[Cite as *State v. Scott*, 2001-Ohio-3417.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 99 CA 324
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
LESTER SCOTT and	)	
SHAUNA SCOTT,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case Nos. 98 CR 136, 136A.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 28, 2001

VUKOVICH, P.J.

{¶1} Defendants-appellants Lester and Shauna Scott appeal to this court after guilty verdicts were rendered against them in the Mahoning County Common Pleas Court. Central to our disposition of said appeal, we are called upon generally to determine the parameters of a search warrant, and specifically to ascertain: (1) whether a warrant authorizing a search for a 9mm auto-pistol includes the right to open containers which could not contain the weapon, but might conceivably hold a part thereof; and, if not, (2) whether language in a search warrant purportedly authorizing a search "for other instruments of fruits of the crimes" gives the police that right. As we answer both questions in the negative for the reasons hereinafter set forth, the trial court's decision on suppression is reversed. Accordingly, this cause is remanded for suppression of certain evidence obtained in violation of appellants' rights.

STATEMENT OF FACTS

{¶2} Lester and Shauna Scott lived in a triplex apartment building on Elm Street in Youngstown, Ohio. Also living in this building was their son. Various pieces of evidence led police to conclude that the son committed a robbery/shooting, attempted murder and murder. For instance, 9mm shell casings found at each of the three crime scenes matched shell casings which an informant brought to police after watching the son shoot his 9mm handgun which ejected the casings into a field. Also, prior to his death, the murder victim confessed that he and the son committed the robbery/shooting.

{¶3} Thus, a search warrant was issued to search the entire

apartment building and the son's vehicle for "a 9mm auto-pistol and other instruments of *[sic?]* fruits of these crimes, all of which is evidence of [murder, attempted murder and robbery]." On July 11, 1997, police arrested the son while he was in his vehicle, and a 9mm handgun was recovered. Approximately twenty minutes later, police entered and searched the Scott's residence. During this search, police discovered four grams of cocaine in a box for a video tape. They found approximately $17,000 in currency and $1,500 in food stamps in a bag. Some ammunition was also confiscated.

{¶4} On February 13, 1998, Lester Scott was indicted for fifth degree felony possession of cocaine in violation of R.C. 2925.11 (A)(C)(4)(a), fourth degree felony illegal use of food stamps in violation of R.C. 2913.46(B)(D) and fifth degree felony possession of criminal tools in violation of R.C. 2923.24(A)(3)(C). He was arrested on February 18, 1998 and released on bond. A motion to suppress was filed on March 16, 1998. The suppression hearing began on September 10, 1998 and resumed on October 2, 1998.

{¶5} In the meantime, on September 17, 1998, a superseding indictment was filed in order to add Shauna Scott as a defendant in the three crimes for which Lester Scott was previously indicted. This superseding indictment also charged Shauna Scott with third degree felony perjury in violation of R.C. 2921.11(A) as a result of her testimony in a forfeiture hearing.

{¶6} After post-hearing suppression briefs were submitted, the parties agreed that the court's decision on suppression would apply to both defendants. On March 9, 1999, the court denied the suppression motion.

{¶7} On April 28, 1999, immediately prior to the scheduled trial, appellants filed a motion to dismiss on various grounds.

The first basis for dismissal set forth in the motion alleged that Lester Scott's speedy trial rights had been violated. Subsequently, after various continuances and hearings, the court denied this motion. A jury trial began on October 4, 1999.

{¶8} The jury found Lester Scott not guilty of possession of criminal tools but guilty of possession of cocaine and illegal use of food stamps. The court sentenced him to twelve months on the food stamps conviction and eighteen months on the cocaine conviction to run concurrently.

{¶9} The jury found Shauna Scott not guilty of possession of cocaine and not guilty of possession of criminal tools but guilty of illegal use of food stamps and perjury. The court sentenced her to ten days in jail, fined her $1,000 and imposed four years of community control. Appellants filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

{¶10} Appellants' first assignment of error provides:

{¶11} "IT WAS ERROR FOR THE TRIAL COURT TO OVERRULE DEFENDANTS' MOTION TO SUPPRESS THE EVIDENCE OBTAINED IN VIOLATION OF DEFENDANTS' RIGHTS UNDER R.C. 2933, THE OHIO CONSTITUTION AND U.S. CONSTITUTION."

{¶12} Before delving into the crux of this assignment, we shall respond to the state's preliminary argument. The state urges this court to disregard this assignment of error because appellants failed to submit the trial transcript to this court. The state contends that this court requires the trial transcript to confirm appellants' argument that the unsuppressed evidence was admitted at trial.

{¶13} However, because a decision on suppression occurs pretrial, it is illogical to absolutely require transcripts from the trial to be prepared and submitted to the appellate court. Appellants submitted the suppression transcripts to this court; it

is the motion to suppress and the suppression transcripts that govern our decision. When an appellate court evaluates a suppression issue, the court is not technically faced with affirming or reversing a conviction, but rather the court is faced with affirming or reversing the decision on suppression. The reversal and remand of a trial court's denial of a suppression motion may or may not require dismissal of the charges.

