[Cite as *State v. Quinones*, 2009-Ohio-2718.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91632

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FELIX QUINONES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
AND REMANDED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500492

BEFORE: Dyke, P.J., Celebrezze, J., and Jones, J.

RELEASED: June 11, 2009
JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, P.J.:

{¶ 1} Defendant-appellant, Felix Quinones ("appellant"), appeals the trial court's denial of his motions to suppress, as well as his convictions and sentences. For the reasons proffered below, we affirm in part and reverse and remand in part.

{¶ 2} On August 31, 2007, the Cuyahoga County Grand Jury indicted appellant on 14 counts: counts 1 and 4 alleged drug trafficking in violation of R.C. 2925.03(A)(1); counts 2, 5, 7, 9, and 12 alleged drug trafficking in violation of R.C. 2925.03(A)(2); counts 3, 6, 8, 10, 11, and 13 alleged drug possession in violation of R.C. 2925.11(A); and count 14 alleged possession of criminal tools in violation of R.C. 2923.24(A). All counts included forfeiture specifications, and counts 9 and 10 each included a major drug offender specification. Initially, appellant pled not guilty to all charges in the indictment.

{¶ 3} On December 31, 2007, appellant filed a motion to suppress evidence. In the motion, appellant challenged the search of his Mercury Grand Marquis ("Mercury"), as well as the search of an apartment located at 8513 Madison Avenue, apartment number 2 ("Madison apartment") and the search of appellant's house located at 3451 West 135th Street ("West 135th Street residence").

{¶ 4} On February 13, 2008, the trial court conducted a suppression hearing and the following facts were presented.

{¶ 5} Detective Scott Moran of the Cleveland Police Department testified that earlier in the day on August 22, 2007, a judge signed a search warrant for

appellant's green Mercury. He explained that he prepared the warrant and accompanying affidavit the previous evening after witnessing a confidential informant ("CI") purchase illegal drugs from appellant and the co-defendant, Jose Arios ("Arios").

{¶ 6} After the judge signed the warrant for the Mercury, Moran conducted a meeting with various law enforcement personnel regarding the planned procedure for a second drug buy involving the CI and the eventual arrest of appellant and Arios. At the meeting, Moran also presented Detective James Cudo with a copy of the search warrant for appellant's Mercury.

{¶ 7} After the meeting, the detectives went to the proposed site and waited as appellant and Arios engaged in a drug buy with the CI. Detective John Dlugolinski testified that he followed appellant and Arios as they left the scene of the drug buy. He watched the appellant and Arios enter the West 135th Street residence, retrieve a black bag, and place it in the trunk of the Mercury. Soon thereafter, around 5:30 p.m., Det. Cudo, along with Det. Edwin Cuadra, and Det. Michael Connelly, performed the stop of the vehicle at the intersection of West 117th Street and Linnett.

{¶ 8} During the initial stop, Det. Cuadra and Det. Connelly extracted appellant and Arios from the vehicle and performed a precursory search. From the ashtray of the vehicle, Det. Cuadra and Det. Klamert retrieved a set of appellant's keys. Additionally, the black bag, which contained illegal drugs, was removed from

the trunk. Subsequently, the detectives moved appellant, Arios, and the vehicle, so as to ease traffic, to a nearby park.

{¶ 9} While at the park, detectives engaged in a more thorough search of the vehicle for contraband, creating an inventory sheet of their findings. Appellant and Arios were arrested. Additionally, Det. Connelly and Det. Cuadra testified that while at the park, Det. Connelly presented appellant with the search warrant for the Mercury.

{¶ 10} Immediately after learning of the stop of appellant's vehicle, Det. Moran traversed to the police station downtown to prepare search warrants and accompanying affidavits for the Madison apartment and the West 135th Street residence. After finishing the search warrants, Moran drove to a judge's home, where he swore to the veracity of the affidavits, and the judge reviewed and signed the warrants. Moran testified that he left the judge's house at 7:35 p.m. Immediately thereafter, he informed the other law enforcement personnel via radio that he had obtained the search warrants for the Madison apartment and West 135th Street residence.

