did not properly comply with the "knock and announce" requirement under HRS § 803-37. By "knocking and announcing" their presence and purpose at the outer door of the property, the police complied with the statutory requirement of HRS § 803-37 and once inside, were not required to again engage in this procedure at Ramirez's bedroom, which was at the front of the structure.

III.

CONCLUSION

Based on the foregoing, we vacate the January 8, 2004 Findings of Fact, Conclusions of Law and Order Regarding

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Defendant's Motion to Suppress Evidence and remand for proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, April 19, 2005.

On the briefs:

Cynthia T. Tai,
Deputy Prosecuting Attorney,
County of Hawai'i,
for Appellant.


Acting Chief Judge

Victor M. Cox,
for Defendant-Appellee.


Associate Judge


Associate Judge