{¶14} We agree that trial transcripts could be reviewed for harmless error if ordered by the state to establish harmless error or if ordered by the defendant in support of other assignments of error. Nevertheless, we do not believe that a trial transcript is a mandatory filing or a condition precedent to a defendant raising a suppression issue on appeal. See, *e.g.*, App.R. 9(B) (requiring only the necessary portions of the transcript to be filed and providing the appellee with a method to compel the appellant to submit necessary portions that were omitted); *State v. Henderson* (1990), 51 Ohio St.3d 54, 58, fn.2 (mentioning that only a suppression transcript was submitted without holding that the defendant had the duty to submit a trial transcript). As such, in reviewing this assignment of error, only the suppression transcripts were necessary.

{¶15} The key question in such cases is not whether a trial transcript is part of the record. Rather, the key question is whether or not there is sufficient information in the record to determine that the evidence which was the object of a suppression motion addressed an essential element of the crime charged. If it did not, then it would be very difficult for a reviewing court to conclude that a trial court committed prejudicial error in failing to sustain a motion to suppress. However, where it can be determined that the evidence sought to be suppressed constitutes an element of the crime convicted, prejudice to appellants is

apparent.

{¶16} Here, even the dissent concedes that it is apparent that all convictions in the case at bar originate out of the search of the Scott residence and the seizure of evidence such as cocaine and food stamps. See *State v. Cowans* (1999), 87 Ohio St.3d 68, 80 (stating that the admission of an erroneously unsuppressed item constituting the critical element of the crime is not harmless). Accordingly, we conclude that the lack of a trial transcript is not a fatal defect and we shall now address the merits of this assignment of error dealing with suppression issues.

{¶17} In reviewing suppression issues, this court defers to the trial court's factual findings but conducts a *de novo* review regarding the law and the proper application of the law to the facts. See, *e.g.*, *State v. Brandenstein* (Dec. 30, 1999), Belmont App. No. 98BA30, unreported, 3.

{¶18} The first suppression issue is whether the police had a right to search the Scott residence. In support of their position, appellants note that once police discover the item specified in the search warrant, the search must terminate. Accordingly, appellants claim that once the police arrested their son and recovered a 9mm from his possession, they were not permitted to enter the house. Conversely, the state contends that the officers were unable to determine if the 9mm handgun recovered from the suspect was the murder weapon and that such a determination would have to be made after laboratory testing.

{¶19} We note that in *Horton v. California* (1990), 496 U.S. 128, the court stated that police with a search warrant for a rifle must terminate the search once the rifle is found. *Id.* at 141 (Although *Horton* may not be a case on point as the issue appealed was whether plain view discovery must be inadvertent, it

nevertheless set forth the general law behind search and seizure cases involving items found that are not specifically enumerated in the warrant). In the case at bar, the search warrant authorized a search of the suspect's vehicle and residence for a 9mm auto-pistol. The affidavit in support of the warrant recited an informant's tip as part of the probable cause. Specifically, the affidavit read, "The aforementioned confidential informant also advised affiant that [suspect] still has the weapon used in these crimes, and that he always carries the gun with him." Appellants contend that if the confidential informant was so trustworthy that a warrant was issued in reliance on his statements, observations and evidence collecting skills, then once police discovered a 9mm auto-pistol on the suspect, it is not unreasonable for them to assume that they possessed the object of the search.

{¶20} Yet, as the state points out, the officers were unaware of the brand name and serial number of the gun. Additionally, it does not appear unreasonable for officers to conclude that a person who allegedly shot three different people on three different occasions with a 9mm handgun may own more of these guns. Accordingly, the decision to proceed with the residential search under these facts and circumstances was not improper. Nonetheless, even if it were reasonable for officers to assume that they did not possess the object of their search and to proceed with the residential search to preserve the murder weapon in case they had the wrong 9mm auto-pistol, the scope of the search is problematic.

{¶21} During the search, police discovered items which allegedly incriminated the Scotts, rather than the actual subject of the search warrant. The state claims that a warrant authorizing a search for a gun and instruments of murder or

robbery necessarily allows police to search for ammunition and parts of a gun. The state also relies on the plain view doctrine to uphold the validity of the discovery and seizure of this evidence.

{¶22} To rely on the plain view doctrine, not only must the police have been lawfully located at the place of the search when they notice an object whose incriminating character is immediately apparent, but police must have had a lawful right of access to the object itself. *Horton*, 496 U.S. at 136-137. In gaining lawful right of access to an object which is in a container, the container must logically be capable of concealing the specific object of the search. *State v. Welch* (1985), 18 Ohio St.3d 88, 92, citing *United States v. Ross* (1982), 456 U.S. 798, 821 (which states, "a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and *containers in which the weapon might be found.*" [Emphasis added]). See, also, *Wyoming v. Houghton* (1999), 526 U.S. 295, 307. As such, the next issue concerns whether the police were entitled to open certain containers during their search.

{¶23} Appellants claim that the scope of the search was too broad as police looked in places where a 9mm auto-pistol could not be found. For instance, Officer Wilson testified that he opened a box for a video tape and discovered crack and powdered cocaine. He admitted that the box was too light to have contained a gun but claimed that the box could have contained ammunition or the component parts of a gun. (9/10/98 Supp. Tr. 28, 36). This officer also found a large plastic shopping bag in a closet. When asked if it could contain a gun, he stated, "I don't know. It felt heavy." *Id*. at 25. When he opened the bag, he spotted green leafy matter that appeared to be marijuana and approximately $17,000 in cash. (Laboratory testing later revealed that the

leaves were not marijuana.) In this large plastic bag was a smaller bag which was not transparent and which the officer admitted could not contain a 9mm handgun. *Id*. at 26. Upon opening this bag, the officer discovered $1,500 worth of food stamps.