{¶ 11} Moran testified that he arrived at the Madison apartment at 7:45 p.m. and presented appellant with the search warrant. Once inside, Moran noted that the apartment was nearly empty. The detectives had previously utilized the keys obtained from appellant's Mercury to open the door of the apartment. Inside, the only furniture was a mattress. In the closet hung some coats and merely a couple pairs of shoes. The refrigerator contained a bottle of vanilla, a half gallon of distilled

water, and an open container of baking soda. In the kitchen was a coffee grinder, a block of heroin, and a large bag of marijuana. Finally, Det. Moran discovered a Sam's Club identification card that belonged to appellant in the apartment.

{¶ 12} Appellant, maintaining he had standing to challenge the search of the apartment, testified that he leased the Madison apartment as a place of residence for 20 days at the time he was arrested. He asserted that he intended to move into the apartment once the lights and gas were turned on because he and his girlfriend were separating. He further provided that he stayed in the apartment the night before he was arrested.

{¶ 13} Detective Moran, however, testified that, due to his experience as a narcotics detective, he believed the Madison apartment was not a place of residence but rather a stash house or distribution location for drugs. He explained that he was unable to acquire a lease or utility bills for the apartment in appellant's name. Moran, however, admitted that appellant spent the night of August 21, 2007 in the apartment. He explained that detectives witnessed appellant and Arios enter the front of the building on August 21, 2007, and only exit the next day prior to the second CI buy.

{¶ 14} With regard to the search of the West 135th Street residence, Detectives Cudo, Dlugolinski, and Capt. Brian Heffernan were conducting surveillance for at least two hours at the West 135th Street residence when Moran informed them that he had the search warrant. Immediately thereafter, Glenda Padilla, appellant's girlfriend, answered a knock at the door from Cudo, Dlugolinski and Heffernan, as

well as Officer Lipscomb. Captain Heffernan testified that the men entered the premises at 7:38 p.m. Ms. Padilla, however, maintained that the police knocked on her door around 6:30 or 6:45 p.m., while she was watching the Spanish show, Que Locura.

{¶ 15} Upon entry, the police explained to Ms. Padilla that appellant had been arrested for selling drugs, they had a search warrant signed by a judge for that location, and the warrant would arrive later. Cudo, as well as Dlugolinski, testified that she did not ask to see the warrant, but instead, opened the door and let the four men enter the home. Ms. Padilla, however, asserted that she asked to see the search warrant.

{¶ 16} Ms. Padilla further provided that Det. Moran arrived at the residence and provided her with a copy of the warrant around 9:00 p.m. Detective Moran, however, testified, and Detectives Cudo and Dlugolinski confirmed, that Moran arrived at the West 135th Street residence around 8:10 p.m. and presented Glenda Padilla with the search warrant. He then proceeded to list the items confiscated from the residence on the inventory sheet, including but not limited to the money used during the drug buy with the CI, another large sum of money, cell phones, and a computer. Additionally, a Range Rover registered to appellant was confiscated from the garage.

{¶ 17} After hearing all the evidence, the trial court determined that appellant did not have standing to challenge the search of the Madison apartment. Also, the court denied appellant's remaining motions to suppress on February 19, 2008. In

light of the court's rulings, appellant pled no contest to all charges in the indictment. The trial court accepted appellant's no contest pleas and found him guilty of all counts.

{¶ 18} On May 21, 2008, the court sentenced appellant to a 50-year prison term. The court imposed eight-year sentences for the first three counts, 10 years each on counts 4, 5, 6, 9 and 10, five years for counts 7, 8, 12 and 13, one year for count 11, and 12 months for count 14. Counts 1, 4, 7, 9, 10, 11, 12, and 14 were ordered to be served consecutively to each other.

{¶ 19} Appellant now appeals and presents eight assignments of error for our review. In the interest of convenience, we will address appellant's assignments of error out of order where appropriate.

{¶ 20} Appellant's third assignment of error states:

{¶ 21} "III. The appellant was denied due process where the suppression hearing was tainted after the trial court quashed, in part, defense subpoenas for police officers."

{¶ 22} Within this assignment of error, appellant argues that the trial court erred in quashing his subpoenas for the duty logs of several detectives on the case. Appellant believes that the logs will demonstrate that the judge signed the search warrant for the West 135th Street residence after the police entered and began searching the residence. For the reasons that follow, we find appellant's argument without merit.

{¶ 23} First, contrary to appellant's assertions in his brief, the record is void of any subpoenas filed by appellant, including any subpoenas requesting the duty logs of the police in this case. In any event, the trial court's ruling that such documents would not be discoverable is correct pursuant Crim.R. 16 and R.C. 149.43.

