IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RUSSELL WAYNE HORN, JR.,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2006-736
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

CHAPEL, JUDGE:

Russell Horn was tried by jury and convicted of Count I: Trafficking in Illegal Drugs (methamphetamine) in violation of 63 O.S.Supp.2004, §2-415 and Count II: Unlawful Possession of a Controlled Drug (cocaine) in violation of 63 O.S. Supp.2004, § 2-402, After Former Conviction of Two or more felony offenses in the District Court of Tulsa County, Case No. CF-05-914.[1] In accordance with the jury's recommendation, the Honorable Clancy Smith sentenced Horn to concurrent sentences of Life Imprisonment without the Possibility of Parole for Count I, and nineteen and a half (19 1/2) years' imprisonment for Count II. Horn has perfected his appeal to this Court.

At approximately 6:15 a.m. on February 24, 2005, Tulsa Police Officers executed a search warrant on Horn's home and "a certain vehicle." Upon entering the residence, the Officers secured Horn and commenced their search, which revealed $4,805.00 found in Horn's pocket and .71 grams of methamphetamine found under a couch cushion. Officer Corbin Collins found

a set of car keys on the coffee table and sent ATF Agent Matthew Abowd to search Horn's vehicle.

When Agent Abowd attempted to unlock the car with the keys, he set off the alarm. Attempting to turn off the alarm, Agent Abowd opened the hood to disconnect the battery. Once opened, Agent Abowd immediately noticed a black camera bag next to the brake cylinder. The search of the camera bag revealed 20.73 grams of methamphetamine, almost 5 grams of cocaine, and one Xanax tablet.

In his sole proposition, Horn argues that the search of his car was illegal because it was not specifically described within the search warrant. Horn filed a motion to suppress, which was denied. Horn renewed his arguments for suppression in a second motion immediately before trial. Again, it was denied. We now review the issue *de novo* giving deference to the trial court's findings of fact.[2]

A valid warrant must specifically describe the place to be searched so that the executing officer can find it without any additional information.[3] This rule is designed to limit the discretion of law enforcement officers executing the warrant. A warrant deficient in its description is invalid. Here, the warrant specifically described Horn's apartment but failed to specifically describe the vehicle. "A certain vehicle" would allow law enforcement to search any vehicle under the warrant. As the officers could not determine which vehicle to search

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[1] Horn was also tried and convicted of Count III: Unlawful Possession of a Controlled Drug (Xanax). However, this conviction was dismissed by the trial court at sentencing.
[2] *Seabolt v. State*,152 P.3d 235, 237 (Okl.Cr.2006).

without additional information, the search of Horn's car was not authorized based upon the description contained in the warrant.

The State submits that even if the vehicle's description is inadequate this Court should uphold the search because the officers knew that Horn drove a black Saturn. Other courts have considered the knowledge of the executing officer to determine the adequacy of a warrant's property description.[4] We are not persuaded by this argument. If the officers knew that Horn drove a black Saturn before obtaining the warrant, they could have and should have specifically described the car. This Court will not start down the slippery slope of applying an officer's knowledge to a deficient description. Doing so, would render the specificity requirement meaningless.[5]

The State also argues that the search of Horn's car was proper either because (1) the vehicle was within the apartment's curtilage or (2) the search was in "good faith." These arguments fail.

Any item that could contain the illegal items to be seized and is within the curtilage of the home to be searched falls within the terms of the warrant specifically describing the home.[6] Here, the warrant specifically described Horn's residence, thus the search of Horn's curtilage was authorized. However, this was not a single family home but an apartment building. This requires the

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[3] *Anderson v. State,* 657 P.2d 659, 661 (Okl.Cr.1983).

[4] *U.S. v. Hutchings,* 127 F.3d 1255, 1259)10th Cir. 1997)(court permitted to consider executing officer's knowledge in determining the adequacy of the property description in the warrant); *U.S. v. Occhipinti,* 998 F.2d 791, 799 (10th Cir. 1993)(same).

[5] *Anderson,* 679 P.2d at 661; (loose interpretation of the rule of specificity with exceptions would eventually erode its requirement in a search warrant altogether).