{¶24} Since the officer admitted that neither the video box nor the bag of food stamps could have contained a 9mm handgun, appellants urge that the cocaine found in a video box and the food stamps found in a bag should be suppressed. Contrary to the dissent filed to this opinion which cites an unreported appellate case out of Arkansas, neither appellant nor this court suggests that a 9mm auto-pistol cannot fit into a video box or into the bag containing food stamps. Rather, the focus is on the officer's admission that he knew a firearm did not rest in either of these containers. It is not only the size of the container, but also the density and weight of the container that is at issue herein. See *State v. Bulls* (June 28, 2000), Mahoning App. No. 98CA173, unreported (although a plain feel/frisk case, we stated that the fact that a pouch is large enough to contain a weapon does not *per se* provide a reasonable belief that a weapon is contained therein), citing *State v. Evans* (1992), 67 Ohio St.3d 405, 416. See, also, *State v. McDonald* (Oct. 24, 1997), Lucas App. No. L-97-1037, unreported, 2 (noting the importance of the weight of an eyeglass case in determining whether it was logical to believe the case contained a firearm). For example, where a search warrant authorizes the search for and seizure of a twenty-seven pound standard gold bar, police cannot open a feather-light bag solely because a gold bar could fit in the bag. (Nor, as we will discuss *infra*, could police open the bag only the basis that a sliver of a gold bar could possibly be contained therein.)

{¶25} The dissent opines that the officer's subjective intent is irrelevant. However, the holdings on the irrelevancy of subjective intent deal with scenarios where probable cause exists to search for one object and the officer lawfully finds in plain view an object which he was subjectively hoping he would find. *Horton*, 496 U.S. at 138, 141 (stating that as long as the officer stays within the scope of the warrant, the fact that he finds an item not specified in the warrant does not invalidate the seizure just because he was fairly certain that the unspecified item would be found). As the dissent suggests, the cases mandate an objective assessment of alleged Fourth Amendment violations. However, that objective assessment entails an evaluation of the "officer's actions *in light of the facts and circumstances then known to him*" and requires consideration of the "*facts available to the officer at the moment of the seizure of the search*." *Scott v. United States* (1978), 436 U.S. 128, 137 (emphasis added). Hence, testimony that the officer subjectively hoped to find cocaine while lawfully searching for a weapon is not relevant; however, testimony that he opened a video box and a bag knowing that neither one contained a firearm is highly relevant to an objective assessment of the situation.

{¶26} As aforementioned, the state contends that the scope of the search was not overbroad because police were searching for bullets and parts of a gun as well as the gun itself. First, we note that Officer Wilson, the officer who found the disputed items, did not read the search warrant. Further, the routine briefing before the execution of a warrant was not conducted. Officer Wilson testified that he knew that someone had been shot and robbed. He stated that he was searching for weapons but was never informed what type of weapon was sought.

{¶27} We also point out that a drug trafficking investigator assisted in the execution of the search warrant solely because he had been investigating appellants for ten years even though the search warrant was the result of an investigation of the son's violent crimes. Appellants argue that police were using the son's crime as an opportunity to raid them. Nevertheless, alternative subjective reasons for a search warrant do not invalidate a warrant that is supported by probable cause. Returning to the issue, we note that this officer testified that he was searching for a 9mm handgun and its associated parts and ammunition.

{¶28} Various constitutional and legislative provisions prohibit general exploratory searches. Pursuant to the Fourth Amendment of the United States Constitution, Article I Section 14 of the Ohio Constitution, R.C. 2933.24(A) and Crim.R. 41(C), search warrants must "particularly" describe the property to be searched for and seized. The requisite specificity varies with the nature of the items to be seized. *State v. Benner* (1988), 40 Ohio St.3d 301, 307. Where the items are evidence or instrumentalities of a crime, the key inquiry is whether the warrants could reasonably have described the items more precisely. *Id.* In *Benner*, the Supreme Court upheld the language calling for seizure of "fibers and hairs and other trace evidence" by noting that it would be too difficult to list every possible source of hair and fiber and that the language sufficiently limited police to searching for and seizing only that evidence that could contain this type of evidence. *Id.*

{¶29} In the case before us, the search warrant authorized a search for "a 9mm auto-pistol and other instruments of *[sic?]* fruits of these crimes, all of which is evidence of [murder, attempted murder and robbery]." The search warrant did not seek

ammunition and did not indicate that officers were to search for the component parts of a 9mm auto-pistol. There is no indication in the affidavit that the attesting detective desired ammunition as he already possessed spent 9mm shell casings from each of the three crime scenes and spent 9mm casings that an informant picked up after the suspect shot his 9mm handgun in a field.