{¶ 24} Crim.R. 16(B)(2) excludes a defendant from discovery of the following information:

{¶ 25} "Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents."

{¶ 26} In *State v. Freeman* (June 22, 1995), Cuyahoga App. No. 67383, we concluded that, pursuant to Crim.R. 16, an officer's duty log was not discoverable even for an in camera inspection. Id. In that case, Officer Lett testified that he prepared a duty log to record his actions during the investigation. Id. Other officers, however, prepared the official report regarding the investigation. Id. In reaching our conclusion, we stated "[t]he portions of a police report which recite matters beyond the witness' personal observations, such as notes regarding the officer's investigative decisions and interpretations, are privileged and excluded from discovery under Crim.R. 16(B)(2)." Id. In so finding, we relied on the court's decision in *State v. Carballo* (Oct. 16, 1989), Madison App. No. CA88-02-006, that

no rights of a defendant are infringed by the nondisclosure of a police officer's "original log" pursuant to Crim.R. 16.

{¶ 27} We find the instant matter analogous to the circumstances in *Freeman*, supra. The duty logs requested by appellant were part of an official criminal investigation and prepared in anticipation of the prosecution of appellant for drug offenses. Thus, appellant was excluded from discovery pursuant to Crim.R. 16(B)(2).

{¶ 28} Additionally, R.C. 149.43(A)(1) excludes discovery of the duty logs. Pursuant to R.C. 149.43(B)(1), generally, upon request, a defendant is entitled to the prompt presentation of public records in order to review and inspect said documents. "Confidential law enforcement investigatory records," however, are excluded from the general rule. R.C. 149.43(A)(1)(h). Therefore, the duty logs of the police in this case are exempt from public disclosure.

{¶ 29} Appellant's third assignment of error is without merit.

{¶ 30} Appellant's fourth assignment of error states:

{¶ 31} "IV. The trial court erred in finding that the appellant did not have standing to challenge the search of the Madison Avenue address."

{¶ 32} As a procedural matter, we note that "[a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they

are supported by competent, credible evidence." *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 2003-Ohio-5372, 797 N.E.2d 71 (internal citations omitted). With respect to the trial court's conclusion of law, however, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard. Id. at 155, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 33} The Fourth Amendment of the United States Constitution and Article I, Section 14 of the Ohio Constitution protect against unreasonable searches and seizures. Evidence obtained in violation of the Fourth Amendment is barred by the exclusionary rule. *Mapp v. Ohio* (1961), 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684.

{¶ 34} Before challenging the legality of a search or seizure, a defendant must first establish an interest in the property being searched that is protected by the Fourth Amendment. *Rakas v. Illinois* (1978), 439 U.S. 128, 138, 99 S.Ct. 421, 58 L.Ed.2d 387; see, also, *Rawlings v. Kentucky* (1980), 448 U.S. 98, 104, 100 S.Ct. 2556, 65 L.Ed.2d 633, citing *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. A person has an interest protected by the Fourth Amendment when he or she possesses a legitimate expectation of privacy in the property being searched or seized. *Rakas*, supra at 143. In order to determine whether a person's expectation of privacy is legitimate, we must decide whether the expectation of privacy is the kind "that society is prepared to recognize as 'reasonable.'" Id. at 143, fn.12, quoting *Katz*, supra at 361 (Harlan, J., concurring).

{¶ 35} Generally, an expectation of privacy attaches to one's home or residence. *State v. Dooley*, Montgomery App. No. 22100, 2008-Ohio-1748. A person, however, may have a legitimate expectation of privacy in a place other than his or her home. *Minnesota v. Olson* (1990), 495 U.S. 91, 96-97, 110 S.Ct. 1684, 109 L.Ed.2d 85. In *Olson*, the Supreme Court held that an overnight guest may have a legitimate expectation of privacy in their host's home. *Olson*, supra.

{¶ 36} In this case, appellant's status as an overnight guest alone may be sufficient to demonstrate that he had a legitimate expectation of privacy in the Madison apartment. Appellant testified that he spent the previous evening at the apartment. The detectives verified this assertion by testifying that they witnessed appellant enter the apartment on August 21, 2007, and not exit until the following day. Furthermore, while appellant's overnight status may be enough to establish a legitimate expectation of privacy, we find his expectation of privacy heightened when we consider the compelling fact that the appellant's keys, retrieved from his Mercury, opened the door to the Madison apartment. We also note that appellant testified, and Det. Moran confirmed, that inside the apartment was a mattress, some of appellant's shoes and coats, and his Sam's Club identification card.

