

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
TERRY SCRUGGS	:	NO. 2005-06

MEMORANDUM

Baylson, J.

March 22 , 2006

Several issues are presented by the Defendant's Motion to Suppress:

(1) Whether a search warrant describing a two-story building without designation of multiple units is invalid as a matter of law when the police had reason to know that the building may have been divided into first and second floor apartments, but also had reason to believe that the Defendant, who was the owner of the building and the subject of the search, had access to and used the first floor and lived on the second floor?

(2) Whether upon entering the building, and saw that there were two separate apartments, the police had an obligation to stop any search and present additional probable cause to the issuing magistrate before searching both apartments?

(3) Whether the "good faith" exception applies.

(4) Whether because the Defendant made his first incriminating statement after his arrest without adequate waiver of his Miranda rights, a second incriminating statement taken approximately eight hours later must also be suppressed even though, before the second statement, the Defendant adequately waived his Miranda rights?

A. Search and Seizure Issue

Through very careful police work, Philadelphia police developed substantial evidence that Defendant was involved in large-scale narcotics trafficking. The preliminary work consisted of careful surveillance, record checking and use of credible informants. As a result of this activity, the police prepared a detailed affidavit to support a search warrant of the Defendant's residence located at 4834 Sansom Street in Philadelphia. The police had credible information to know that the Defendant owned the building, lived at that address and had observed him entering that property.

Defense counsel does not seriously dispute the adequacy of the probable cause that Defendant was engaged in narcotics trafficking. The property identified on the search warrant is 4834 Sansom Street, Philadelphia, PA 19139. The search warrant did not identify the location as being anything other than a single-family dwelling. It also failed to indicate, as the facts eventually showed, that the dwelling consisted of two apartments, that Defendant lived in one of those apartments, and that he made use of the other then vacant apartment.

1. Findings Based on the Suppression Hearing

a. Facts Re: Police Investigation

At the suppression hearing, which was held on December 27, 2005, Philadelphia Police Officer Reginald Graham testified to the extensive investigation which he conducted, leading to indisputable probable cause that Defendant was a significant narcotics trafficker. The surveillance included several opportunities to observe the premises that was searched, 4834 Sansom Street, and Officer Graham saw the Defendant using keys to enter that location. N.T. 14-16. He also testified that each time he saw the Defendant enter that premises, he saw a light

go on on the first floor and could see a shadow, inferentially the Defendant (having just entered the building) walking across the first floor of the building. Officer Graham testified that the house had an open porch with a screen door in front of the main door and there was only one door from the porch into the building. N.T. 17-18.

Officer Graham testified that he could not tell from the outside surveillance whether there were separate units inside the building. When he tried to go on the porch for a closer look, a motion light would go on and he did not go any further (inferentially because he did not want to attract attention to himself). Therefore, Officer Graham could not tell whether the building was separated into apartments. He did not see doorbells because the storm or screen door blocked observation of that kind of detail as to what was behind the storm or screen door or on the front door.

In the early morning hours of December 8, 2004, Officer Graham and several others searched the trash can at 3834 Sansom Street and found two large clear plastic bags and mail addressed to Terry Shaw (another name by which the Defendant was known) addressed to 5541 Elliot Street, and one piece of mail addressed to Defendant with the address of 4834 Sansom Street, as to which Officer Graham testified the mail “had the second floor.” N.T. 40. The search warrant affidavit does not mention that the piece of mail said “second floor.”

Also found in the trash can was a one kilogram plastic wrapper which contained a white powdery residue which tested positive for cocaine-base or cocaine. There was also a clear plastic bag with a razor blades with residue testing positive for cocaine. N.T. 41-43. In all, Officer Graham found five separate kilogram wrappers in the trash can search. The Court concludes that the evidence of the surveillance, as well as the evidence in the trash can, gave the police probable

cause to believe that Defendant occupied the second floor and was involved in narcotics trafficking.

The affidavit states, and Officer Graham also testified, that he had checked real estate records, apparently on a computer program assertedly only available to the police, which indicated that Defendant owned this building and it was shown as a single family dwelling. N.T. 14, 73.

Although this police computer record was not available at the hearing, the Court held the record open and allowed the record to be supplemented by this document. The five-page record was subsequently supplied by letter dated January 8, 2006 to the Court and defense counsel and it has been marked as Exhibit G-10. The first two pages appear to be data entered by the police department, such as a case identification number, the type of investigation, and the assigned police officer. The next three pages appear to be data from this computer source. At the bottom of the page there is a reference to “Nexis” but no information has been provided to the Court whether this material is available to any Nexis subscriber. The first of these three pages indicates that the information is being provided by a “person locator” and lists the name as Terry Scruggs with the last update on February 3, 2000, his current address as 1104 South 52nd Street and one of two previous addresses as 4834 Sansom Street, which is designated as “single family.” The next two pages contain data for 4834 Sansom Street with a “estimated roll certification date” of October 1, 2003. Under the heading “land use,” it reads “Apt 2-4 units 2sty masonr.” [sic]. However, there is a notation at the bottom of the page under the heading “property characteristics,” where there is no entry next to the word “units:”. For the reasons stated in footnote 1, *infra*, the Court does not find that these records describe a multi-unit building. The

last page of this document shows the date of a prior transfer to Defendant as of June 26, 1997, and the address, without any indication one way or the other as to whether the property is single family or multi-unit.