{¶30} Furthermore, in cases where a search for ammunition or the parts of a gun were upheld, the warrant had specifically listed these items. See, *e.g.*, *State v. Jordan* (Apr. 29, 1999), Cuyahoga App. No. 73453, to be reported, 13 (where the search warrant specified a 9mm or any other handgun and ammunition); *State v. Van Johnson* (Feb. 1, 1990), Montgomery App. No. 11347, unreported, 5 (where the search warrant authorized a search for firearms, ammunition and parts of firearms, and where an officer's affidavit articulated probable cause to believe that parts of firearms would be discovered that assisted the suspects in converting semiautomatic weapons into automatic weapons). In other cases, the seizure of ammunition, shell casings or gun parts was upheld after it was discovered in plain view in a place which could have concealed the specifically identified object of the search. See, *e.g.*, *State v. Williams* (1978), 55 Ohio St.2d 82, 84 (stating that fruits or instrumentalities of a crime, such as a bullet, may be seized without being specifically named in a warrant if they are found in plain view; however, police cannot "rummage" through personal belongings to find unidentified incriminating evidence); *State v. Fields* (1971), 29 Ohio App.2d 154, 161 (stating that where the warrant authorized a search for a .38 special, police could seize a shell casing from a .38 special if the casing was discovered in a place or container in which the .38 special itself could be found).

{¶31} Under the *Benner* analysis, the nature of ammunition and

parts of a gun are not types of evidence that are too difficult to describe more precisely than by solely listing a 9mm auto-pistol and other fruits or instrumentalities of murder and robbery. As Officer Wilson testified, a pistol could be broken down into parts such as a barrel, shaft, stock, trigger and springs. Furthermore, as the court noted in *Van Johnson*, a firing pin could be considered a component part of a firearm. If police could search for bullets and parts of a gun every time a warrant authorized a search for a firearm, then police searching for a firearm would have no limit to where they could search.

{¶32} Analogously, according to the state's theory, if a warrant authorized the search of a garage for a stolen van, then police could open a latched toolbox and justify this search by stating that a VIN plate, or other component part of a motor vehicle, could have fit inside the toolbox. This is clearly not the law under search and seizure cases. See *State v. Halczyszak* (1986), 25 Ohio St.3d 301, 310 (affirming the seizure of a VIN plate spotted lying in an open tool box during the execution of a search warrant for a stolen vehicle but remanding for a determination on whether other tool boxes were open or closed with regards to the seizure of other evidence). As aforementioned, the United States Supreme Court stated that when a search warrant instructs police to search for illegal weapons, then police can open containers in which the weapon might be found. *Ross*, 456 U.S. at 821. The Court did not state that police can open containers in which the weapon, its bullets or its component parts might be found.

{¶33} The point of the particularity of warrant requirements is that it is a court's function to make a probable cause decision concerning the objects of the search, leaving nothing in terms of the scope of the search to the discretion of the executing

officers. *Andresen v. Maryland* (1976), 427 U.S. 463, 480. Fruits and instrumentalities language is often inserted into search warrants even though police may seize fruits and instrumentalities discovered during a lawful search without corresponding language in the warrant. See *Williams*, 55 Ohio St.3d at 84. The Court in *Andresen* may have refused to invalidate a warrant based on fruits and instrumentalities language; however, it did not imply that police had discretion to determine the scope of the search, nor did it indicate that police had authority to search receptacles or crevices which could not hold the specified items. The *Andresen* Court held that the general fruits and instrumentalities phrase did not invalidate the entire warrant. Rather, the Court construed the fruits and instrumentalities language to be limited by the documents, relating to false pretenses by the defendant in selling a parcel of property, which were particularly itemized in the warrant. The Court then concluded that the officers were justified in seizing unnamed documents, found during the search for named documents, if those documents related to the crime of false pretenses regarding the sale of realty. In the case at bar, the officers attempted to utilize their own discretion to determine the scope of the search by opening containers that could not contain a 9mm auto-pistol on the basis that the containers could have contained a bullet or a piece of a 9mm, neither of which were specified in the affidavit or the warrant.

{¶34} Contrary to the suggestions of the dissent, *unspent* ammunition is not a fruit or an instrumentality of a completed shooting. It is true that a *spent* bullet casing may be the instrumentality of shooting since it represents the means by which an end was achieved, *i.e.* a shooting is achieved through the expenditure of a bullet. See, *e.g.*, *State v. Fields* (1971), 29 Ohio App.3d 154 (defining instrumentality as an object that

facilitates the commission of the crime, noting that a shell casing is an instrumentality of a crime where the weapon is a revolver which does not eject its casings, and stating that the integral part of the instrumentality test deals with seizure of evidence, not the search for evidence). However, a 9mm auto-pistol ejects its spent casings, and in this case, the casings were found at the crime scenes. As such, any spent shell casings in the house would not appear to be instrumentalities of the shooting being investigated. Again, if they were, they should have been included in the search warrant.

{¶35} As an aside, we also disagree with the dissent's *per se* characterization of a magazine as an integral part of a 9mm auto-pistol; in fact, such weapon can fire a bullet from the chamber without a magazine. Moreover, although a magazine may be an instrumentality of a shooting, it is a part of a gun just like any other part of a gun. Nonetheless, the dissent does not address the problem of where this court would draw the line, with gun parts, if we were to hold that police may search for a magazine when searching for a 9mm auto-pistol or the instrumentalities of a shooting. If we were to adopt the holding of the dissent, then police would be granted the discretion, after the issuance of the warrant, to brainstorm about the smallest item that could be a fruit or instrumentality of a shooting, such as a firing pin or a tissue with blood on it, and tailor their search of containers and spaces accordingly.

{¶36} In conclusion, the search went beyond the scope of the warrant. The state cannot rely on the plain view doctrine as to the cocaine and food stamps because police did not have lawful right of access to these items when viewed within non-transparent containers which the officer knew could not contain the object of the search. If bullets and parts of firearms are to be included

as objects of the search, they must be enumerated in the search warrant after the court finds that an affidavit supported by probable cause seeks these items.