{¶ 37} The state argues that the apartment was so bare that one could only reasonably conclude that the apartment was a stash house for drugs. In maintaining this proposition, the state directs this court's attention to the Ninth District's opinion in *State v. McCoy*, Lorain App. No. 08CA009329, 2008-Ohio-4947. In that case, the court noted that the apartment was "not furnished for everyday living" and defendant

was unable to present any evidence indicating that he was an "overnight guest." Therefore, the court concluded the defendant was not entitled to the protections of the Fourth Amendment in a "commercial center used to conduct illegal transactions." Id.

{¶ 38} The state's reliance, however, on the *McCoy* case is misplaced. In *McCoy*, the court indicated that, had the defendant presented corrobating evidence that he was an "overnight guest," the court would have found a legitimate expectation of privacy in the premises. In this case, because the police verified appellant's testimony that he spent the previous evening at the apartment, we find the instant matter unlike the circumstances in *McCoy*, supra. More importantly, we are concerned by the fact that the detectives opened the apartment door with appellant's key. Appellant's possession of the key indicates possessory control over the apartment.

{¶ 39} Therefore, based on the applicable legal standard, we disagree with the trial court and find that, while appellant's status as an overnight guest alone establishes a legitimate expectation of privacy, that status coupled with the fact that appellant's key was used to open the apartment door, undoubtedly establishes a legitimate expectation of privacy in the Madison apartment. Accordingly, the trial court erred in finding appellant did not have standing to challenge the search of the premises. We reverse the court's ruling to this extent and remand the matter to the trial court for a new hearing solely to determine whether the search of the Madison apartment was valid.

{¶ 40} Furthermore, as a result of our decision, we reverse appellant's convictions for counts 9 through 13, which were based upon a no contest plea entered after the trial court denied appellant standing to challenge the search of the Madison apartment. Moreover, we vacate appellant's sentences for those five counts for the same reasons.

{¶ 41} We also decline to address the merits of appellant's eighth assignment of error.[1] This argument is not ripe for review as the trial court has yet to determine whether the search of the apartment was valid.

{¶ 42} Finally, we also note that the trial court failed to merge appellant's convictions for counts 2 and 3, 5 and 6, and 7 and 8. The trial court convicted appellant of drug trafficking in violation of R.C. 2925.03(A)(2) in counts 2, 5, and 7 as well as drug possession in violation of R.C. 2925.11(A) in counts 3, 6, and 8. These offenses, however, are allied offenses of similar import pursuant to R.C. 2941.25. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181 (holding that drug trafficking in violation of R.C. 2925.03(A)(2) and drug possession in violation of R.C. 2925.11(A) are allied offenses of similar import). Accordingly, the convictions are reversed and remanded to the trial court for application of R.C. 2941.25, the statute concerning allied offenses of similar import.

{¶ 43} Appellant's fifth assignment of error states:

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[1]"VIII. The trial court erred in not permitting counsel an opportunity to litigate whether all of the items seized from the Madison Avenue home where [sic] fruits of the poisonous tree."

{¶ 44} "V. The trial court erred in denying the appellant's motion to suppress where the affidavit in support of the search warrant failed to establish probable cause to search."

{¶ 45} We reiterate that a review of a motion to suppress presents a mixed question of law and fact and we accept a trial court's findings of fact if supported by competent, credible evidence but review independently whether the facts satisfy the applicable legal standard. *Burnside*, supra at 154-155.

{¶ 46} The Fourth Amendment to the United States Constitution guarantees people the right to be free from unreasonable searches and seizures and provides that no warrants shall issue but upon probable cause. In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant, the duty of the reviewing court is to determine whether the issuing judge had a substantial basis to conclude that probable cause existed. *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph two of the syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527. Neither a trial court nor an appellate court should substitute its judgment for that of the issuing judge by conducting a de novo review. *Gates*, supra at 236; *George*, supra.

{¶ 47} In making the determination of whether there was a substantial basis to conclude that probable cause existed, the reviewing court must:

{¶ 48} "Make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability

that contraband or evidence of a crime will be found in a particular place." *Gates*, supra at 238; *George*, supra at paragraph one of syllabus.