Officer Graham also testified that the reliable source had told him that the Defendant “had access to the whole property, that was his property, nobody else lived there.” N.T. 105. This information turned out to be true.

b. Search Warrant and Affidavit

Officer Graham secured a search warrant for the location. Relative to this issue, the affidavit stated that a reliable source “also stated that Terry Scruggs lives at 4834 Sansom Street and also stores drugs inside of both 4834 Sansom Street and 5541 Elliot Street.” This information was received in September 2004. However, the affidavit relates that several months later, on December 1, 2004, just a week before the search, Officer Graham, the affiant, “received information from the same reliable source who stated that Terry Scruggs would be getting approximately .4-5 kilograms of cocaine. The source also stated that he would be packaging and storing the drugs inside of 4834 Sansom Street & 5541 Elliot Street.”

The affidavit further relates that on December 7, 2004 at approximately 8:30 p.m., another police officer “who was set up for a surveillance at 4834 Sansom Street, observed the white Tahoe [which the police had previously seen Defendant driving] park in front of 4834 Sansom Street, at which time Terry Scruggs exited the driver side of the white Tahoe, walked up on the porch of 4834 Sansom Street, opened the door using keys, and entered the property. Approx. 2-3 mins. later, Scruggs was observed leaving 4834 Sansom Street. . . .”

The affiant concluded, based on all the information related in the four-page single-spaced

affidavit, that “illegal narcotics are being distributed, packaged and stored inside of the location 4834 Sansom Street and 5541 Elliot Street.”

c. Facts Re: Execution

After securing the affidavit, Officer Graham and other police returned to the property later the same day, December 8, 2004, at approximately 7:00 p.m. The police set up a surveillance, waiting for the Defendant to return to that location, which he did at about 7:20 p.m. Officer Graham then testified to the execution of the search warrant. He said that a SWAT team went into the property first, secured the property and the Defendant, who was on the second floor, and then notified Officer Graham and the other narcotics investigators to enter the building.

Officer Graham described the premises when the front door was entered. He said “there is a door to the left which goes to the first floor. In the first floor living room area, there was no furniture or anything, just a lamp.” N.T. 49.

Officer Graham testified that in the front bedroom there were two boxes, one of which contained thirty kilograms of cocaine and another contained four kilograms of cocaine, and a black bag which contained a machine gun, with an obliterated serial number and loaded with 29 rounds, plus other guns, for a total of three guns in the kitchen and one gun in the livingroom. N.T. 46-48. There were other items of narcotics paraphernalia and narcotics located in the kitchen. N.T. 48-49.

Officer Graham described that the other first floor rooms also had no furniture. There is nothing in the record to indicate that any person lived in the first floor space, or that it had been rented to anyone.

Officer Graham also described the second floor. When one enters the front door of the building, there was a vestibule area and the door to the left, leading to the first floor apartment with rooms described above, and then there is a door, seven to eight feet from the front door, leading to the second floor. N.T. 51. Thus, on entering the house, the officers had reason to know there were two separate apartments, each with its own door.

Defendant was arrested on the second floor. U.S. currency was found in several places. Officer Graham testified to furniture in various room and bunk beds in the bedroom, which indicates that this apartment may have been used for living, although there was no clothing. The total amount of currency seized was approximately \$37,000. Also found on the second floor was mail addressed to Defendant and a bottle of Bolivian Rock, which Officer Graham testified was used as a cutting agent.

Officer Graham confiscated keys from the Defendant's person, which opened the front door, the first floor apartment door, and the door which led to the second floor, as well as keys that fit the white vehicle that the police had observed Defendant driving.

d. Findings Re: Credibility

On cross examination, Officer Graham was questioned extensively about his direct testimony that on several occasions during his surveillance of the premises at 4834 Sansom Street, after he saw the Defendant enter the property, the lights would go on in the first floor and he would see a shadow moving across the first floor, inferentially indicating that the Defendant was making use of what turned out to be the first floor apartment. Defense counsel brought out that this observation does not appear anywhere in the affidavit for the search warrant or in the officer's "49" report, and further suggested that Officer Graham invented this testimony when he

found out that defense counsel was asserting that the seizure of the drugs should be suppressed because the warrant was insufficiently particular as to the fact that the building contained two separate apartments. N.T. 75-6. Officer Graham denied that he had falsified his testimony for this reason and asserted on redirect examination that he did not put his observations about the Defendant using the first floor apartment in either of these documents because it was not important at the time he prepared them and because he had information from his reliable source that the Defendant had “access to the whole property, that that was his property, that nobody else lived there.” N.T. 105.

