[Cite as *State v. McDivitt,* 2012-Ohio-2243.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-129**
- vs -	:	
DYLAN D. MCDIVITT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 10 CR 000323.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Albert L. Purola, 38298 Ridge Road, Willoughby, OH 44094 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Dylan D. McDivitt, appeals the judgment of the Lake County Court of Common Pleas denying his motion to suppress evidence and his motion to dismiss a firearm specification. For the reasons that follow, the judgment is affirmed.

{¶2} On May 15, 2010, occupants of a residence in Concord Township, Lake County, awoke to gunshots, ultimately finding their property badly damaged by bullet holes, including a flat tire apparently punctured by a bullet. Similarly, on May 17, 2010, occupants of a residence in Leroy Township, Lake County, awoke to gunshots, finding

their home to be riddled with bullet holes. Appellant, aged 18, was implicated in the shootings after a detailed investigation by the Lake County Sheriff's Office.

{¶3} A search warrant was issued for appellant's residence. The sheriff's office assembled a search unit and the warrant was executed. The search uncovered several pieces of evidence that place appellant squarely at the scenes of the crimes. The search also uncovered a .22 caliber revolver handgun, along with various types of ammunition and spent cartridges. After the search, appellant was taken back to the station and interviewed where he confessed to his involvement in the shootings.

{¶4} A four-count indictment was filed against appellant on September 17, 2010. Appellant was charged with one count of improperly discharging a firearm at or into a habitation or school safety zone, a second-degree felony in violation of R.C. 2923.161(A)(1), with a firearm specification. Appellant was additionally charged with two counts of improperly handling firearms in a motor vehicle, a fourth-degree felony in violation of R.C. 2923.16(B). Appellant was also charged with one count of criminal damaging or endangering, a second-degree misdemeanor in violation of R.C. 2909.06(A)(1).

{¶5} Appellant thereafter sought to suppress essentially all evidence against him claiming that the search warrant lacked sufficient probable cause and that the officers illegally executed the warrant by failing to knock and announce their presence. He also claimed he was unlawfully seized after evidence was found in his home, and that he involuntarily made statements to the police after his request for an attorney went unnoticed. The trial court considered testimony from those involved in the search and seizure during a two-day suppression hearing. Specifically, the trial court heard testimony from Deputy Brian Butler, the officer who prepared the affidavit in support of

the warrant; Lieutenant Carl Dondorfer, who aided in executing the warrant; Captain Lonnie Sparkman, Jr., who interviewed appellant; and Deputy Angela Gondor, who witnessed a portion of Captain Sparkman's interview with appellant. The trial court also heard testimony from appellant's parents, Robert McDivitt and Victoria McDivitt, who were home when the search warrant was executed. Appellant also testified during the suppression hearing. Upon consideration, the trial court denied appellant's suppression motion, finding that the issuance and execution of the warrant was lawful and that appellant never requested an attorney.

{¶6} Appellant further moved the court to dismiss the firearm specification attached to count one (improperly discharging a firearm at or into a habitation or school safety zone) because, he argued, it violated his right to be free from double jeopardy. The trial court denied appellant's dismissal request.

{¶7} Appellant thereafter changed his plea from "not guilty" to "no contest" on count one (improperly discharging a firearm at or into a habitation or school safety zone with a firearm specification) and count four (criminal damaging or endangering). The trial court found appellant guilty and, upon application of the state, entered a nolle prosequi on the remaining two counts set forth in the indictment.

{¶8} Appellant was ordered to serve a prison term of two years on count one and a concurrent term of 90 days on count four. He was further ordered to serve an additional, consecutive term of three years for the firearm specification attached to count one, pursuant to R.C. 2941.145, for a total prison term of five years. He was also ordered to pay restitution for the victim's economic loss in the amount of $2,600.

{¶9} Appellant now appeals and asserts five assignments of error, which are addressed out of numerical order.