{¶ 49} In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, reviewing courts should afford great deference to the issuing judge's determination of probable cause. Doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. *Gates*, supra at 237, fn.10; *George*, supra at paragraph two of syllabus.

{¶ 50} Here, appellant argues that the trial court erred in failing to grant his motions to suppress evidence seized from the Mercury and the West 135th Street residence because the underlying search warrants were not supported by probable cause. In maintaining this proposition, appellant argues that the affidavits failed to establish a nexus between the areas to be searched and the presence of drugs. We find appellant's argument without merit.

{¶ 51} The affidavit of Det. Scott Moran in support of the search warrant for the Mercury stated that a CI notified Moran that he could purchase heroin from Gonzalo Diaz and that he delivers the heroin in a green Mercury Grand Marquis. The affidavit further laid out the specific steps Moran took to discover that Gonzalo Diaz was an alias of appellant. Moran further averred that he performed surveillance of appellant and observed him drive the green Mercury. A check of the license plate revealed that appellant owned the Mercury. Most compellingly, Moran provided that the CI, while wearing a wire, performed a controlled heroin buy from appellant and the co-defendant, Arios. In light of the foregoing, we agree with the trial court that sufficient

probable cause existed to search the Mercury and that there existed a sufficient nexus between illegal drugs and the vehicle.

{¶ 52} Additionally, we find sufficient probable cause for the warrant of the West 135th Street residence. Moran's affidavit in support of the warrant for the West 135th Street residence included the averments contained in the affidavit for the Mercury. In addition, the West 135th Street residence affidavit provided that a second controlled CI buy was arranged and performed. Moran averred that while the CI wore a wire, appellant sold the CI approximately 60 grams of heroin. At the buy, appellant also indicated that he had 44 pounds of marijuana. When the CI told appellant he had a buyer, appellant informed the CI he would be back in 30 minutes with the marijuana. The detectives then followed as appellant drove to the West 135th Street residence.

{¶ 53} At the West 135th Street residence, detectives observed appellant and Arios enter the house and exit shortly thereafter with a large black garbage bag, which they placed in the trunk of the Mercury. Soon thereafter, the detectives stopped the Mercury and a subsequent search of the vehicle confirmed that the black bag contained a large amount of marijuana. Appellant and Arios were placed under arrest and both men informed the police that they resided at the West 135th Street residence. Furthermore, the affidavit provided that detectives periodically performed surveillance on the West 135th Street residence and witnessed appellant driving both the Mercury and a Range Rover to and from the residence. In light of

the foregoing, we find that the trial court properly concluded that there was probable cause to justify the search of the West 135th Street residence.

{¶ 54} For all of the aforementioned reasons, the trial court properly denied appellant's motions to suppress the search of the Mercury and the West 135th Street residence. This assignment of error is without merit.

{¶ 55} Having determined that the search warrants of the Mercury and West 135th Street residence contained sufficient probable cause, we decline to address appellant's sixth assignment of error pursuant to App.R. 12(A).[2]

{¶ 56} Appellant's seventh assignment of error states:

{¶ 57} "VII. The trial court erred in failing [sic] suppress all of the items seized from the West 135th Street home where the officers did not possess a search warrant at the time of entry and did not provide a copy of the warrant to the occupant of the apartment."

{¶ 58} Again, we note that as an appellate court, we accept a trial court's findings of fact concerning a motion to suppress if supported by competent, credible evidence but review independently whether the facts satisfy the applicable legal standard. *Burnside*, supra.

{¶ 59} The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures of people and their effects and further provides that no warrant shall be issued, "but upon probable cause, supported by

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[2]"VI. The state failed to demonstrate a good faith reliance on a search warrant lacking probable cause."

oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." These protections are applicable to the states via the Fourteenth Amendment, *Mapp*, supra at 650, and by Section 14, Article I, of the Ohio Constitution, which is virtually identical to the Fourth Amendment. See *State v. Pierce* (1998), 125 Ohio App.3d 592, 596, 709 N.E.2d 203. Warrantless searches "are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz*, supra at 357.

{¶ 60} Appellant maintains that the court should have suppressed the items seized from the West 135th Street residence because the police unlawfully entered the house without a valid search warrant and failed to present the occupant, Ms. Padilla, with the search warrant during the search.