Officer Graham also indicated that he did not put his observations about the Defendant’s use of the first floor in the search warrant or the “49” report, N.T. 73-5, because he believed that the Defendant “had access to the whole building.” N.T. 105., based on his surveillance and the trash pull, which included the piece of mail addressed to Defendant indicating the second floor, as well as the observation of the Defendant’s silhouette on the first floor, that the Defendant “had access to the whole building.” N.T. 105.

Although defense counsel adroitly brought out some serious omissions in the officer’s written accounts that warrant close scrutiny of the officer’s credibility, the Court notes that if the officer had intended to cover up the facts and perjure himself, the officer could have and would have omitted testifying about the fact that the mail pulled from the trash contained a reference to the Defendant occupying the second floor (which fact appears on the property receipt for the items found in the trash can). This fact (which, just as the officers’ testimony about the light going on in the first floor after Defendant entered 4834 Sansom Street, is not contained in the search warrant affidavit) did indeed put the police on notice that the building inferentially

contained apartments rather than being a single unit residential dwelling. The fact that the officer testified about the mail showing “second floor” gives the Court comfort that Officer Graham was credible. In addition, Mr. Randolph’s testimony about Defendant’s presence in the vacant first floor apartment, discussed infra also supports Officer Graham’s credibility.

On cross examination, defense counsel showed Officer Graham records from the Board of Revision of Taxes, available online, which indicate next to the designation “Improvement” that not only 4834 Sansom Street, but also every other property on that side of that block, is designated “Apt. 2-4 unts.” Ex. D-6.¹ Officer Graham was not aware of this document, but had relied only on the information from the police computer.

Defense counsel also demonstrated on cross examination that on close examination of the front door at 4834 Sansom Street, an observer can see that there are two doorbells and also the separate apartments were marked as A-1 and B-2. However, Officer Graham had credibly indicated that when the screen door is closed, an observer cannot see that there are two bells or

¹Defense counsel argues that this designation indicated that these records show 4834 Sansom Street and every other building on that block had two to four units. A similar notation appeared on the property record Officer Graham reviewed, Exhibit G-10. However, this could be a use or zoning classification, and does not necessarily mean that the building was in fact divided into separate units. The data from the police computer Exhibit G-10 under the heading “assessment information” and the designation “land use” indicates some of the same information as on the Board of Revision of Taxes information. Nonetheless, as to this property Exhibit G-10, on which Officer Graham relied at one point described 4834 Sansom as “single family”, and has nothing written next to the designation “units”, which the Court finds Officer Graham was entitled to rely on. Nonetheless, the record of the suppression motion leaves a question as to whether the information from the Board of Revision of Taxes shows actual apartments or merely a fact of assessment or zoning. The Court finds that Officer Graham was diligent in looking at real estate records, but was not from these records put on notice that 4834 Sansom Street was in fact divided into multiple units. However, as noted in the text, when Officer Graham found the mail in the trash, implying that the defendant lived on the second floor, this was notice that there were multiple units.

two separate apartments designated. See N.T. 93.

A related question is raised by the fact that under Officer Graham's testimony, the SWAT team entered the building first. N.T. 94. Although there is no testimony from the SWAT team itself, Officer Graham testified SWAT team members had placed Defendant under arrest on the second floor before he entered the building. There is no indication that any member of the SWAT team saw the drugs which are the subject matter of the indictment. There is also no testimony as to whether or how the SWAT team opened the door to the first floor apartment or the door to the second floor apartment where the Defendant was found.

In an effort to impeach Officer Graham, defense counsel established through the testimony of Defendant's parole officer, Kevin O'Rourke, that before the Defendant was arrested in this case, the front door to 4834 Sansom Street, had two units marked A-1 and B-2 and two bells, but the Defendant lived on the second floor when visited. On one visit Mr. O'Rourke was advised that the owner of the building was the sister of the Defendant's girlfriend. Mr. O'Rourke testified that his computer search showed Terry Scruggs was the owner of the building, but he could not recall if those records showed that the building contained multiple units. N.T. 115.

A next-door neighbor to Mr. Scruggs, Leroy Randolph, also testified that 4834 Sansom Street has had two apartments, so marked on the front door for a number of years. Mr. Randolph testified that a family had previously lived in the first floor apartment at 4834 Sansom Street, but had moved out in the summer of 2004. To his knowledge, no one had moved in after the family moved out. Of importance, Mr. Randolph indicated that he had seen Defendant renovating the apartment on the first floor in December 2004. N.T. 120-3. Based on this testimony, the Court finds that the first floor apartment was not rented or occupied at the time of the search, and thus

under the control of Defendant, as the owner of the building, and was also being used by Defendant at that time.