{¶37} For the foregoing reasons, the decision of the trial court refusing to suppress the cocaine and food stamps is reversed, and this cause is remanded for suppression of this evidence. Due to our resolution herein and/or the fact that trial transcripts were not filed, we need not address appellants' assignments of error dealing with the issues of admission of other acts evidence, refusal to dismiss the perjury charge, sufficiency of the evidence, and incorrect jury instructions. However, because a speedy trial violation absolutely requires dismissal of the case, we shall address appellants' fifth assignment of error.

ASSIGNMENT OF ERROR NUMBER FIVE

{¶38} Appellants' fifth and final assignment of error provides:

{¶39} "DEFENDANTS' SPEEDY TRIAL RIGHTS WERE VIOLATED BY THE TRIAL COURT."

{¶40} The arguments under this assignment consist of a mere three sentences. The first sentence cites Section 10, Article I of the Ohio Constitution which accords an accused the right to a speedy trial. The second sentence quotes R.C. 2945.71 which provides that a person charged with a felony shall be brought to trial within two hundred seventy days after his arrest. The third and final sentence concludes that a review of the record demonstrates that the state failed to bring both Lester and Shauna Scott to trial within the applicable time frame.

{¶41} Although the motion to dismiss and supplemental motion filed in the trial court list both Lester and Shauna Scott as the defendants who seek dismissal of the case, the reasons for dismissal were many, some involving both defendants and some

involving one or the other. The supplemental memorandum contains an attached brief which details the reasons behind the alleged speedy trial violation. In this brief, however, only Lester Scott's speedy trial rights were alleged to be violated.

{¶42} A defendant must raise an alleged violation of speedy trial rights "at or prior to commencement of trial." R.C. 2945.73(B). A defendant cannot raise a speedy trial issue for the first time on appeal. *State v. Brown* (Dec. 19, 1999), Belmont App. No. 99BA13, unreported, 2 (citing a case from every appellate district except the first district). It appears that the reason Shauna Scott's speedy trial rights were not argued to be violated in the brief was because it was clear that her speedy trial rights had not been violated at that time. She was indicted on September 17, 1998 and served with the indictment four days later. The motion to dismiss was filed on April 28, 1999. Two hundred and seventy days had not yet elapsed. As such, any argument that Shauna Scott's speedy trial rights were violated was without merit.

{¶43} In response to Lester Scott's argument that his speedy trial rights were violated, the state points out that pursuant to App.R. 12(A)(2), an appellate court may disregard an assignment of error if it fails to identify where in the record the error occurred. We reiterate that the appellate brief merely sets forth a general allegation that a trial was not held within two hundred and seventy days after the date of arrest. The brief fails to present any arguments regarding relevant dates, days passed, the sufficiency of continuances or which continuances are chargeable to whom. Moreover, in constructing our own table of dates and evaluating the rulings, we conclude that various continuances and motions tolled the speedy trial time and extended the "try by" date so that it had not been violated on April 28, 1999, the day

the motion to dismiss was filed.[1]

{¶44} Pursuant to R.C. 2945.72(E), the two hundred seventy day try by time period may be extended by a period of delay necessitated by motion, proceeding or action made or instituted by the accused. This time period may also be extended by the period of a continuance granted on the defendant's own motion or the period of a reasonable continuance granted other than upon the accused's own motion. R.C. 2945.72(H). The determination of whether a continuance is reasonable can be made by reviewing the reasons set forth in the journal entry. See *State v. King* (1994), 70 Ohio St.3d 158, 162 (holding that where the court *sua sponte* grants a continuance, the court must enter the continuance and the reasons therefor in a journal entry prior to the expiration of the speedy trial time).

{¶45} Appellant was arrested on February 18, 1998. He filed his motion to dismiss on April 28, 1999, the day the trial was scheduled to begin. At that time, four hundred thirty four days had passed. This is facially over the two hundred seventy day period. However, we shall outline the various occurrences that extended this time period. The following list of days and descriptions are chronological examples of defense motions and actions, defense requests for continuances, *sua sponte* continuance with reasons set forth in a journal entry and continuances granted on the state's motion with reasons set forth in the journal entry: thirty days from the date Lester Scott filed a suppression motion until the date the hearing was originally scheduled to begin; five

[1]We shall only evaluate the time period between the date of arrest and April 28, 1999 as that was the only time period at issue before the trial court. (See Motion to Dismiss and Supplement). We note that appellant failed to provide transcripts of the proceedings that concerned his speedy trial arguments.

days when the court *sua sponte* continued the suppression hearing and stated in a journal entry that the court was engaged in another trial; thirteen days when the state was granted a continuance and the journal entry demonstrated that an officer who would testify was away at training; twenty-one days the suppression hearing was continued on motion of the defense requiring the trial date to also be reset; seventy-one days when the state was granted a continuance in a journal entry which established that state witnesses would be unavailable for the next two months; one day for the suppression hearing; eight days when the defense asked that the suppression hearing be continued; seventy-three days between the time of the continued suppression hearing and the date that the defense filed the suppression brief that it desired to file (this time includes: forty-five days between the time of the continued suppression hearing at which the defense stated it would file a posthearing brief and the time the speedy trial date elapsed, and a twenty-two day extension granted to the defense to file a brief after it missed its deadline for the second time); twenty-nine days when the defense, on December 15, 1998, asked that the jury trial be rescheduled; thirteen days when the court *sua sponte* continued the trial date due to the defense's filing of a supplemental suppression brief and the need to give the state time to respond; and at least thirty days after that period for the court to decide the finally fully briefed and argued suppression issue.

