[Cite as *State v. Polk*, 2005-Ohio-774.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84361

STATE OF OHIO,	:	
	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
THRICE POLK,	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 24, 2005
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-436394
JUDGMENT	:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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JOSEPH J. NAHRA, J.*:

{¶ 1} The State of Ohio appeals the trial court's order that granted Thrice Polk's motion to suppress evidence. After the police searched Polk's home on January 18, 2003, he was charged with one count of possession of drugs in violation of R.C. 2941.141, one count of drug trafficking in violation of R.C. 2925.03 with a firearm specification, and one count of having a weapon while under a disability in violation of R.C. 2923.13. The State claims in three assignments of error that the trial court erred in determining the search was illegal. We reverse and remand.

{¶ 2} The State's first assignment of error states: "The trial court erred when it held a hearing on a motion to suppress when a search warrant was obtained and there was no showing that misstatements were made knowingly, or with a reckless disregard for the truth contrary to *Franks v. Delaware*, 438 U.S. 154 (1978)." We will not address the State's first assignment of error since it is made moot by our ruling on its second assignment of error, which states: "The trial court erred when it found that the search warrant was overly broad when it described the place to be searched as a single-family unit rather than a multi-unit dwelling." Appellate review of a trial court's ruling on a motion to suppress presents mixed questions of law and fact. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, 707 N.E.2d 539. An appellate court is to accept the trial court's factual findings unless they

are clearly erroneous. *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. We are therefore required to accept the factual determinations of a trial court if they are supported by competent and credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. The application of the law to those facts, however, is subject to de novo review. Id.

{¶ 3} The trial court found that Polk's home was subdivided into a two-family house. Polk lived in the second-floor apartment and was not mentioned in the affidavit supporting the warrant. Near the front door, the first-floor unit was separated by a glass partition and a curtain from a hallway and stairs that led to Polk's second-floor apartment. The entrance to the downstairs unit was through an outside door at the back of the house. A second back door provided a back entrance to the second floor unit.

{¶ 4} Police sought the search warrant as the result of an investigation that revealed suspected drug activity. Police Detective David Sims testified at the hearing that he saw heavy pedestrian traffic at the house and arranged for an undercover agent to conduct a controlled buy. The detective acknowledged he mistakenly believed the street number to be 1855 instead of 1853. The trial court ruled that this error reflected in the warrant was not a fatal flaw. But, it ruled that the warrant did not describe the house as a two-unit residence, and did not describe Polk's second-floor apartment as an area to be searched. In making its factual determinations, the trial court found that the house

appeared to be a single-family home when viewed from the street. There was only one front door and one doorbell at the front of the house. The trial court further found that utilities for both the first-floor and second-floor units were charged on the same bill. Finally, the trial court found that, consistent with current practice, the police consulted the county's computer for further information on the house, but the computer was not functioning. The trial court ruled that the search was illegal because the police did not make reasonable efforts to determine the number of units in the house. We find that the trial court's factual determinations are supported by competent and credible evidence. But, we review de novo its legal determination that the police failed to make reasonable efforts to determine the number of units in the house. *State v. Harris* at 546.

{¶ 5} In *Maryland v. Garrison* (1987), 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72, the Supreme Court reversed the lower court's ruling that invalidated a search warrant issued to search the entire third floor of a building. It turned out the third floor was divided into two apartments. Id. at 80. The Court ruled that the search warrant was nevertheless valid because when "the police applied for the warrant and when they conducted the search pursuant to the warrant, they reasonably believed that there was only one apartment on the premises described in the warrant." Id. The Court recognized that if the police had known there were two separate dwelling units on the third floor, they would have been

obligated to exclude the respondent's apartment from the scope of the search. Id. at 85. But, the constitutionality of the police's conduct must be judged "in light of the information available to them at the time they acted." Id. Likewise here, the reasonableness of the police's belief that 1853 East 70th Street was a single-family home must be judged in light of the information available to the police.

{¶ 6} According to the trial court's findings, the information available to the police showed 1853 East 70th Street to be a single-family home. The house appeared to be a single-family home when viewed from the street. Utilities for both the first-floor and second-floor units were charged on the same bill, so even if police had checked the utilities, the information available would not have revealed a two-family home. And, although the county's computer system may have revealed the home as a multi-unit dwelling, the computer system was not functioning and, thus, was unavailable. We rule that based on information available to the police, their belief that 1853 East 70th Street was a single-family home was reasonable. The State's second assignment of error is sustained.

{¶ 7} The State's third assignment of error challenges the trial court's ruling that the forced entry into the house was unreasonable. It states: "The trial court erred when it granted defendant's motion to suppress when it ruled that the state failed to meet it's burden in showing that the police did not have to

knock and announce." We find that this assignment of error has merit.

{¶ 8} Detective Sims testified at the hearing that he observed SWAT execute the warrant. He testified at page 55 of the transcript that he saw SWAT members open the screen door at the front of the house, knock on the main door, and announced themselves as SWAT attempting to gain entry. Detective Sims further testified that he heard two gun shots come from inside the home and heard two gun shots returning fire. Based on this testimony, the trial court concluded in its oral findings of fact at pages 107-108 of the transcript that the police did knock and announce themselves before gaining entry. The State's third assignment of error is sustained.

{¶ 9} We reverse the trial court's order that granted Polk's motion to suppress and remand this case to the trial court for further proceedings consistent with this opinion.