In summary, the testimony at the suppression hearing showed that the Defendant, although owning and controlling the entire building, only lived in the upstairs apartment. There was some indication, that would have been apparent from close observation of the doorway to the building, that the building was divided into apartments; however, Officer Graham, who prepared the search warrant affidavit, testified credibly that these indicia were not clear to him as he was observing the building from across the street and because they were obscured by the screen or storm door.

Officer Graham is charged with knowledge of the possibility of separate apartments from observing the notation about the “second floor” on the piece of mail addressed to the Defendant which he retrieved from the trash can. However, there was also evidence from the surveillance that Defendant used the first floor. As Officer Graham testified, he did not indicate anything about the first floor or second floor in the search warrant affidavit, “for the simple fact that based on my surveillance and the trash pull, which indicated the second floor, and the observation of the silhouettes on the first floor, that he had access to the whole building.” N.T. 105. The issue that has been raised by all the testimony is whether, notwithstanding that the building did contain two separate units and the police had reason to know this, the Court must find that the search warrant was deficient because it does not describe that the building had two units and why the police had probable cause to search both.

2. Legal Discussion

Defendant contends that there are two separate issues of constitutional import, arising

from the Fourth Amendment, in this case. The first deals with whether the warrant was valid as issued, which Defendant contends must be determined solely on the information which the police disclosed to the issuing magistrate. The record establishes the entirety of this information is in the affidavit. N.T. 81. The second issue relates to the execution of the warrant, and on this issue, the Court can consider facts and circumstances that developed at the time the warrant was executed. Defendant contends that his Motion to Suppress must be granted on both of these grounds.

As to the validity of the search warrant, this search warrant authorizes a search of the entire building. Defendant owned the entire building. The police had some information that the Defendant lived on the second floor, but their surveillance established that he also used the first floor. The Court finds as to the validity issue that the warrant is valid because the totality of the police knowledge was that the Defendant had use and control over the entire building. Although not known to the police, the facts at the hearing also developed additional evidence from Mr. Randolph that the first floor apartment was vacant and that the Defendant was in the process of renovating it, which supports the credibility of the police's belief that the Defendant had control over the entire building at the time of the search.

Although defense counsel is correct that the issues of validity and execution are analytically separate, much of the case law in this area conflates these two concepts, if only because the facts that are revealed upon execution are often considered in assessing validity.

The law is clear that where a building is divided into separate apartments, probable cause must be shown for searching each apartment unless the evidence shows the entire building is actually being used as a single unit. Maryland v. Garrison, 480 U.S. 79 (1987). In Garrison, the

Court upheld a search of one of two apartments on a third floor, even though the warrant had only designated the premises as containing one third-floor apartment. The court found that the evidence showed that the police had conducted a reasonable investigation and did not have any reason to know that there were two apartments on the third floor.

The facts in Maryland v. Garrison showed that the investigating officers had secured a warrant to search the person of one McWebb at a certain street address in Baltimore, and the warrant specifically designated the third floor apartment of those premises. When the officers arrived, they went upstairs to the third floor and found a door leading to a vestibule, at which time they found the defendant, Harold Garrison, who was standing in the vestibule hallway area. The apartment of Mr. McWebb, who had been named in the warrant, was to the left, and Mr. Garrison's apartment was to the right, and the doors to both apartments were open. After entering Mr. Garrison's apartment and finding heroin, cash and drug paraphernalia, the officers then realized that the third floor contained two apartments and they then discontinued the search. The lower court had found, and the Supreme Court assumed, that all of the officers reasonably believed that they were searching Mr. McWebb's apartment. The court found, referring to the warrant, "that a literal reading of its plain language, as well as the language used in the application for the warrant, indicates that it was intended to authorize a search of the entire third floor." Id. at 82.

The Fourth Amendment of the United States Constitution categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." This clause has been construed by the Supreme Court many times; however, Maryland v. Garrison is an important case because it introduced into search and

seizure jurisprudence the recognition that some latitude must be given to police officers acting on mistaken belief, as in that case, that there was only one apartment on the third floor of the building. The Court noted that if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor, “they would have been obligated to exclude [Garrison’s] apartment from the scope of the requested warrant . . . [but] the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant.” *Id.* at 85. The Court also found that the officers’ entry into the third floor common area was legal because they had a warrant for those premises and they had met Mr. McWebb, who was named in the warrant, who provided the key they used to open the door giving access to the third floor common area.

The Court upheld the search because the illegal drugs and paraphernalia had been found before the officers recognized they were in the wrong apartment. Although they discontinued their search when they realized this fact, it was after the drugs and paraphernalia had been found:

Moreover, as the officers recognized, they were required to discontinue the search of respondent’s apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant. The officers’ conduct and the limits of the search were based on the information available as the search proceeded. While the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.

Id. at 87.

The Court concluded the objective facts available to officers at the time suggested no distinction between McWebb’s apartment and the third floor premises.