[6] *Beeler v. State,* 677 P.2d 653, 657 (Okl.Cr.1984)(automobile in driveway adjacent to house within home's curtilage).

court to assess whether the parking lot of multi-family dwelling falls within the curtilage of a dwelling in the complex.

The central consideration when determining an area is curtilage is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."[7] To aid this analysis, we consider four factors: "[1] the proximity of the area claimed to be curtilage to the home; [2] whether the area is within an enclosure surrounding the home; [3] the nature and uses to which the area is put; and [4] the steps taken by the resident to protect the area from observation by people passing by."

Applying these factors, this parking lot was not a part of Horn's residence's curtilage. The parking lot was approximately fifty (50) feet from his apartment. There was no enclosure around the parking lot. The area was used as a common parking lot for all residents. Horn did not attempt to conceal his car in the parking lot to protect it from public view. Lastly, the area was open to all tenants and public visitors. This parking lot was not intimately tied to any apartment residence. We join other courts considering this issue in finding that parking lots of multi-family dwellings are not part of the curtilage for any of the units.[8]

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[7] *U.S. v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 941 L.Ed.2d 326 (1987).

[8] *Mack v. City of Abilene*, 461 F.3d 547, 554 (5th Cir.2006)(applying *Dunn* factors and finding apartment's curtilage did not extend to parking area); *U.S. v. Stanley*, 597 F.2d 866, 870 (4th Cir. 1979)(common parking lot at mobile home park not within any mobile home's curtilage); *U.S. v. Cruz-Pagan et.al*, 537 F.2d 554, 558 (1st Cir. 1976)(finding an apartment tenant's dwelling does not extend beyond his residence and that underground parking garage was not curtilage); *Commonwelath v. McCartney*, 705 N.E.2d 1110, 1113 (Mass.1999)(apartment parking area not within curtilage), *cf Joyner v. State*, 303 So.2d 60 (Fla.1974)(car in parking lot

The State finally asserts that even if the search was improper, it should be upheld as it was in "good faith." The Supreme Court adopted the "good faith" exception to uphold a search where the exclusionary rule's purpose of deterring police misconduct was not furthered by suppressing the evidence.[9] This Court has consistently rejected its previous opportunities to adopt the "good faith" exception.[10] We do so again.

The "good faith" exception to exclusionary rule is limited. It does not apply when the purpose of the exclusionary rule in deterring police misconduct is furthered.[11] Moreover, "[f]ormulations of the so-called 'good faith' exception to the exclusionary rule do not include within their scope actions in ignorance of established law."[12] The officers knew of their need to describe specifically all the property that they wanted to search because they did so for Horn's residence. However, they failed to describe his car. We find that the "good faith" exception does not apply.

The Officer that obtained the warrant knew that Horn drove a black Saturn but failed to describe it in the warrant. We will not further erode clearly established law to save this search, however unfortunate the result. Law enforcement know the constitutional limitations placed upon them in

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identified by keys found in apartment was within apartment's curtilage). A vehicle might be within a multi-family dwelling's curtilage if the parking spaces were assigned, enclosed or attached to a particular unit within the complex.

[9] *U.S. v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

[10] *Dodson v. State,* 150 P.3d 1054, 1058-59 (Okl.Cr.2006)(declining to adopt good faith exception to illegal anticipatory warrant); *Solis-Avila v. State,* 830 P.2d 191, 192 (Okl.Cr.1992); *Beeler,* 677 P.2d at 657 (Okl.Cr.1984)(this Court declined to recognize a "good faith" exception before *Leon*).

[11] *Dodson v. State,* 150 P.3d at 1058-59.

[12] *Hightower v. State,* 672 P.2d 304, 307 (Okl.Cr.1984).

conducting searches of people, places or their effects. Failure to follow those rules requires all items seized from Horn's vehicle to be suppressed from evidence. As a result, the Judgment and Sentence in Count I is reversed and remanded for new trial and the Judgment and Sentence in Count II is reversed and remanded with instructions to dismiss.

Decision

The Judgments and Sentences of the trial court on Count I is **REVERSED** and **REMANDED** for a new trial and Count II is **REVERSED** and **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, J.
LUMPKIN, P.J.: DISSENT
C. JOHNSON, V.P.J.: CONCUR
A. JOHNSON, J.: DISSENT
LEWIS, J.: CONCUR IN RESULTS

LUMPKIN, PRESIDING JUDGE: DISSENTING

After thoroughly considering the facts of this case, I must dissent to the Court's Opinion.

