

<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Denver, Colorado 80203</p> <hr/> <p>Appeal from the District Court for La Plata County Case Number 10CR518, 10CR71 Honorable Jeffrey Raymond Wilson</p> <hr/> <p>APPELLANT:</p> <p>CHARLES EDWARD TROGDON</p> <p>APPELLEE:</p> <p>THE STATE OF COLORADO</p> <hr/> <p>Attorney for Defendant-Appellant: David C. Japha, Reg. No. 14434 THE LAW OFFICES OF DAVID C. JAPHA, P.C. 950 S. Cherry Street, Ste. 912 Denver, CO 80246 Phone Number: (303) 964-9500 Fax Number: 1- (866) 260-7454 E-mail: DJapha4064@aol.com</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>CASE NUMBER: 12CA2045</p>
<p>REPLY BRIEF</p>	

SEPTEMBER 8, 2014

Oral Argument Requested

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains words.



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INTRODUCTION

Mr. Trogdon replies to the People's Answer Brief. He relies on the arguments made in his Opening Brief and replies to specific matters. The People and Mr. Trogdon agree on the preservation of the record and standards of review. Where there are disagreements as to the meaning of facts, those will be set forth in the reply below.

As noted in the Opening Brief, Mr. Trogdon contends that the evidence upon which he was convicted should have been suppressed and not allowed into evidence. Further, the testimony from the victims and law enforcement together with evidence introduced was insufficient to convict Mr. Trogdon of the crimes of conviction because all of it required inferences that needed to be drawn from other inferences. For these reasons, Mr. Trogdon requests his convictions to be reversed.

ARGUMENT

I. THERE WAS NO LEGAL JUSTIFICATION FOR PHOTOGRAPHING AND RECORDING THE SERIAL NUMBERS OF EVERY WEAPON FOUND IN MR. TROGDON'S HOUSE, REQUIRING SUPPRESSION OF EVIDENCE RELATED TO THE ILLEGAL SEARCH

Contrary to the People's argument and account of the initial November 30, 2010 search of Mr. Trogdon's house, it was legally and factually impossible for the

police to have acquired probable cause to catalogue every piece of jewelry and weapon in the possession of Mr. Trogdon.

The trial court found, and the People do not dispute, that “the photographing of the jewelry and the recording of the serial numbers to be beyond the scope of the warrant.” People’s Answer, p. 21. The People advance a number of theories to defend the trial court’s denial of Mr. Trogdon’s Motion to Suppress on the grounds that there was independent probable cause to record every serial number on every gun, and photograph each piece of jewelry found in and on Mr. Trogdon’s property. People’s Answer, p. 13.

Mr. Trogdon does not dispute that the initial search warrant for very specific items was consistent with the particularity requirements of the Fourth Amendment to the United States Constitution, *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (*see also* Appellant’s Br., at p. 14); nor does he dispute that there was probable cause for the items identified in the initial search warrant. *Id.* at 12. However, there is no legal support for, nor is there any cited in, the district court’s reasoning that the warrantless search for all jewelry and weapons was justified. Investigator Patterson’s “suspicion” that “most of the jewelry and guns were stolen” “grew into probable cause” (PR Vol. 1, p. 227) has no basis in law or fact. It would appear that this is the very basis for

suppressing fruits of poisonous trees – if the search was beyond that permitted by the warrant, absent exigent circumstances, anything found beyond that allowed by the warrant could not be seized.

A. There were no exigent circumstances requiring the memorialization of the guns and jewelry

Mr. Trogon contends that the court’s conclusion that a post hoc assumption that new victims would come forward after the search can satisfy the probable cause requirement for warrantless searches (*see New York v. Belton*, 453 U.S. 454, 457 (1981)), and the court improperly found that there were exigent circumstances that required police to “memorialize the property found during the search” out of a fear it might be hidden or destroyed. PR Vol. 1, p. 227. This is not the correct legal standard for a search based on exigent circumstances. Rather, the question is “whether there is a real or substantial likelihood that the contraband or known evidence on the premises might be removed or destroyed before a warrant could be obtained.” *People v. Turner*, 660 P.2d 1284, 1288 (Colo. 1983), *disapproved on other grounds by People v. Schoondermark*, 759 P.2d 715, 719 (Colo. 1988).

Indeed, the People concede that there were no findings by the trial court regarding “exigent circumstances” that would justify a search outside the scope of the

warrant. *See* People’s Answer, at p. 27, n. 6 (“There are no factual findings or conclusions of law to support the trial court’s reference [to exigent circumstances]. Therefore . . . the case should be remanded for further factual findings”). And because (1) the trial court deemed the recordation and photographing of guns and jewelry to be beyond the scope of the November 30, 2010 search warrant, and (2) a warrantless search is presumptively “invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement,” *Flippo v. West Virginia*, 528 U.S. 11, 12 (1999), of which exigent circumstances is not one, the People turn to other theories to justify the warrantless search. At the very least, then, Mr. Trogdon’s convictions should be reversed and the matter remanded for further proceedings.

B. The search was outside the scope of the warrant and the plain view doctrine is inapplicable.

Even though the People acknowledge a lack of exigent circumstances, the People still assert that the photographing of jewelry and recordation of serial numbers was legally justified. One theory the People advance is that contrary to the trial court’s findings, the recording the serial numbers of all the guns found in Mr. Trogdon’s house was actually within the scope of the search warrant. *See* People’s

Answer Brief, at p. 15.