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

{¶11} "The affidavit supporting the search warrant is defective and insufficient to give the magistrate any basis for concluding, as *Illinois v. Gates*, 426 U.S. 213, requires, there is a 'fair probability that contraband or evidence of crime will be found (in a particular place) * * * Leroy Township, Ohio.'"

{¶12} Appellant argues that the search warrant was defective in that it lacked probable cause. As such, he contends that the trial court erred in failing to suppress all resulting evidence from the search.

{¶13} At the onset, we must address the standard of review to be applied in this case. An appellate court's review of a decision on a motion to suppress involves issues of both law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. During a suppression hearing, the trial court acts as trier of fact and sits in the best position to weigh the evidence and evaluate the credibility of the witnesses. *Id*., citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Accordingly, an appellate court is required to uphold the trial court's finding of facts provided they are supported by competent, credible evidence. *Id*., citing *State v. Fanning*, 1 Ohio St.3d 19 (1982).

{¶14} Once an appellate court determines if the trial court's factual findings are supported by the record, the court must then engage in a de novo review of the trial court's application of the law to those facts. *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, ¶13, citing *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, ¶9. Upon review of the record, we determine that the trial court's factual findings are indeed supported by competent, credible evidence. Thus, we accept the court's factual findings as accurate and proceed to determine whether, as a matter of law, the applicable legal standard was properly applied in the case.

{¶15} Crim.R. 41(C) sets forth the procedure and requirements for the issuance of a search warrant. It provides, in relevant part:

> **{¶16}** (1) A warrant shall issue on either an affidavit or affidavits communicated to the judge by reliable electronic means establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located.
>
> **{¶17}** (2) If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * * The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

{¶18} Thus, the pivotal inquiry is whether the warrant is supported by sufficient probable cause, as explained by the Ohio Supreme Court in adopting the test set forth in *Illinois v. Gates*:

> **{¶19}** In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to 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.' *State v. George*, 45 Ohio St.3d 325 (1989), paragraph one of the syllabus, quoting *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983).

{¶20} In assessing the sufficiency of probable cause in an affidavit which supports a search warrant, neither the lower court nor the appellate court should engage in a de novo review. *Id.*, paragraph two of the syllabus. Instead, a reviewing court should merely ensure that the magistrate had a "substantial basis" for concluding that probable cause existed to issue a warrant. *Id*. Thus, great deference must be afforded to the magistrate's finding of probable cause and "doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *Id*.

{¶21} After a review of the affidavit supporting the warrant in this case, it is clear, given all the circumstances set forth, the magistrate had a substantial basis for concluding that probable cause existed. The affiant, Deputy Butler of the Lake County Sheriff's Office, explains that he was assigned to investigate two separate incidents in which a firearm was discharged into two occupied residences, one in Leroy Township and one in Concord Township. The affidavit explains that Amber G. resides at the home in Concord Township with her family, and Melanie P. resides at the home in Leroy Township with her parents. Both homes were damaged by gun shots. Automobiles in the driveway of both homes were also damaged.

{¶22} As to the first incident, the affiant interviewed Amber G., who explained that appellant, seemingly intoxicated on drugs and alcohol, arrived at her home on May

15, 2010, at 3:30 a.m. with his friend, Zachary B. She stated that she had gotten into a fight with appellant over not wanting to engage in sexual contact with him. She further explained that she asked appellant and Zachary to leave. Appellant begrudgingly left, but sent Amber a barrage of angry text messages throughout the morning. Later in the morning, Amber awoke to find her mother's vehicle had been shot and her home riddled with bullet holes.

{¶23} The affidavit explains that neighbor Jerry Prahl observed a male in the backyard of Amber's residence at around 6:30 a.m. holding a handgun sideways and discharging it into a parked automobile. Mr. Prahl immediately contacted the Lake County Sheriff's Office. Later that same morning, Mr. Prahl observed a male, traveling south on State Route 86 riding a red off-road vehicle, pull into a nearby residence, later identified as appellant's home.