{¶ 61} First, we find unpersuasive appellant's argument that the detectives conducted a warrantless search of the house. There is no requirement, either under the Fourth Amendment to the United States Constitution, or Article I, Section 14 of the Ohio Constitution, or the rules governing the issuance of a search warrant, that the executing officer present the occupant of the premises with a copy of the warrant prior to performing the search. Fourth Amendment to the United States Constitution; Section 14, Article I, Ohio Constitution; Fed.R.Crim.P. 41; Ohio Crim.R. 41; *State v. Ealom*, Cuyahoga App. No. 91140, 2009-Ohio-1073, citing *State v. Swartz* (Sept. 12, 1990), Summit App. No. 14514. In this case, the trial court found that Det. Moran left the judge's house with a signed warrant by 7:35 p.m., the surveillance team was notified immediately thereafter, and the entry was made at 7:38 p.m. These findings

of fact are supported by competent and credible evidence of the testimony of Detective Moran and Captain Heffernan. Hence, the police conducted the search pursuant to a signed, valid warrant.

{¶ 62} Furthermore, the record demonstrates that Det. Moran presented Ms. Padilla with a copy of the warrant within a reasonable amount of time after the search began. Detectives Cudo and Dlugolinski confirmed Moran's testimony that he arrived at the West 135th Street residence around 8:10 p.m., while the detectives were still searching the residence for contraband. The trial court was in the best position to evaluate the witnesses' credibility and chose to believe the detectives' testimony over Ms. Padilla's that Moran did not appear with the warrant until almost 9:00 p.m. See *Burnside*, supra. Therefore, the trial court did not err in denying appellant's motion to suppress. Appellant's seventh assignment of error is overruled.

{¶ 63} Appellant's first and second assignments of error concern his sentences and are related. Therefore, in the interest of convenience, we will address them together. Furthermore, we are mindful of the fact that these assignments of error are only pertinent to appellant's convictions for counts 1, 4, and 14 in the indictment because we previously reversed appellant's convictions with regards to counts 2, 3, and 5 through 13. Appellant's first assignment of error states:

{¶ 64} "I. The trial court's imposition of maximum consecutive sentences is contrary to law and an abuse of discretion."

{¶ 65} Appellant's second assignment of error states:

{¶ 66} "II. The appellant was denied due process of law where the trial court failed to articulate judicially reviewable reasons for imposing maximum consecutive sentences."

{¶ 67} Within these assignments of error, appellant maintains that his sentences were contrary to law and an abuse of discretion because the trial court failed to consider whether appellant's sentences were consistent with sentences imposed upon other similar offenders. Appellant further argues that the trial court erred by not providing any reasons for the imposition of maximum and consecutive sentences.

{¶ 68} Without addressing appellant's concerns, we vacate his sentences. As noted above, the court failed to merge allied offenses. In addition, the sentence announced in open court differed from the sentence that was journalized. *State v. Culver*, 160 Ohio App.3d 172, 188, 2005-Ohio-1359, 826 N.E.2d 367, quoting *State v. Aliane*, Franklin App. No. 03AP-840, 2004-Ohio-3730 ("a trial court errs when it issues a judgment entry imposing a sentence that differs from the sentence pronounced in the defendant's presence.") Accordingly, we must vacate appellant's sentences for counts 1, 4, and 14.

{¶ 69} In summation, we reiterate that we reverse the trial court's finding that appellant lacked standing to challenge the search of the Madison apartment and remand the matter to the trial court for a new hearing for the sole purpose of determining whether the search of the Madison apartment was valid. The trial court's findings regarding the search of the West 135th Street residence as well as

the Mercury are upheld and remain undisturbed. Furthermore, because we are reversing and remanding the case to the trial court for a suppression hearing concerning the search of the Madison apartment, appellant's convictions for counts 9 through 13, which were based upon a no contest plea entered after the trial court determined appellant lacked standing to challenge the search, are reversed and his sentences resulting therefrom are vacated. Also, the convictions for counts 2, 3, 5, 6, 7, and 8 are reversed and their sentences vacated because the court failed to merge the convictions pursuant to R.C. 2941.25. Finally, appellant's sentences for counts 1, 4, and 14 are vacated and the entire matter is remanded to the trial court for resentencing.

Judgment affirmed in part and reversed and remanded in part.

It is ordered that appellant and appellee shall each pay their respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

ANN DYKE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and

LARRY A. JONES, J., CONCUR