{¶46} Other time periods could arguably have assisted in further extending the time period; however, the aforementioned are the most glaring occurrences that allowed extension. In conclusion, the original speedy trial try by date was November 15, 1998. Between that day and April 28, 1999 (which is both the date the trial was to take place and the date the defense filed its

dismissal motion), approximately one hundred sixty-four days had elapsed. However, prior to expiration of the original speedy trial date, at least one hundred ninety-four days had been accumulated that extended the speedy trial time. Moreover, as can be seen *supra*, events occurring after November 15, 1998 further extended the speedy trial date. Accordingly, this argument is without merit.

Waite, J., dissents; see dissenting opinion.
DeGenaro, J., concurs.

WAITE, J., dissenting.

{¶47} I must respectfully disagree with the opinion of the majority. Because police officers had the right, by warrant, to search the premises not only for a gun, but for any of its component parts and also for other fruits or instrumentalities of the crimes involved, I would hold that the search here was absolutely within law and affirm the trial court as to its decision not to suppress the evidence in question.

{¶48} The majority concedes that officers possessed the right to continue searching the apartment building even after a non-specific gun was found in Clinton Longmire's possession at the time of arrest. As to the specific containers searched, however, the majority concludes that a video cassette box and a wrapped package holding $1,500.00 in food stamps found within a heavy plastic shopping bag containing a substance which looked like marijuana and held $17,000.00 in cash should not have been searched. The majority opines that the video box was too small and light and the package of food stamps too small to hold a 9mm

gun, and were therefore outside the scope of the search warrant. The majority then argues that the items found within the video cassette box and the wrapped package cannot fall within the plain view exception to the warrant requirement because the officers had no justification for looking into either container. I would hold that the officers were fully justified in this search and that a discussion of the plain view doctrine is unnecessary.

{¶49} I must disagree with the majority's analysis for three reasons. First, the majority takes exception to *Davis v. State* (June 18, 1997), Arkansas Ct. App. No. CACR96-1337, unreported, where a .38 caliber pistol was found in just such a video cassette box. Although the officer who opened the video box in the matter before us testified that he knew that it did not have a pistol in it, the subjective attitudes and mental impressions of the officers executing the search warrant are *not* part of our review of the constitutionality of the search. *Horton v. California* (1990), 496 U.S. 128, 138. If the video box could have objectively and reasonably held a 9mm pistol *or its component parts*, then the video box was a viable area to search even using the majority's reasoning, as can be seen from the next, second, reason I disagree with the majority.

{¶50} The majority contends, essentially, that because a warrant *may* be so specific as to state that a search be undertaken not only for a gun as a whole but for any component parts, that warrant *must* so state. The majority also believes that the "fruits or instrumentalities" language inserted into the warrant is superfluous, as these were never described with more specificity. Using the cases the majority relies on, it is difficult to determine how this conclusion was reached, since none of these supports the majority's conclusion and, in fact, as

easily supports the opposite conclusion advanced by this dissent.

{¶51} The majority begins by relying on *State v. Benner* (1988), 40 Ohio St.3d 301. I would agree that *Benner* is relevant. I would disagree as to *Benner*'s impact, however, as its factual dissimilarity does not lend itself to any meaningful application to the matter before us. In *Benner*, officers were authorized to look for fibers, hairs and other trace elements of the crimes of rape and murder. Defendant argued that officers should have been told specifically which hairs, fibers and other "trace elements" they must look for. The court overruled this argument, stating that, "[i]n search and seizure cases where a warrant is involved, the requisite specificity necessary therein usually varies with the nature of the items to be seized." *Id.* at 307. As officers could not possibly know which items or locations in the defendant's homes or truck would yield these elements until they began their search, the warrant was not impermissibly broad. Further, the language regarding "other trace evidence," which the Supreme Court agreed was unarguably very broad, gave the officers enough of a general parameter guideline that this "catchall phrase" also did not serve to invalidate the warrant or the search. *Id.* at 307.

{¶52} Since *Benner* provides only vague, general guidelines, and refers us to a fact-specific review, we must look to similar cases for guidance. In *State v. Jordan* (Apr. 29, 1999), Cuyahoga App. No. 73453, relied on by the majority, the issue appears to be whether a search warrant which allows a search for bullets as well as a gun as a whole is impermissibly broad. Unquestionably, if the warrant allows a search for bullets, there are very few areas of a residence which will not be susceptible to search. The court in *Jordan* stated that the warrant is not overbroad, even though

allowing for an extensive search, because the warrant was sufficient to prohibit a general, exploratory search. Thus, *Jordan* holds that a more specific warrant is valid, but does not in any way *require* such specificity. The *Jordan* court also upheld language in the warrant as to a search for any other evidence of specific crimes, finding the language authorizing a search for handguns, ammunition, and any or all other evidence pertaining to the charged crimes was sufficiently specific. It would appear, then, that *Jordan* allows for and upholds the "fruits and instrumentalities" language such as we find before us.

