IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case Nos. S-2012-553
	)	S-2012-554[1]
FRANK LEE ARMSTRONG	)	
and SHEILA CAROL JOHNSON,	)	
	)	
	)	
Appellees.	)	

OPINION

A. JOHNSON, JUDGE:

The State of Oklahoma appeals orders entered by Judge George W. Butner of the District Court of Seminole County in Case Nos. CF-2010-200 and CF-2010-202(B), sustaining Defendants Armstrong's and Johnson's discrete motions to suppress evidence obtained during a search of a vehicle occupied by them.[2] We exercise jurisdiction pursuant to 22 O.S.2011, § 1053(5) and affirm the district court's ruling.

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[1] Armstrong and Johnson, the two appellees, were arrested together. They retained the same attorney to represent them in their respective drug cases and pressed the same winning argument in their motions to suppress. The State raises the same issue challenging the suppression rulings in both appeals and Armstrong's and Johnson's responses are identical. Pursuant to Rule 3.3 (D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), we consolidate these two appeals for disposition in a single opinion.

[2] The Orders sustaining Armstrong's and Johnson's motions state that the motions were heard on May 9, 2012. The judge's rulings sustaining the motions to suppress are memorialized in court minutes dated June 13, 2012, and the judge ordered defense counsel to prepare Orders reflecting the rulings. The actual Orders were not signed by the judge and filed until October 24, 2012.

BACKGROUND

On June 10, 2010, agents with the District 22 Drug Task Force and Oklahoma Bureau of Narcotics met with an informant known as Morgan Gold. Gold stated that she could purchase methamphetamine from Frank Armstrong of Konowa, Oklahoma, and that she had last purchased $50 worth of methamphetamine from him on June 8, 2010. That same day, the agents oversaw a controlled purchase of methamphetamine between Gold and Armstrong.[3] The following day, June 11, 2010, Josh Dean of the District 22 Drug Task Force applied for a search warrant of Armstrong's residence and its appurtenances. Special Judge Gayla Arnold authorized a search and signed the search warrant at 1630 hours. The warrant was served and executed on June 21, 2010. Agents found Armstrong and Johnson sitting in a car in the front yard of Armstrong's residence. A search of the car yielded four smoking pipes, a metal cylinder containing a baggie of methamphetamine, two baggies containing marijuana and one used hypodermic needle.

Based upon the search and previous controlled purchase of methamphetamine, the State charged Armstrong and Johnson with various drug related charges.[4] Each waived the right to a preliminary hearing. They retained

[3] There was an unknown female with Armstrong when Gold made the controlled purchase.

[4] The State charged Armstrong in Case No. CF-2010-200 with Count 1 – Unlawful Delivery of Methamphetamine (based on the controlled buy with Gold); Count 2 – Unlawful Possession of Marijuana with Intent to Distribute; and Count 3 – Unlawful Possession of Methamphetamine with Intent to Distribute. The State charged Johnson in Case No. CF-2010-202(B) with Count 1 – Unlawful Possession of Methamphetamine, Count 2 -Misdemeanor Unlawful Possession of Marijuana and Count 3 – Misdemeanor Unlawful Possession of Drug Paraphernalia (Count 3).

the same counsel and filed motions to suppress the evidence obtained from the search of the car in their respective cases.

After a hearing, District Judge Butner sustained the motions, finding:

> that officers executing the search warrant in this case exceeded the scope of the warrant in that they failed to execute the search warrant "immediately" as set out in the language of the search warrant. Thus the officers executed the search warrant outside the time for execution as set by the issuing judge.

This case raises the sole issue of whether the district court erred by finding that the warrant was not timely executed. We affirm.

DISCUSSION

This Court reviews a district court's ruling on a motion to suppress evidence for an abuse of discretion. *State v. Goins*, 2004 OK CR 5, ¶ 7, 84 P.3d 767, 769. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *State v. Delso*, 2013 OK CR 5, ¶ 5, ___P.3d___. An abuse of discretion is also described as a clearly erroneous conclusion or judgment, one that is clearly against the logic and effect of the facts presented. *Id.; see also Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. In reviewing the district court's suppression order, we accept the district court's factual findings unless clearly erroneous, review questions of law *de novo*, and view the evidence in the light most favorable to Armstrong and Johnson, the prevailing parties below. *Underwood v. State*, 2011 OK CR 12, ¶ 12, 252 P.3d 221, 232, *cert. denied*, ___U.S.___, 132 S.Ct. 1019, 181 L.Ed.2d 752 (2012); *Coffia v. State*, 2008 OK CR 24, ¶ 5, 191 P.3d 594, 596.