{¶24} As to the second incident, the affidavit explains that, on May 17, 2010, at 7:00 a.m., Edward P. awoke to the sound of gun shots. Edward went outside to investigate, finding his home and his vehicle in the driveway to be damaged. In his mailbox, Edward found a letter addressed to his family with a unique clown drawing at the bottom. Neighbor Henry Ledoux stated he saw an individual on a red off-road vehicle leaving the scene and heading towards State Route 86 at approximately the same time five shots had been fired.

{¶25} The affiant spoke with Melanie P., who explained that appellant has clowns like the type in the letter on murals in his bedroom at home. She also explained that he has a tattoo of a similar clown design on his body. A picture located on appellant's "my space" profile page depicts a tattoo on the torso of a male believed to be appellant with a clown drawn in a similar style. Melanie further informed the officer

that she has ridden on an off-road vehicle with appellant consistent with the kind Mr. Ledoux described. The affiant also spoke with Adam L., appellant's friend, who explained that appellant draws clowns on occasion. The affidavit goes on to describe appellant's residence, explaining the size and color of the home, and other distinguishing features. Based on the foregoing, it is clear the magistrate had a substantial basis for concluding that probable cause existed to believe that evidence of the crime would be found at that address.

{¶26} Appellant argues this court's decision in *State v. Young*, 146 Ohio App.3d 245 (11th Dist.2001) is dispositive on this issue. However, that case is clearly distinguishable from the facts of the instant case. In *Young*, the trial court granted the defendant's motion to suppress evidence seized pursuant to a search warrant. *Id*. at 251. This court affirmed the suppression of evidence, agreeing that the officer's mere observation of a single baggy of marijuana, with nothing more, did not translate to the residence being a "drug house" as the officer assumed it was. *Id*. at 255. Here, however, there was substantial evidence provided by the affiant, after a well-rounded investigation, such that the trial court properly denied appellant's motion.

{¶27} Even if the search warrant was ultimately found to be unsupported by probable cause, the remedy sought by appellant to exclude the uncovered evidence would still not apply. The Fourth Amendment exclusionary rule does not apply to exclude evidence obtained by officers "acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate." *State v. George*, 45 Ohio St.3d 325 (1989), paragraph three of the syllabus, following *U.S. v. Leon*, 468 U.S. 897 (1984). There is nothing that indicates the officers in this case were not reasonable in

relying on what could only be described as an objectively-valid warrant signed by the magistrate.

{¶28} Appellant's second assignment of error is without merit.

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

{¶30} "The police entry into the McDivitt home was in violation of the knock and announce rules, and the factual findings to the contrary by the trial court is [sic] not supported by credible evidence. The Ohio Constitution excludes evidence obtained in violation of this statute and rule."

{¶31} Appellant next argues that the police violated the well-founded "knock and announce" rule upon executing the search warrant. As such, he argues the court erred in not excluding the evidence from the search.

{¶32} Appellant specifically argues that the police violated the statute codifying the "knock and announce" rule. R.C. 2935.12 provides that when executing a search warrant, an officer "may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make such arrest or to execute the warrant or summons, he is refused admittance, but [an officer] executing a search warrant shall not enter a house or building not described in the warrant."

{¶33} Appellant claims the police were not refused admittance, but instead, no one in the home responded to the knock; therefore, the police action was in violation of R.C. 2935.12. However, this statute is inapplicable to the present set of facts. This court has concluded that the provisions of R.C. 2935.12 only apply when an officer makes a forced entry. *State v. Campana*, 112 Ohio App.3d 297, 302 (11th Dist.1996). Indeed, R.C. 2935.12 is labeled, "*forcible entry* in making arrest or executing search warrant." (Emphasis added.) *See also State v. Baker*, 87 Ohio App.3d 186, 193 (1st

Dist.1993). ("R.C. 2935.12 applies only if law enforcement officials break down a door to enter * * * [or engage in] violent, forcible entry.") Here, the police made their entrance to execute the warrant through an unlocked door without the use of force.