{¶53} In *State v. Van Johnson* (Feb. 1, 1990), Montgomery App. No. 11347, the warrant in question likewise authorized a search for both "ammunition" and "parts of weapons". Apparently, the search authorized police to look for very small gun parts, used to convert conventional weapons to automatic. Certain of these parts could be as tiny as one-eighth of an inch. Police looked into an opaque aspirin-type bottle and found illegal drugs. The issue was never addressed by the court, however, since the count against the defendant which involved the illegal drugs was dropped. Even though it appears that the court was ready to uphold the search, it eventually determined that the issue did not need to be decided. Thus, a very analogous issue was not ultimately addressed in *Van Johnson*, and this case stands only for the proposition that a warrant *can* be more specific, not that it *must* be more specific.

{¶54} *State v. Williams* (1978), 55 Ohio St.2d 82 also fails to shed light on the instant matter, contrary to the majority's assertion. In *Williams,* police had a warrant allowing them to look in a garage for a stolen hydraulic jack, cutting torch and acetylene tank. Police removed other auto parts from the garage. The matter dealt not with the scope of the warrant, but whether

under the plain view doctrine the police could confiscate other auto parts, parts which the officers could not and did not immediately or obviously connect with any crime. Auto parts are likely to be found in a garage. Thus, unless the officers knew the seized parts, not named in the warrant, were criminal instrumentalities or fruits of a crime, they could not be seized under the plain view doctrine. Again, we are currently dealing with items seized pursuant to a search warrant, not under plain view. *Williams* is also inapplicable to the matter before us under the *Benner* rationale, which requires a factual, case by case analysis.

{¶55} *State v. Fields* (1971), 29 Ohio App.2d 154, raised by the majority, actually seems to support the validity of the search undertaken in the case at bar. The majority's conclusion that the shell casing found could be validly seized because it was, "discovered in a place or container in which [the gun] itself could be found," is a material misstatement of the holding in *Fields*. The matter before the *Fields* court was, where the warrant authorized police to look for a .38 caliber revolver, a ladies' purse and its contents and the police found, instead, a .38 caliber shell or casing in a dresser drawer, the casing could be seized and admitted. The argument of the defendant was that it could not, because it was not specifically named within the warrant as an item to be located and seized. While the casing *was* undoubtedly discovered in an area police could have searched for the entire gun, the court held that seizure of the casing was valid for two reasons. First, the casing was closely related to the crime. Importantly, the court also stated at page 161:

{¶56} "The .38 calibre casing was discovered in the area properly being searched within the purpose for which the search warrant had been issued. **The .38**

> **calibre shell casing may be considered as being relevant to, if not a component part of, the instrumentality of the crime,** as well as the crime itself. As a firearm, **a revolver is of little use without ammunition,** which is composed of the bullet, the shell, and the necessary powder or charge**. The latter elements, coupled with the former, constitute the complete instrumentality** possessing the capabilities of facilitating the commission of a crime." (Emphasis added).

{¶57} *Fields* approved the seizure, then, because the warrant authorizing a search for a gun also authorized a search for any component of the gun.

{¶58} Returning to the matter before us, I do not believe that a search warrant for a 9mm auto-pistol must be so narrowly interpreted as to exclude the possibility of also searching for the ammunition magazine and/or bullets in places where a magazine or ammunition could be found. The magazine is an integral part of the gun, but is also easily removed and reattached. Needless to say, bullets are also easily removed. Thus, any search for a gun which uses such a magazine may reasonably entail a distinct search for the magazine and/or a search for separate ammunition used or intended to be used in the specified crime or crimes. Also, since a modern gun, especially, can be broken down into component parts and each part separately hidden, any one of those parts could have been located in either the box or the plastic package. While subjective thoughts of the searching officer should not be considered, this is precisely what Officer Wilson testified as regards the video box, as the majority correctly points out.

{¶59} Third, in addition to the gun, the search warrant authorized a search for, "other instruments [or] fruits of these crimes * * *." Although the majority would have us disregard this language as meaningless, as earlier discussed, citing a few cases where the ammunition and component parts *were* specifically listed

in a warrant, the United States Supreme Court has interpreted almost identical language to authorize the search and seizure of other evidence relating to the specific crimes listed in the search warrant. *Andresen v. Maryland* (1976), 427 U.S. 463, 480. See also the discussion of *State v. Jordan, supra.* The crimes listed in the search warrant in the instant case were murder, attempted murder and robbery. At a minimum, the additional language in the warrant also allowed the officers to search for the bullets used or intended to be used in those crimes or bullets fired from the same gun used to commit the crimes. Bullets could easily have been located in the video box and/or in the wrapped food stamp package at issue. The fact that the scope of the search legitimately includes very small objects does not transform it into an unconstitutional generalized search, see *State v. Jordan, supra*, also *State v. Benner, supra*. One can also assume with a robbery charge that money might easily be a fruit of the crime. No one disputes that the shopping bag contained large amounts of money in plain view, as well as the plant materials which actually turned out not to be marijuana. Upon this discovery, it was reasonable to believe that the wrapped package could contain, if not the entire gun, parts of this gun, bullets or an entire magazine. There is no showing that this bundle was too light to contain any of these, only that, while the shopping bag itself was heavy the officer did not think the wrapped package held a whole gun.