For that reason, the officers properly responded to the command contained in a valid warrant even if the warrant is interpreted as authorizing a search limited to McWebb's apartment rather than the entire third floor. Prior to the officers' discovery of the factual mistake, they perceived McWebb's apartment and the third-floor premises as one and the same; therefore their execution of the warrant reasonably included the entire third floor. Under either interpretation of the warrant, the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched with the meaning of the Fourth Amendment.

Id. at 89.

For courts in the Third Circuit, the jurisprudence on search warrant execution now fast forwards to United States v. Ritter, 416 F.3d 256 (3d Cir. 2005), which is the most recent Third Circuit case interpreting Maryland v. Garrison, as to the execution of a warrant for a single-unit building when multiple units are encountered during the search. In Ritter, there had also been, as in Maryland v. Garrison and in the present case, extensive surveillance and preparatory work prior to securing a warrant. In all these cases, there was no dispute as to the existence of probable cause to believe that the premises, in a general sense, contained contraband. However, in Ritter, during the execution of the warrant, an entry team member (presumably similar to the SWAT team which entered the Defendant's apartment in this case), realized that the property's main structure was not a single dwelling but, rather, consisted of at least four separate apartments, and that each of the defendant brothers in the case occupied separate apartments, although the record was not clear as to whether all of the brothers were home at the time of the raid. Id. at 260.

The court noted that despite the discovery of multiple units in the residence, after the preliminary sweep, search teams were sent in to more thoroughly search the premises and collect

evidence. In Ritter, the district court had granted the motion to suppress the physical evidence, finding that the warrant did not describe particularly the place to be searched, relying on Maryland v. Garrison. The government argued that the good faith exception should have been applied. The district court found that when the police officers realized that there were multiple dwelling units and the search warrant gave them no guidance as to which units were to be searched, the police did not execute the warrant in good faith by subsequently searching four different residential units. 416 F.3d at 260-1.

After reviewing the relevant law and finding that the facts presented a “close case,” the Third Circuit majority, in reliance on Maryland v. Garrison, held, in examining the reasonableness of the warrant’s execution, that the police officers testified that they did not know the multi-unit nature of the defendant’s residence prior to the execution of the warrant, and that therefore the entry into the building’s common area was reasonable and lawful. However, once the officers knew or should have known of the error, and found that there were multi-units, they were obliged to stop the search. At that point, they could no longer rely on the warrant to justify their search of the entire building. Because the record was not clear as to whether any illegal drugs had been found prior to the point that the officers recognized that they were in a house with multiple dwelling units, the Third Circuit concluded that the case should be remanded to the district court for additional finding on this issue, but it was error for the district court to have granted the defendant’s suppression motion without any factual findings on this issue. The court held that if the district court found that the members of the entry team had observed contraband in the shared common area of the defendant’s residence, before they realized that the residence

actually comprised multiple apartments, such evidence should not be suppressed.²

It is very important to note that in neither Garrison or Ritter was the apartment vacant. In another recent execution case, United States v. White, 416 F.3d 634 (7th Cir. 2005), the police had secured a search warrant for a property at 118 West Creighton Avenue, Chicago. Although the particularity argument had not been made in the district court, the court nonetheless reviewed the issue under the plain error standard of review. After repeating the general rule that when a search warrant identifies a building with multiple, separate units, the warrant must specify the precise unit that is the subject of the search to satisfy the particularity requirement, citing United States v. Hinton, 219 F.2d 324 (7th Cir. 1955)³ and Jacobs v. City of Chicago, 215 F.3d 758 (7th

²Judge Smith dissented on the issue of remand because he found that the good faith exception under United States v. Leon, 460 U.S. 897 (1984), should have justified the search of the entire premises, notwithstanding the fact that the officers found multiple units upon entry into the building. See discussion about Leon below.

³Defendant relies on Hinton, but the facts are not similar because in that case, the search was for an entire building where the police had reason to know that the building contained four separate apartments. The police had information that heroin had been sold from the building by four different persons, but there was no specification that they all inhabited the same apartment. The court held that the absence of a designation of a particular apartment or apartments in which the sales were made or that sales were made, in apartments occupied by the alleged sellers, resulted in “meager factual allegations” that were insufficient as a matter of probable cause as well as particularity. The court noted that a search warrant for a single building must designate specific apartments and show probable cause for searching each apartment. However, the court added “but probable cause must be shown for searching each residence unless it is shown that, although appearing to be a building of several apartments, the entire building is actually being used as a single unit.” Hinton, 219 F.2d at 326. Another case making this distinction, and relevant for the Court’s conclusion, is United States v. Whitney, 633 F.2d 902 (9th Cir. 1980), in which a search warrant for an entire building was upheld even though, on execution, the building was found to have more than one unit because the defendant “had full control of the house. This being so, probable cause existed for the search of the entire residence.” Id. at 907. Although in Whitney, the police did not have any reason to believe that the building had separate units until the house was entered, based on the informant, the court upheld the officers’ belief a search of the entire house was warranted.