{¶34} Thus, the requisite analysis is limited to whether the action was reasonable pursuant to the Fourth Amendment. Here, appellant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated, as this was not a situation where the police failed to announce their presence and their purpose. Instead, the record indicates that the police acted reasonably. The search unit arrived at the home on the warm, sunny evening of May 18, 2010, at around 5:00 p.m. Deputy Butler testified that he was among the search squad. He explained that Lieutenant Dondorfer knocked on the main door of the residence and announced, "Lake County Sheriff's Office, search warrant." Deputy Butler testified that Lieutenant Dondorfer waited several more seconds and made a second announcement while knocking on the door. Deputy Butler explained that, after approximately 30 seconds, the squad entered the residence to execute the warrant through the front, unlocked storm door.

{¶35} Lieutenant Dondorfer testified that the main door of the residence was open, and the glass storm door was closed. He stated that a second-story window facing the front of the house was open. He too explained that he made the announcement, "sheriff's office, search warrant," twice. When there was no response, he stated that the search unit waited 20 to 30 seconds before entering the home. The door was unlocked, and the battering ram was not used. Lieutenant Dondorfer further testified that he continued to announce "sheriff's office, search warrant," as the officers moved through the house.

{¶36} However, appellant argues that the testimony of Victoria McDivitt not only contradicts the officers' testimony, but is also more credible. Mrs. McDivitt testified before the trial court that she was in the laundry room, about 20 feet from the front door, when the police entered. She explained she did not hear a knock or an announcement from outside the door; otherwise, her two dogs would have started barking. To this point, it again must be stressed that factual questions during suppression hearings are to be resolved by the trial court because it sits as the trier of fact. *State v. Howard*, 11th Dist. No. 2009-L-158, 2010-Ohio-2817, ¶33. Thus, it is squarely within the province of the trial court to assess the credibility of the witnesses by weighing their testimony and observing their demeanor. As such, the trial court is entitled to believe all, part, or none of the testimony of the officers who testified. *Id*., citing *State v. Dierkes*, 11th Dist. No. 2008-P-0085, 2009-Ohio-2530. In light of the trial court's ruling, it is clear that it opted to believe the testimony of the officers. Further, this was not necessarily conflicting testimony—merely because Mrs. McDivitt failed to hear the police knock and announce does not mean they failed to knock.

{¶37} Further, the remedy sought by appellant to exclude the uncovered evidence would again not apply because the Fourth Amendment does not require the suppression of evidence found in the ensuing search. *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, ¶11, citing *Hudson v. Michigan*, 547 U.S. 586 (2006). The exclusionary rule is not applicable in this case because the relevant evidence was obtained during the subsequent search pursuant to a lawful warrant, *not* because of any police failure to knock or announce. *See Hudson v. Michigan*, 547 U.S. 586 (Kennedy, J., concurring).

{¶38} Parenthetically, appellant makes continual references to the alleged "reign of terror" perpetuated by the officers upon the "unsuspecting" and "victimized" McDivitt family while executing the warrant. Despite appellant's sensational and dramatic editorial pontification of the facts, the police must take necessary, appropriate, and reasonable precautions when they effectuate a search warrant. This would naturally include securing the perimeter of the area to be searched by detaining bystanders to ensure officer safety. Particularly, when the evidence sought to be retrieved includes deadly weapons, it is simply prudent for the police to exercise great caution in an effort to maintain their safety. Finally, given the severity of the crime being investigated of shooting into an occupied structure, responding officers are justified in their suspicion that the likely perpetrator may be home, armed, and dangerous.

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

{¶40} Appellant's first assignment of error states:

{¶41} "The forcible removal of Dylan McDivitt from his home to the station house for questioning violated the Fourth Amendment."

{¶42} Appellant next argues the trial court erred in concluding that the warrantless seizure of appellant was reasonable. Thus, appellant contends the court should have suppressed all subsequent statements flowing out of the detention.