Title 22 O.S.2001, § 1231 provides, "[a] search warrant must be executed and returned to the magistrate by whom it is issued within ten (10) days. After the expiration of these times respectively, the warrant, unless executed is void." "A warrant is void if not executed and returned within ten days. A late warrant is void only if not executed, and this court has held that return on an executed warrant may be made at any time before trial." *Bryan v. State,* 1997 OK CR 15, ¶ 22, 935 P.2d 338, 353.

The Court discussed time limitations for the execution of search warrants in *Simmons v. State,* 1955 OK CR 89, ¶ 9, 286 P.2d 296, 297-98 and stated:

> The matter of the issuance of a search warrant calls for the exercise of judicial discretion . . . It is an integral part of our system of government that an officer assuming to execute process upon the property or person of a citizen should execute it promptly. The court issuing the warrant might determine from the evidence before him taken on oath that the premises described were such that the person allegedly in possession of the contraband might flee if the warrant was not promptly served or he might determine that it was in an area where there was a constant turnover of population and that a warrant which would be valid against the temporary resident of the premises would only serve to harass a subsequent occupant who might have moved to the premises shortly after the warrant was issued. At any rate we feel that the court issuing the search warrant has a discretion in fixing the time in which the warrant could be served subject only to the provision of the statute, 22 O.S.1951 § 1231, supra, which provides that it must be served within ten days. If the court feels that the warrant should be served within a lesser time than ten days, he may so place such limitation in the warrant but if no limitation is placed in the warrant fixing a lesser time, then the warrant may be executed within ten days after its issuance.

The parties agree that the search warrant in this case was executed within ten days of its issuance.

The search warrant in this case followed the prescribed format and language in 22 O.S.2001, § 1226 and commanded the officers "to make the immediate search" of the property described in the warrant. Neither party cites any authority concerning the term "immediate" as a limitation on the execution of a search warrant and its effect on the ten day time limit established in 22 O.S.2001, § 1231.

The Orders sustaining the motions to suppress state that the district court considered the parties' briefs "along with evidence submitted in support of the motion." The district court concluded under the evidence that the officers did not execute the warrant immediately or with all due haste as ordered by the magistrate. The hearing on the motions to suppress was not recorded and there are no evidentiary facts to review that would allow us to find that the district court's ruling was in error.[5] The burden is on the appellant to provide a sufficient record to dispose of claims raised. *Simpson v. State,* 1994 OK CR 40, ¶ 42, 876 P.2d 690, 703; *Williams v. State,* 1988 OK CR 221, ¶ 7, 762 P.2d 983, 986. Without evidence in the record to the contrary, we presume the rulings of the district court are correct. *See Simpson,* 1994 OK CR 40, ¶ 42, 876 P.2d at 703. For these reasons, we find no evidence that the

[5] Armstrong and Johnson have each filed a motion to strike Appellant's Brief and dismiss appeal because the Appellant's briefs contain no citations to the record and therefore do not comply with this Court's rules. The failure to provide citations to the record is a violation of our rules, but the problem here is that there is no record at all. According to the Designation of Record in these appeals, no transcript is available of the evidentiary hearing. It states that the "State of Oklahoma and Defense Counsel will submit affidavits and/or stipulate to what transpired during the proceedings not transcribed in accordance with the Court of Criminal Appeals Rule 2.2 (C)." The record before us contains no such affidavits or stipulations. The motions to strike Appellant's briefs and dismiss appeals for failing to cite to the record are DENIED.

district court abused its discretion in sustaining the motions to suppress and affirm its rulings.

DECISION

The Orders of the District Court sustaining the appellees' motions to suppress evidence are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEMIMOLE COUNTY
THE HONORABLE GEORGE W. BUTNER, DISTRICT JUDGE

APPEARANCES AT TRIAL
CHRISTOPHER G. ANDERSON
ASSISTANT DISTRICT ATTORNEY
SEMINOLE COUNTY
P.O. BOX 1300
WEWOKA, OK 74884
ATTORNEY FOR STATE

DOUGLAS L. PARR
ATTORNEY AT LAW
228 ROBERT S. KERR
SUITE 715
OKLAHOMA CITY, OK 73102
ATTORNEY FOR DEFENDANT

APPEARANCES ON APPEAL
CHRISTOPHER G. ANDERSON
ASSISTANT DISTRICT ATTORNEY
SEMINOLE COUNTY
P.O. BOX 1300
WEWOKA, OK 74884
ATTORNEY FOR APPELLANT

DOUGLAS L. PARR
ATTORNEY AT LAW
228 ROBERT S. KERR
SUITE 715
OKLAHOMA CITY, OK 73102
ATTORNEY FOR APPELLEE

OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur
SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur

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