{¶60} Thus, I would find the search here to be valid and would affirm the trial court's decision not to suppress the evidence found during this valid search. The majority seeks to set certain boundaries on the police in a bright-line fashion; i.e. in order to look for component parts of a gun and/or ammunition these must be specifically part of the warrant. This is not the law with

regard to search warrants. Each situation is fact based, and areas to be searched will be limited only by the facts of a specific case as they relate to the items to be found and the crimes to which these items relate. Further, no court invalidates the "fruits or instrumentalities" language or requires that these also be specified exactly in a warrant to validate a search. Again, this language is limited by the items to be found and the crimes involved. Under the facts of this case and based on the crimes involved, I would hold that the search into the video box and package of food stamps was valid.

{¶61} While I agree with the majority that, in certain instances, an entire transcript need not be provided in order to review an issue solely relating to the failure to suppress, because Appellants here raised other, additional issues on appeal, the transcripts of trial were absolutely necessary.

{¶62} As the majority correctly points out, errors in the suppression of evidence are subject to the harmless error rule. *State v. Tucker* (1998), 81 Ohio St.3d 431, 442; *State v. Reynolds* (1998), 80 Ohio St.3d 670, 675. An error is not harmless when there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Champman v. California* (1967), 386 U.S. 18, 23; *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388. If the remaining evidence presented at trial overwhelmingly supports the conviction, then the evidentiary error is considered harmless. *State v. Davie* (1997), 80 Ohio St.3d 311, 318.

{¶63} Often a criminal defendant will enter a "no contest" plea after losing the suppression motion and there will be no subsequent trial transcript to review. If the matter proceeds to trial, a reviewing court must first determine whether the evidence

in dispute was even presented and admitted at trial, and then whether any additional evidence admitted at trial provided overwhelming proof of the defendant's guilt. It is nearly impossible for a reviewing court to make these determinations without a transcript of the trial proceedings. Without a transcript, we would be obliged to presume the correctness of the proceedings below, including the presumption that the state provided other overwhelming proof of the defendant's guilt. *State v. Grant* (1993), 67 Ohio St.3d 465, 483; *State v. Dalton* (June 23, 1999), Belmont App. No 97BA56, unreported.

{¶64} In the matter before us, the record appears to reveal that Appellee had no additional evidence to use at trial other than the evidence presented at the suppression hearing. Therefore, in this particular case, it was unnecessary for Appellants to provide a trial transcript. Appellate counsel should not assume, however, that a trial transcript will never be required on appeal of the denial of a motion to suppress.

{¶65} In fact, as I would overrule Appellants' assignment of error on the suppression issue, this matter presents an illustration as to why the trial transcripts should be provided on appeal. Appellants' failure to provide transcripts are fatal to their next three assignments of error.

{¶66} In the second assignment of error, Appellants argue that the court erred in the denial of a motion in limine attempting to exclude evidence of prior bad acts under Evid.R. 404(B). "[T]he denial of a motion in limine does not preserve a claimed error for review in the absence of a contemporaneous objection at trial." *State v. Hill* (1996), 75 Ohio St.3d 195, 203. Here, Appellants' failure to provide a transcript is crucial. Because Appellant failed to provide a trial transcript, they have waived review of

this alleged error.

{¶67} The lack of a transcript is also fatal to the third assignment of error in which they argue that there was insufficient evidence to charge Appellant Shauna Scott with perjury. In order to determine whether or not there was sufficient evidence presented at trial, we must necessarily review that evidence. Without a transcript this review is impossible. Appellants also argue that the date of the alleged perjury was incorrectly stated on the indictment. Absent a showing of prejudice, the exact time and date of an offense are not essential parts of the indictment. *State v. Hart* (1994), 94 Ohio App.3d 665, 676; *State v. Sellards* (1985), 17 Ohio St.3d 169, 172; *State v. Gingell* (1982), 7 Ohio App.3d 364. Furthermore, Appellee clarified the exact date and circumstances of the perjury charge in its June 22, 1999, response to Appellants' motion for bill of particulars.

{¶68} Appellants' fourth assignment of error argues that there was plain error in the jury charge pertaining to the illegal use of food stamps. Appellants argue that R.C.§2913.46 makes it a crime to knowingly possess food stamp coupons in a manner, "not authorized by the 'Food Stamp Act of 1977,' 91 Stat. 958, 7 U.S.C.A. 2011, as amended * * *.". R.C. §2913.46(B). Appellants argue that the jury was not instructed about what the Food Stamp Act of 1977 actually says. They claim that this lack of instruction was plain error requiring a reversal of the verdict.

{¶69} Appellants' failure to provide evidence that they formally objected to the jury instructions waives all but plain error on review. *State v. Bey* (1999), 85 Ohio St.3d 487, 497. Plain error is only found where, "but for the error, the outcome

of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of syllabus.

{¶70} At first glance, it does appear that the instruction may be inadequate. The trial court merely instructed the jury that the food stamp program, "was authorized which permits low income households to obtain a more nutritious diet by increasing food purchasing power for all eligible households who apply for participation." (10/4/99 Tr. of Jury Charge, p. 11). The trial court was not required to instruct the jury on the particulars of the entire Food Stamp Act, but it should have paraphrased and summarized the sections which Appellants were accused of violating. Nevertheless, Appellants have not provided us with any arguments indicating that the outcome of the trial would have been different had more thorough instructions been given, we have no transcript of the trial on which to have to base such a determination, ourselves.

{¶71} Finally, I do agree with the majority on the fifth assignment of error and would also hold that, even with the record as it is presented, it can be seen that Appellants' speedy trial rights were not violated.

{¶72} For all the foregoing, I would overrule Appellants' assignments of error and I would affirm the trial court in full.