{¶43} Initially, it must be noted that the facts of this case present a quintessential seizure under the Fourth Amendment: appellant was in his bedroom with his friend, Zachary B., playing video games when he was swiftly apprehended by several uniformed police officers with their guns drawn. He was immediately handcuffed, removed from his home, and placed into an unmarked cruiser. He was then transported to the nearby school, where the search unit had assembled earlier in the day, and

transferred to a marked cruiser. Appellant was then brought to the station, read his *Miranda* rights, and questioned. For a period of time during questioning, appellant remained handcuffed. Appellant had to ask for permission to use the phone, and the number was dialed for him. As to whether the police *requested* appellant and his friend to come down to the station, Captain Sparkman, Jr. made it clear during the suppression hearing that the police were not asking, stating: "No, we were taking them to the station." Thus, no reasonable person would have felt free to leave at any point during this process. As a result, the safeguards of the Fourth Amendment were activated, triggering the constitutional requirement that the seizure in this case be reasonable.

{¶44} Both appellant and the state recognize that appellant was seized without an arrest warrant. The governing standard for a warrantless seizure or arrest is the same as if there had been a warrant: there must be probable cause. That is, "[u]nless an arresting officer has probable cause to make an arrest, a warrantless arrest is constitutionally invalid." *State v. Ball*, 11th Dist. No. 2009-T-0013, 2010-Ohio-714, ¶19, citing *State v. Timson* (1974), 38 Ohio St.2d 122, 127. "Probable cause exists when the arresting officer has 'sufficient information, derived from a reasonably trustworthy source, to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused.'" *Id*., quoting *State v. Timson*, *supra*.

{¶45} Further, "[w]arrantless arrests for felony offenses are explicitly permitted in Ohio: R.C. 2935.04 allows for a suspect to be detained until a warrant can be obtained. A reasonably prudent person must, at the time of arrest, believe that the person placed under arrest was committing or had committed a criminal offense." *State v. Brown*, 115 Ohio St.3d 55 (2007), citing *Gerstein v. Pugh*, 420 U.S. 103 (1975).

{¶46} Here, there was probable cause for the seizure and subsequent arrest of appellant. During the search of appellant's home, the property described in the search warrant was located, thereby warranting the reasonable belief that appellant committed the felony being investigated. The police found several firearms throughout the residence, including a .22 caliber pistol, a rifle, two shotguns, and spent shells. The police also located a red off-road vehicle like the two witnesses saw at or around the scenes of the crimes. Further, the police found a spent 20-gauge shotgun cartridge, consistent with one found at the scene of the second crime. This evidence, in conjunction with the witnesses' statements suggesting appellant's intent and motive, provided probable cause for appellant's arrest.

{¶47} Appellant's first assignment of error is without merit.

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

{¶49} "The police ignored Dylan McDivitt's request for a lawyer and continued their custodial interrogation, in violation of *Edwards v. Arizona*, 451 U.S. 477."

{¶50} Appellant next contends that the trial court erred in not suppressing his statements to the police because he requested an attorney, yet the interrogation continued.

{¶51} It is well founded that, if a suspect is in custody, police must advise the suspect of his *Miranda* rights prior to questioning. *Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966). *Miranda* explains that a suspect has the right to have an attorney present during a custodial interrogation and to consult with that attorney. *Id*. Although a suspect may waive his *Miranda* rights, if a suspect requests counsel during a custodial interrogation, the police must cease questioning and halt the interrogation. *State v. Knuckles*, 65 Ohio St.3d 494, 495 (1992), adopting *Edwards v. Arizona*, 451 U.S. 477

(1981). After a suspect requests counsel, the interrogation can only continue if the suspect himself initiates further communication or an attorney has been made available to him. *Davis v. United States*, 512 U.S. 452, 458 (1994), citing *Edwards*, *supra*.

{¶52} However, a suspect's request for counsel must be unambiguous and unequivocal, as the United States Supreme Court has explained: "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." (Emphasis sic.) *Id*. at 459. That is, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." *Id*.