It is undisputed that police executed a valid search warrant for the apartment in this case. The affidavit shows an experienced police officer working with two separate confidential informants, one of whom was described as "reliable" (he'd given the officer good information resulting in 20 previous convictions). Both indicated Appellant was selling large amounts of methamphetamine from his residence. The officer set up four separate controlled buys from Appellant. The reliable informant conducted three; the other informant conducted one. All four resulted in successful purchases of methamphetamine.

Based upon this information, officers obtained a search warrant for Appellant's residence. The warrant included boilerplate language that it would apply to the area "within a certain vehicle," but it is clear the focus of the search was not upon a vehicle, but the residence from where all the drug purchases had previously been made, as set forth in the specific descriptive language, which is not boilerplate.

Still, we're too focused on the warrant/affidavit in this case. I agree the warrant does not sufficiently describe the car, and curtilage is probably a stretch when we're talking about an apartment (even though this one is actually a four-plex).

With car searches, the focus should be on probable cause rather than the language in a search warrant affidavit. As Judge Arlene Johnson recognized in the recent case of *Gomez v. State*, 2007 OK CR 33, ___ P.3d ___, "probable cause sufficient to justify a warrantless search of a vehicle exists if an officer reasonably believes the vehicle contains contraband or evidence of a crime." *Gomez* also rejects the notion that exigent circumstances have to be present before conducting a warrantless (but probable cause-based) vehicle search.

Here, the officers serving the warrant knew Appellant had been selling drugs. In a briefing prior to serving the warrant, officers were informed that Appellant had been seen driving a black Saturn. One officer had seen him driving it four times, and Appellant had always parked the Saturn in the same spot, at the bottom of a staircase leading to his back door, one of only three available spots for that building.

As officers approached the apartment from the rear, they saw the Saturn, again parked in the same place it had always been. As they drew close to the Saturn—on their approach to the apartment—they heard the chirping sound of the car's alarm being activated. This was circumstantial evidence that both they and the car were being monitored.

After serving the warrant, officers found drugs in the apartment, albeit a smaller amount than they'd expected. However, while searching the apartment living room, they observed surveillance equipment that was monitoring the Black Saturn. That is, cameras were located outside

the apartment and were trained on the car. A television was on inside the apartment, showing the car parked in front of the back stairs. During their search, officers also found two sets of keys to the car in the apartment, including one with an alarm switch. They also found receipts for the car's alarm system.

Based upon all this information, I find the officers had probable cause to believe they would find contraband inside the car. The alarm and surveillance equipment played a large role in the trial court's decision to find this search valid and allow the admission of the evidence found inside. I see no abuse of discretion in that decision. Indeed, I believe the ruling was absolutely correct.

A. JOHNSON, JUDGE, DISSENTING:

The majority opinion finds that the black Saturn was neither specifically described in the search warrant nor found within the curtilage of the premises to be searched and holds therefore that the search of that vehicle cannot be validated by the warrant. That said, the opinion fails to consider the next question: whether a warrantless search of the automobile was reasonable under the circumstances. Because I believe that question must be answered in the affirmative, I dissent.

The relevant facts here include the following: (1) as the officers approached the quadraplex where Horn lived they noticed surveillance cameras on the outside of the building; (2) as they passed the Saturn automobile they heard a "chirping" sound that they associated with the setting of a car alarm; (3) Horn had been seen by police driving that black Saturn while under police surveillance for suspicion of possessing and selling drugs; (4) once inside Horn's apartment, the officers found a surveillance camera was focused on the black Saturn providing a live image of the car from a monitor in Horn's living room; (5) an officer used car keys—found on a coffee table in Horn's living room—to attempt to open the Saturn, setting off the car alarm; (6) that officer opened the hood in a futile attempt to disconnect the alarm; and (7) under the hood, he saw the camera case subsequently seized and found to contain drugs and paraphernalia.

Under these circumstances the police clearly had probable cause to believe that the black Saturn contained contraband belonging to Horn. Their

warrantless search of this mobile vehicle was constitutionally reasonable. *See, e.g., Gomez v. State*, 2007 OK CR 33, ___ P.3d ___ .