Judgment reversed and remanded.

This cause is reversed and remanded for proceedings consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellee its costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JOSEPH J. NAHRA*
JUDGE

SEAN C. GALLAGHER, P.J., CONCURS.

ANTHONY O. CALABRESE, JR., J., DISSENTS WITH SEPARATE OPINION.

(*SITTING BY ASSIGNMENT: Judge Joseph J. Nahra, Retired, of the Eighth District Court of Appeals.)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84361

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	
	:	D I S S E N T I N G
	:	
vs.	:	O P I N I O N
	:	
	:	
THRICE POLK	:	
	:	

Defendant-Appellee :

DATE: FEBRUARY 24, 2005

ANTHONY O. CALABRESE, JR., J. DISSENTING:

{¶ 10} I respectfully dissent from the majority's decision. I believe that the trial court acted properly and I would, therefore, affirm the trial court.

{¶ 11} Appellant argues in its brief that the trial court erred and ran afoul of *Franks v. Delaware*; however, I do not find *Franks* to be applicable to the suppression issues of the case at bar. In *Franks,* the defendant challenged the affidavit used to obtain the search warrant by alleging that the misstatements included in the affidavit were not inadvertent but made in "bad faith." This was not the argument made in the case at bar.

{¶ 12} In the case at bar, the state admitted it made a mistake with the address; however, the defendant never alleged that Detective Sims' sworn statements rose to the level of bad faith. In addition, the trial court is clear in its amended ruling on appellee's motion to suppress that it did not grant the suppression based on a *Frank's* issue.

{¶ 13} Appellate review of a trial court's ruling on a motion to suppress presents mixed questions of law and fact. See *State v. McNamara* (1997), 124 Ohio App.3d 706, 710. An appellate court is to accept the trial court's factual findings unless they are

"clearly erroneous." *State v. Long* (1998), 127 Ohio App.3d 328, 332. We are, therefore, required to accept the factual determinations of a trial court if they are supported by competent and credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546. The search warrant described the place to be searched in an insufficient and inaccurate manner. Therefore, the trial court did not err when it found the warrant to be overly broad.

{¶ 14} The trial court explained its actions in detail in its May 12, 2004 amended ruling on motion to suppress. The trial court stated in its ruling that "no testimony was presented as to what the police did before forcing entry to the house."[1] Moreover, the trial judge noted that a computer search was not conducted. The trial judge stated:

> **"The police did not make a search to determine whether the two-family subdivision had been registered with the City of Cleveland. One officer testified that at the time the warrant was sought *it was police practice to consult the county's computer for further information on the house, but the computer was not functioning. If a computer search had been conducted, the police would have learned, of course, that the house number was inaccurate.***
>
> **"That would have obliged the police to provide a different address for the place to be searched under the warrant so that the warrant would be fully accurate. The computer search would have revealed whether the house was listed as a single or a two-family home. No evidence has been presented concerning that listing."**[2]
>
> (Emphasis added.)

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[1]See trial court's amended ruling on motion to suppress, May 12, 2004, p.2.

[2]See trial court's amended ruling on motion to suppress, May 12, 2004, p.4.

{¶ 15} The trial court went on to state that no evidence was presented that, as in *Garrison*,[3] an inquiry was made by the police concerning a possible conversion of the house to a two-family dwelling.[4]

{¶ 16} The holding in *Maryland v. Garrison* (1987), 480 U.S. 79, turned on whether the police had made reasonable efforts to determine the nature of the dwelling before they entered. In *Garrison,* the court found that reasonable steps had been taken. Here, the trial court distinguished this case from *Garrison* in that the police in the case at bar did not make reasonable efforts to determine the nature of the dwelling before they entered.

{¶ 17} Furthermore, the trial court ruled that "no evidence of any urgency has been presented by the State," and went on to state:

> **"The danger of not seeking such information is apparent from the facts in this case. The first floor occupant apparently became fearful when the police forced entry through his front window. In response, he shot at them. The police shot back and injured him. *A more thorough effort to determine the nature of the occupancy and where Walter Freeman went when entering the house should have alerted the police to the fact that they were entering a two-family house and to the importance of not forcing entry through a first floor unit, unless that was the location of the suspected drugs.* As it was, nothing in the warrant or affidavit showed that drugs were expected to be found in the portion of the premises separately leased to or occupied by the defendant."**
>
> (Emphasis added.)

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[3] *Maryland v. Garrison* (1987), 480 U.S. 79.

[4] See trial court's amended ruling on motion to suppress, May 12, 2004, p.5.

{¶ 18} The police failed to act reasonably in their efforts to obtain the search warrant. There was no evidence presented as to whether the home was registered as a two-family home. A computer search was never conducted and there was never any evidence of urgency presented by the state. This resulted in the creation of a dangerous situation that possibly could have been mitigated. Had the urgency issue been addressed prior to the SWAT entry, the shooting may have been entirely avoided. Moreover, the police never saw appellee interact with Mr. Freeman, the man who sold to the undercover agent. At the time the police chose to search appellee's apartment, all they knew was that he lived in close proximity to where a controlled drug buy occurred.

{¶ 19} The evidence demonstrates that the trial court's actions were competent and credible. I believe that the trial court acted properly when it found the search warrant to be overly broad. I would, therefore, overrule appellant's assignments of error.