{¶53} Thus, the focus of our analysis is the clarity of appellant's request to counsel, if any. Once brought to the station, appellant was interviewed twice by Captain Sparkman, Jr. Captain Sparkman apparently had some familiarity with appellant and chose to talk with him directly. He testified that he entered the interview room, introduced himself, and read appellant his *Miranda* rights. He stated that he read the rights off of a card that is commonly used by the Lake County Sheriff's Office. Captain Sparkman stated that after reading the card containing the *Miranda* rights, appellant affirmed that he understood his rights. Captain Sparkman then asked about the shootings. During the conversation, only Captain Sparkman and appellant were present. The conversation was not recorded in any way.

{¶54} Captain Sparkman explained that after five or ten minutes, appellant confessed his involvement in the shootings. After this information was offered, Captain Sparkman stated he stepped out of the room in order to get a document to reinforce that appellant had confessed. During this "break," appellant's handcuffs were removed, he went to the restroom, and he was offered a cup of coffee and some food.

{¶55} Captain Sparkman met appellant again in the interview room, this time with Deputy Gondor. Captain Sparkman stated that he then read appellant his rights a second time, this time with Deputy Gondor present. Appellant then signed the *Miranda* rights card and again affirmed he understood his rights. Appellant once again made incriminating statements about his involvement in the shooting. Captain Sparkman testified that he asked appellant if he would put his confession in writing. Captain Sparkman stated that appellant refused to write anything down and instead requested that he call his father. Captain Sparkman then dialed the number and handed appellant the phone.

{¶56} Captain Sparkman affirmed that there was no point in time, up until the time appellant requested to speak to his father, when appellant stated he did not want to answer any of his questions. Captain Sparkman further stated there was never a point when appellant stated he needed an attorney, or even inquired about an attorney. Thus, any *Edwards* violation is not supported by the testimony of Captain Sparkman.

{¶57} Deputy Gondor, who witnessed the second interview, corroborated Captain Sparkman's version of events. She testified that appellant indeed stated he understood his rights, and he explained the shootings he took part in. Deputy Gondor affirmed that it was *not until appellant spoke to his father after the second interview* that appellant requested the assistance or the presence of an attorney.

{¶58} However, appellant rebukes this testimony as incredible and again exhausts the bulk of his argument on the proposition that the defense testimony is more credible than the officers' testimony. Specifically, appellant points to his own testimony during the suppression hearing. He testified that Captain Sparkman asked him why he committed the crime, to which he replied, "I want to call my lawyer." Appellant testified that Captain Sparkman slid the phone over to him and stated he could contact his attorney. Appellant did not know his attorney's number but instead called his father.

{¶59} Again, as noted above, we defer to the trial court's factual findings. The trial court followed the officers' testimony that appellant was twice informed of his rights and twice indicated he understood. Based on the testimony of the officers, the trial court concluded that appellant never requested an attorney. As indicated above, there is nothing that suggests the court's factual findings are based on anything but competent, credible testimonial evidence. The trial court therefore did not err when it concluded that appellant did not invoke any of his *Miranda* rights, including his right to an attorney, prior to or during any interrogation.

{¶60} Appellant's fourth assignment of error is without merit.

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

{¶62} "Consecutive sentences for shooting at a dwelling and a gun specification for the gun used to shoot the home, violate the Double Jeopardy Clause of the Fifth Amendment and the Ohio counterpart."

{¶63} Finally, appellant argues the trial court erred in not dismissing the firearm specification in count one because it proscribes the same conduct (therefore, the same offense) set forth in count one and thus violates the Double Jeopardy Clause of the Fifth Amendment, which states that "[n]o person shall * * * be subject for the same offence to

be twice put in jeopardy of life of limb." However, appellant was never twice put in jeopardy in this case. A firearm specification, though requiring a separate finding from the jury, acts as a sentencing enhancement to a pre-existing offense rather than a separate, respective offense. *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, ¶16.

{¶64} Appellant's fifth assignment of error is without merit.

{¶65} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.