STATE OF CONNECTICUT *v.*
HERBERT J. BROWNE III
(AC 27662)

DiPentima, Gruendel and Berdon, Js.

Argued March 26—officially released November 6, 2007

(Appeal from Superior Court, judicial district of Middlesex, Holzberg, J.)

John R. Donovan, for the appellant (defendant).

Russell C. Zentner, senior assistant state's attorney, with whom were *Susan W. Hatfield*, deputy assistant state's attorney, and, on the brief, *Timothy J. Liston*,

state's attorney, for the appellee (state).

Opinion

BERDON, J. The defendant, Herbert J. Browne III, following a plea of nolo contendere, was convicted of possession of more than four ounces of marijuana in violation of General Statutes § 21a-279 (b). The plea of nolo contendere was conditioned on the defendant's right to challenge on appeal the validity of the search warrant. The defendant claims that the trial court improperly denied his motion to suppress evidence seized pursuant to that warrant. He argues that the warrant authorizing the search was invalid because the particularity section authorized a search for cocaine, crack cocaine and collateral items,[1] not marijuana, the intended target of the search. We agree that the warrant was invalid and reverse the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's claim. In December, 2003, the Middletown police department began an investigation of the defendant for the sale of marijuana. Police officers observed two controlled purchases of marijuana from the defendant by a confidential informant. As a result of this investigation, they applied for a warrant to search the defendant's person, automobile and residence. The warrant application requested permission to search for "cocaine, crack cocaine" and collateral items believed to be related to the sale of narcotics. The application also stated that these items were believed to constitute evidence of the crime of possession of marijuana. The affidavit in support of the warrant application detailed the affiants' knowledge of the defendant's involvement in the sale of marijuana, including the observation of two controlled purchases of marijuana from the defendant. The warrant itself did not name marijuana as an item to be seized or make any reference to marijuana. Instead, the particularity clause of the warrant listed "cocaine, crack cocaine" and collateral items as those for which police were authorized to search.[2]

The warrant was executed on December 30, 2003. Seven and one-half pounds of marijuana, two scales, proof of residence and plastic bags were seized during the search, leading to the defendant's arrest. When the warrant was executed, neither the warrant application nor the supporting affidavit accompanied the warrant because they had been placed under seal to protect the identity of a confidential informant.

The defendant filed a motion to suppress the evidence seized pursuant to the warrant. At the suppression hearing, Detective Jorge Yepes testified that cocaine, rather than marijuana, was listed as an item to be seized because he mistakenly had copied the particularity section from another warrant and failed to edit the text before submitting the affidavit and warrant to the magistrate for his determination of probable cause and sig-

nature.[3]

"The particularity clause of the fourth amendment requires that no warrants issue except those particularly describing the place to be searched, and the persons or things to be seized. U.S. Const., amend. IV. . . . With respect to the things to be seized, the standard is met if the officer executing it can identify the property sought with reasonable certainty. 1 LaFave & Israel, Criminal Procedure § 3-4 (f), quoting *State* v. *Muldowney*, 60 N.J. 594, 600, 292 A.2d 26 (1972)." (Citations omitted; internal quotation marks omitted.) *State* v. *Santiago*, 8 Conn. App. 290, 304, 513 A.2d 710 (1986). The parties agree that the principal object of this search was marijuana, and it was not listed on the warrant. Instead, cocaine and crack cocaine were listed. This warrant, on its face, simply did not describe the property sought, and we hold that it is invalid.

The state argues that the allegations asserted by the affiants in the affidavit and warrant application reflected a consistent and continuous reference to marijuana such that the absence of marijuana from the particularity clause of both the warrant and application was merely a scrivener's error. This argument was addressed in the recent United States Supreme Court case of *Groh* v. *Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004). In *Groh*, the court held: "The fact that the application adequately described the 'things to be seized' does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. See *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988, n.5 [104 S. Ct. 3424, 82 L. Ed. 2d 737] (1984) ('[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional'); see also *United States* v. *Stefonek*, 179 F.3d 1030, 1033 ([7th Cir.] 1999) ('The Fourth Amendment requires that the *warrant* particularly describe the things to be seized, not the papers presented to the judicial officer . . . asked to issue the warrant' (emphasis in original)) [cert. denied, 528 U.S. 1162, 120 S. Ct. 1177, 145 L. Ed. 2d 1085 (2000)]. And for good reason: 'The presence of a search warrant serves a high function,' *McDonald* v. *United States*, 335 U.S. 451, 455 [69 S. Ct. 191, 93 L. Ed. 153] (1948), and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection. We do not say that the Fourth Amendment forbids a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant. . . . But in this case the warrant

did not incorporate other documents by reference, *nor did either the affidavit or the application (which had been placed under seal) accompany the warrant.* Hence, we need not further explore the matter of incorporation." (Citations omitted; emphasis added.) *Groh* v. *Ramirez*, supra, 557–58. Even if the state is correct that the affidavit and allegations sufficiently describe the items to be seized so as to inform the reader that marijuana, not cocaine, is the object of the search, here, as in *Groh*, the affidavit did not accompany the warrant.[4]