Cir. 2000). Relying on Maryland v. Garrison, the court divided the inquiry into two parts. First, the defendant needs to establish that the warrant failed to describe the Creighton Avenue house with particularity, and if that succeeds, then the defendant must show that the police knew or should have known, based on the available information at the time the warrant was issued, that the warrant was over broad. White, 416 F.3d at 638.

The court then reviewed the facts which showed that the Creighton Avenue house was not a single family residence as described in the warrant, but actually a multi-unit, multi-purpose building. Upon entry, the police found one room that had been converted to a barbershop, but the remaining parts of the building were still in residential use. Each of the two floors contained a furnished bedroom, living room and kitchen. The defendant claimed that this setup, showing two apartments and the barbershop, must invalidate the warrant because the description of the premises in the warrant merely stated that the Creighton Avenue house was a single family residence. The court rejected this argument because, even though it turned out that the residence contained multiple units, the warrant would still be proper under Maryland v. Garrison. The court reached this conclusion because based on the police investigation, the police did not have knowledge to know that the building contained multiple units. Id. at 638-9.

The court in White indicated, until inside the Creighton Avenue house, it was not known that there were multiple apartments. The Court concluded that based on all the evidence, the warrant as sufficient at the time of issue, even if it did not specify multiple units.

What is different from the present case is that, here, because of the observation of the piece of mail, the police had reason to know that Defendant resided on the second floor, but the evidence available to the police had shown that the Defendant also used the first floor apartment.

3. Analysis

Under the facts as found by the Court, although Officer Graham, the affiant on the search warrant, had information from the real estate record. He also had reason to know that the building at 4834 Sansom Street may have been divided into multiple units, and also knew that the Defendant occupied the second floor, from the single piece of mail found in the trash. However, he also had reason to believe that the Defendant used the entire property by personally observing, immediately after the Defendant entered the property, lights go on in the first floor, which indicated the Defendant had access to and made use of the first floor. The officer's testimony that the Defendant made use of the first floor is corroborated by the testimony of the next-door neighbor, Leroy Randolph, who observed the family which had lived in the first floor apartment, vacate that apartment in the summer of 2004, and had seen the Defendant renovating the first floor apartment shortly before his arrest. The Court uses this fact in bolstering Graham's credibility even though this fact was not known by the police.

As to facial validity of the search warrant, defense counsel argues that since the police were obviously on notice that this was a multiple unit building, notwithstanding the evidence showed that the Defendant owned the entire building, and assuming *arguendo*, that the evidence allowed a conclusion that Defendant, as owner, had control of the entire building at the time of the search, the warrant was invalid because the police had failed to advise the issuing magistrate of the multi-unit nature of the dwelling.

As to the execution, defense counsel also argues that even assuming that the police reasonably believed that the building was a single unit building, once they approached the door and the SWAT team entered, it was obvious, from the designation of two units on the front door

and the two doorbells, as well as from the obvious fact of a separate first floor apartment, and steps leading to a second floor apartment, that it was a multi-unit apartment, and the police were obliged to stop at that point.⁴

The legal issue is whether the rule requiring particularity with regard to multiple-unit buildings is applicable when one person controls both units and police knew facts that he was using both units.

The government argued, N.T. 247, that because the police investigation showed that the Defendant had access to the entire building and their source told them that the Defendant used the building to store drugs, without any reference to separate apartments, they clearly had probable cause to search the entire building based on the warrant.

This Court holds on these facts that when a search warrant is based on facts showing that the subject of the investigation owns the building and uses the building for storing drugs, the affiant has knowledge that the building is divided into apartments, and only one is lived in by the subject, but the other is used by the subject, the Fourth Amendment is not violated by the search warrant in this case.⁵ Further, when the separate, vacant apartment, which the police saw being used by the subject, is searched pursuant to such a warrant for the entire building, the search is

⁴Defense counsel seems to concede that even if the police had stopped the search at that point, they may have had sufficient grounds to go up the steps to arrest the Defendant based on their observations of Defendant's activity as detailed in the affidavit to the search warrant. However, the affidavit does not specifically request a search of Scruggs; the affidavit only names him as owner of the property.

⁵On March 21, 2006, in U.S. v. Grubbs, #04-1414, The Supreme Court held that details such as "triggering events" need not be set forth in a search warrant. The court interprets this ruling as approving testimony on probable cause known to the police to be considered even if not set forth in the warrant or affidavit.

not invalid. Thus, the execution of the warrant covering both apartments was also lawful. The Court concludes that the policies behind the Fourth Amendment are not violated by refusing to suppress the evidence found by the police in this search. The Defendant, as owner of the entire building, had no expectation of privacy in the vacant first floor apartment, because it was unoccupied and under his control at the time of the search. In these circumstances, to require that a search warrant for a multi-unit building is per se defective because it does not describe the probable cause for each unit when both are under control of the Defendant and one of them is unoccupied, would put form over substance.

a. Good Faith Exception

The Court also notes that the government has argued the good faith exception under United States v. Leon, 460 U.S. 897 (1984), and the Court finds that the police efforts in this case were in good faith and that the requisites of Leon have been met. In Massachusetts v. Sheppard, 468 U.S. 981 (1984), the companion case to Leon, the Supreme Court applied the good faith doctrine to a case in which a warrant had been invalidated because it was overly broad.

A leading Third Circuit case on the interpretation of Leon is United States v. \$92,422.57, 307 F.3d 137 (3d Cir. 2002), in which the court applied the Leon doctrine and vacated and remanded the district court's suppression of evidence. Under Leon, where law enforcement officers act in the objectively reasonable belief that their conduct does not violate the Fourth Amendment, the marginal or non-existent deterrent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cause of exclusion. Therefore, if an officer has obtained a warrant and executed it in good faith, there is no police illegality and thus nothing to deter. The inquiry is

whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. Id. at 145.

The Third Circuit has also held that the fact that an officer executes a search pursuant to a warrant typically "suffices to prove that an officer conducted a search in good faith and justifies application of the good faith exception." Id. at 146. There are situations where an officer's reliance on a warrant is not reasonable, and one of them is "when the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized." Id.

In this case, the Court finds that the requisites of the good faith exception have been met. The first application of Leon pertains to the SWAT team that entered the building, although this issue does not provide an answer as to the seizure of the drugs and guns. The SWAT team officers were relying on the search warrant in entering the building, seizing the Defendant, and securing the building. Under Leon, the SWAT team was acting on the basis of the warrant and this was in good faith.

The contraband was found after Officer Graham and his narcotics investigators were invited into the building. The application of the good faith rule as to Officer Graham warrants the Court finding that he was presenting the facts to the issuing magistrate in good faith. Reviewing the totality of facts known to Officer Graham when he presented the affidavit to the issuing magistrate, although Officer Graham had some reason to know that the building may have been divided into apartments, he also had reason to believe that Defendant was in control of and used the entire building, and thus there was no necessity, in order for the search warrant to be valid, that it describe multiple apartments.

Based on the probable cause that was presented to the issuing magistrate, particularly

where there is no indication presented to the magistrate that there were multiple units in this building occupied by third parties, there was no reason for the magistrate to hesitate to issue a warrant for the building. The magistrate in this case did not make an error that was so obvious that a law enforcement officer, without legal training, should have realized upon reading the warrant that it was invalid, and should have thus declined to execute it.

Nor will the Court suppress the evidence in this case because the officer purposely withheld information from the issuing magistrate. The officer did have knowledge and information sufficient to search the entire building, including both the first and second floor apartments, but did not specify the probable cause for each unit in the affidavit. If the first floor apartment had, in fact, been rented or occupied by a third party, the outcome in this case would assuredly be different, but because the evidence showed the first floor was under the control and use of the Defendant, there was no error committed by the police officer or by the issuing magistrate. Many hours of good police work had been invested in finding the Defendant in possession of a large quantity of cocaine, as the source said was likely to occur, and that it would be stored at 4834 Sansom Street. Aside from the piece of mail in the trash, nothing in this investigation warranted a description of the internal make-up of 4834 Sansom Street.

There is substantial evidence of professional and competent police work in this case in good faith. The investigation lasted over several months and established without any doubt from the police officers' personal observations that Defendant was involved in heavy duty narcotic trafficking. The informant who advised the police that the Defendant was expecting a major shipment of cocaine was also generally reliable, and the police prepared what is an extremely detailed affidavit by any standard. The warrant could have noted that the building had multiple

units, and the facts that warranted the police believing that Defendant had use of the entire building, because the police were on notice of this before beginning the search. Nonetheless, the failure of the police to put this information in the warrant will not invalidate the search since the evidence known to the police in good faith was that the Defendant had access to, and had in fact used the first floor, as well as lived on the second floor, and the evidence presented to the magistrate was that defendant owned the entire building and uses it to store drugs. The only omission was the fact of two apartments. Under all the facts reviewed above, it is not a fatal deficiency to prevent application of the good faith exception.

B. Suppression of Incriminating Statement

The next issue which is the subject of the Motion to Suppress deals with incriminating statements which the Defendant made after his arrest. The testimony is uncontradicted from the police officers themselves that the Defendant was first warned of his rights after his arrest on December 8 from the standard Philadelphia police Form No. 75-3, but the officer did not question him about the drugs or guns. The Defendant did not make any verbal acknowledgment of the waiver of his rights. N.T. 130-34. At some point, the Defendant said that his present defense counsel would represent him in this matter. N.T. 137-38. One of the interrogating officers testified that the Defendant said “I’m going to get as counsel Dennis Cogan.” N.T. 139. The police did not consider this an intent of the Defendant to want a lawyer at that time. N.T. 140. When DEA Agent Millan arrived, Police Officer Reynolds, who had warned the Defendant of his rights, advised Millan that he had advised the Defendant of his rights. N.T. 141. According to Officer Reynolds, when the Defendant was advised of his rights, he merely nodded his head in an affirmative fashion, but did not say anything. N.T. 143. The Court is compelled

to find under established case law that this is not a knowing and voluntary waiver. Agent Millan testified that after he identified himself to the Defendant, he did not advise him of his rights.