The state also argues that the warrant was valid because the executing officer had personal knowledge of the crime being investigated and knew that marijuana, not cocaine, was the focus of this search. "It is true that the executing officer's personal knowledge of the place to be searched may 'cure' minor, technical defects in the warrant's *place* description. 2 W. LaFave, Search and Seizure [(2d Ed. 1987) § 4.5 (a), pp. 209–10]. However, where the inadequacy arises not in the warrant's description of the place to be searched but rather in the things to be seized, the officer's personal knowledge of the crime may not cure the defect. See generally 2 W. LaFave §§ 4.5-4.6 (discussing the particularity requirement in relation to a warrant's description of the places to be searched and the things to be seized). This is so because the purpose of a warrant is not only to limit the executing officer's discretion, but to inform the person subject to the search what items the officer may seize. *United States* v. *Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986) [cert. denied, 479 U.S. 1086, 107 S. Ct. 1289, 94 L. Ed. 2d 146 (1987)]." (Citation omitted; emphasis added.) *Washington* v. *Riley*, 121 Wash. 2d 22, 28–29, 846 P.2d 1365 (1993). The United States Supreme Court has "long held, moreover, that the purpose of the particularity requirement is not limited to the prevention of general searches. See [*Maryland* v. *Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987)]. A particular warrant also assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."[5] (Internal quotation marks omitted.) *Groh* v. *Ramirez*, supra, 540 U.S. 561.

The state argues that because it had probable cause to believe that some of the collateral items were located in the house, the police officer could seize the marijuana under the plain view doctrine. "[O]bjects not named in the warrant, but found within an officer's plain view, may be seized if the . . . officers had a reasonable basis for believing that the seized evidence was reasonably related to the offense which formed the basis for the search warrant. . . . This doctrine is based upon the premise that the police need not ignore incriminating evidence in plain view while they are operating within the parameters of a valid search warrant or are otherwise entitled to be in a position to view the items seized." (Citations omitted; internal quotation marks

omitted.) *State* v. *Cobb*, 251 Conn. 285, 347, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). The problem with this theory in this case is that the police were not lawfully on the premises of the defendant where the marijuana was found. See *United States* v. *George*, 975 F.2d 72, 80 (2d Cir. 1992) (noting that plain view doctrine inapplicable when "the sufficiently particularized portions make up only an insignificant or tangential part of the warrant"). Moreover, the collateral items, standing alone without the illegal drug, would not support probable cause to believe a crime was committed.[6] Accordingly, the marijuana could not be seized under the plain view doctrine.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to suppress.

In this opinion DiPENTIMA, J., concurred.

[1] The collateral items listed on the warrant include "cutting agents such as lactose and baking soda, white powder, razor blades, scrapers, straws, packaging materials, foil packets, plastic bags, glassine envelopes, glass or plastic vials, scales, records and other 'data' [as defined by General Statutes § 53a-250 (8)] of sale and or purchases of narcotics, currency, rifles, shotguns, semi-automatic weapons, fully automatic weapons, revolvers, ammunition, and other dangerous weapons. Telephone toll records, rent/mortgage records, bank statements, records and account passbooks, receipts showing cash purchases (such as electronic equipment including VCR's, and television sets, video cameras, cameras, computers, computer peripherals and storage [devices], gold and silver jewelry which are believed to have been purchased with money derived from the sale of narcotics, financial records and 'Data', beepers, fax machines and telephone answering machines and stored messages contained either on tape or any other electronic format, safety deposit box keys and records relating to same, police scanners, videotapes, and developed photographs showing narcotics and/or other criminal activity."

[2] The warrant authorized the following search: "The person of [the defendant, date of birth, December 12, 1962] for the property described in the foregoing affidavit and application to wit: Cocaine, crack cocaine, [and collateral items; see footnote 1]."

[3] Yepes testified that he drafted the application, affidavit and warrant on a computer word processor. Using the "cut and paste" function, he copied the text from a warrant in another case and inserted it into the warrant and application at issue.

[4] The dissent claims that our decision today is inconsistent with General Statutes § 54-33c. Section 54-33c (a) provides in relevant part: "A copy of such warrant shall be given to the owner or occupant of the dwelling . . . or place designated therein, or the person named therein. Within forty-eight hours of [the] search, a copy of the application for the warrant and a copy of all affidavits upon which the warrant is based shall be given to such owner, occupant or person. . . ." We recognize that this statutory provision makes obvious reference to those warrants that facially conform to the particularity clause of the fourth amendment and merely permits an owner, occupant or other person subject to search to obtain such supplemental information as set forth in a supporting application or affidavit.

[5] The dissent relies on *United States* v. *Bianco*, 998 F.2d 1112, 1117 (2d Cir. 1993), cert. denied, 511 U.S. 1069, 114 S. Ct. 1644, 128 L. Ed. 2d 364 (1994), for the proposition that a warrant that is clearly lacking in particularity is not incurably defective where both the affidavit and the conduct of law enforcement personnel suggest that "the involved parties were aware of the scope of and limitations on the search." *Bianco* is easily distinguished from the present case. In *Bianco*, the affidavit was not incorporated by the warrant nor was it attached; however, it was present at the time of the search. Id., 1116–17. Here, neither the application nor the affidavit accompanied the warrant, and the warrant specifically authorized a search for cocaine and crack cocaine.

[6] In the present case, the insignificant items found were two scales, proof

of residence and plastic bags, all of which are items that could be found in any home.