N.T. 146. Agent Millan assumed, from the way the Defendant was speaking freely, that he had been informed of his rights. N.T. 148.

The Defendant was then taken to the Police Administration Building for the night and was picked up the next morning December 9, at approximately 7:00 a.m. The Court concludes that this would have been approximately eight hours after Defendant's first discussions with the police the prior night had ended. DEA Agent Millan testified he advised defendant of his Miranda warnings that morning and defendant verbally waived his rights, agreeing to speak about the drugs. N.T. 154-718. The context of the statement shows that defendant was identifying his source of supply, and was considering cooperating with authorities, which allows an inference of voluntary waiver of rights. At some point on December 8, during the second interrogation defendant told Officer Millan that he would be represented by Dennis Cogan. N.T. 154. Subsequently, an FBI agent arrived and the Defendant told the FBI agent that he did not want to make any further statements and at that point all questioning stopped..

According to Officer Millan, the Defendant had made incriminating statements, both on the evening of December 8, and also on the following morning, December 9, before the FBI agent arrived.

The difficult question which the Court must resolve is whether this second interrogation on December 9 and the alleged waiver that took place at that time was inadequate as the proverbial "fruit of the poisonous tree" or whether there was a new independent knowing and voluntary waiver by the Defendant that would make his second statement admissible.

The Defendant characterizes this as an issue presented under Edwards v. Arizona, 451 U.S. 477 (1981), where the court held that once a suspect invokes his right to counsel, “a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.” Id. at 484. The court also said that once the suspect invokes the right, there can be no further police initiated interrogation “until counsel has been made available to him unless the [suspect] himself initiates further communication.” Id. at 484.

In this case, however, after the first warning on December 8, the Defendant did not invoke his right to counsel, but rather proceeded, without an explicit waiver of his right to counsel, to give the police an incriminating statement. The government relies on Oregon v. Lstad, 470 U.S. 298, 318 (1985). In Lstad, the defendant made an incriminating statement in his home without having received Miranda warnings. After being taken to the police station where he was advised of and waived his Miranda rights, he gave a written confession. After his conviction, he asserted that the written confession was improperly admitted, and the Oregon court agreed. In reversing, the Supreme Court held it was “an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect’s ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some undetermined period.” Id. at 309. The Court continued to note that although Miranda “requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.” Id. Absent deliberate coercion or improper tactics in obtaining an unwarned statement, a

careful and thorough administration of Miranda warnings cures the condition that rendered the unwarned statement admissible. Id. at 311-12.

The Supreme Court noted an exception to the Lstad rule in Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601 (2004). In that case, inapplicable to the present case, the police had secured a statement without warnings having been given and after a twenty-minute break, then gave the suspect the Miranda warnings and she signed a waiver and made more incriminating statements.

In Seibert, the court announced a five-factor test to determine the admissibility of a second confession given after an earlier statement without Miranda warnings:

1. The completeness and detail of the questions and answers in the first round of interrogation;
2. The overlapping content of the two statements;
3. The timing and setting of the first and second rounds;
4. The continuity of police personnel; and
5. The degree to which the interrogators' questions treated the second round as continuous with the first.

542 U.S. at 615, 124 S. Ct. at 2612 (four judge plurality).

The Third Circuit has instructed district courts to follow the Seibert plurality opinion as narrowed by Justice Kennedy, who wrote that the test should be limited to two parts - first, whether the officers made a deliberate choice to flaunt Miranda in the first round of interrogation and, if not, the second confession could be admitted if curative measures had been taken. See United States v. Kiam, 432 F.3d 524,532 (3d Cir. 2006).

Both Lstad and the present case have different facts than those in Seibert. In Reinert v.

Larkins, 379 F.3d 76 (3d Cir. 2004), Judge Becker reviewed in a different factual situation this line of cases. In the present case, the evidence is uncontradicted that the Defendant was given his Miranda warnings before any statements were made, whereas in Lstad, they were not given before the first statement. The first statement is not admissible because the court finds that the waiver was not a knowing waiver as required by Miranda and its progeny. However, the Court finds that after the interval of eight hours, the Miranda warnings and receipt of a knowing and voluntary waiver on the morning of December 9, 2004, attenuated any taint from the first interrogation. Further, the Court does not find a deliberate choice to flaunt Miranda in the first round of interrogation. Thus, applying Lstad and the governing Third Circuit cases interpreting it, the Court concludes that the Defendant's second statement should be admissible.

ORDER

The Defendant's Motion to Suppress is GRANTED as to the defendant's statements to police on December 8, 2004, but is otherwise DENIED .

Dated: March 23, 2006

MICHAEL M. BAYLSON, U.S.D.J.