The November 30, 2010 search warrant specifically allowed a search for three rifles, a Henry Big Boy rifle with a serial number, and two others without serial numbers. There was therefore no probable cause to catalogue every gun found in Mr. Trogdon's house that did not match the description of the Big Boy rifle, or the other two rifles without serial numbers. *See People v. Conley*, 804 P.2d 240, 244-45 (Colo. App. 1990). The police could have, for example, compared the serial number of the Henry Big Boy with those on the other rifles, instead of checking each serial number with the Bureau of Alcohol, Tobacco, and Firearms to see whether it was stolen. Such conduct was outside of the search warrant. PR Vol. 1, p. 227.

Furthermore, the investigators could not legally do more than required to determine if the guns were those identified in the search warrant, as such a search would not only constitute a new search for which there was not probable cause or exigent circumstances, but would also depart from the plain view doctrine. As such, the People's reliance on *People v. Bostic*, 148 P.3d 250, 255 (Colo. App. 2006), is misplaced. As the police could readily determine that certain rifles were not those listed in the search warrant without turning over, manipulating, or otherwise moving the guns to reveal their serial numbers, the plain view doctrine does not apply. *Id.*,

citing *Arizona v. Hicks*, 480 U.S. 321 (1987). Instead, *Conley* 804 P.2d at 244, is much more instructive: “If, during a search, a police officer sees stereo equipment that he *suspects*, but has no probable cause to believe, is stolen property, the officer may not move the equipment to record its serial number without violating the constitutional prohibition against an unreasonable search and seizure. The ‘plain view’ exception may be invoked *only if the serial numbers can be recorded without moving the equipment.*” *Conley*, 804 P.2d at 244-245 (emphasis added) (quoting *People v. Alexis*, 794 P.2d 1029 (Colo. App. 1989)).

In the instant case, the trial court determined that the search exceeded the scope of the initial warrant, and Investigator Patterson had only a “suspicion” that some of the guns were stolen. People’s Answer, at p. 19. Therefore, the police were not allowed to manipulate any of the rifles¹ to record serial numbers that were not in plain view, as such a search both exceeded the scope of the search warrant, and was unnecessary to determine the presence of the Big Boy rifle.

Moreover, even if the Big Boy rifle was discovered during the search, which the People confusingly state happened both in the middle of the search and at the end

¹ The People concede that the pistols were not included in the search warrant. People’s Answer, at p. 17.

of the search (People's Answer at pp. 6, 7, 19), such a discovery would not satisfy the plain view doctrine of *People v. Jauch*, 2013 COA 127. Specifically, the plain view doctrine allows the police to seize evidence when they have a reasonable belief such evidence is incriminating, *id.* at ¶ 28, but only when the "incriminating nature of the evidence [is] immediately apparent to the officer." *People v. Glick*, 250 P.3d 578, 585 (Colo. 2011). "In other words, this requirement is satisfied where the officer *had probable cause* to associate the item with criminal activity *without conducting a further search.*" *Id.* (Emphasis added.)

Here, there was admittedly only a mere suspicion the guns were stolen (People's Answer, at p. 19), and no evidence that any other gun was stolen came about until an inquiry was made to the ATF. There was no probable cause to manipulate weapons to record serial numbers, and the People's plain view argument therefore fails.

Likewise, there was no legal justification for photographing the jewelry that did not match those pieces identified in the search warrant. Law enforcement officers did not have probable cause to believe that any of the items they found were stolen. Instead, the jewelry was moved and photographed "to see if in the future sometime somebody might identify it as being stolen," and "in case a victim might be able to

identify it,” not because it was clearly stolen goods. Tr., 09/07/11, 77:18-25, 78:1-6. The search was so exploratory that law enforcement “pretty much documented his whole house.” Tr., 09/07/11, 32:13-17. Such an exploratory search was not only found by the court to be outside the scope of the warrant, as noted by the People (*see* People’s Answer, at p. 21), but the People also fail to provide an applicable search warrant exception in its Answer Brief.

Consequently, because the search was outside the scope of the warrant and because no exception to the search warrant requirements has been met, the evidence obtained pursuant to the illegal search should have been suppressed.

C. Mr. Trogdon’s cooperation did not equate to consent to catalogue each firearm and piece of jewelry

While Mr. Trogdon cooperated with the police, the police were not operating under a consent search, as was the case in *Conley*, 804 P.2d at 244-245. Instead, the police entered his premises with a search warrant. Mr. Trogdon’s cooperation and invitation to “look for whatever they needed” is not consent for the police to exceed the scope of the search warrant. Under the terms of the search warrant, the police were, in fact, already able to search for whatever they needed. Had Mr. Trogdon not cooperated, he would have only made matters far worse for himself. Mr. Trogdon’s

cooperation did not affect the authority the police had in searching his premises.

II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF MR. TROGDON ON EACH COUNT

In respect of the fact that the evidence admitted should have been suppressed, testimony from the victims was insufficient to connect Mr. Trogdon to the crimes alleged. For instance, Mrs. Miller testified that she could not tell if any money was taken. Opening Brief, at p. 39. Rather, Ms. Miller speculated that someone had stolen money from her house, and assumed it was Mr. Trogdon. No evidence was presented that Mr. Trogdon ever stole money from her house, or intended to steal money from her house on October 27, 2010. Because Ms. Miller speculated that Mr. Trogdon had stolen money from her in the past, she speculated that he had entered her house to steal more money, which was the intended crime offense under § 18-4-203, C.R.S., of which Mr. Trogdon was convicted. In essence, Mr. Trogdon's conviction on Count 1 was based only on the assumption Mr. Trogdon had stolen money from Ms. Miller. Without that assumption, there would be nothing for the People to stand on regarding Count 1. For example, if one were to assume that another party had stolen money from Ms. Miller, or Ms. Miller was in fact never burglarized, what evidence would there be that Mr. Trogdon entered Mr. Miller's house with the intent

to commit a crime therein, other than pure speculation?

Similarly, the evidence associated with the burglaries of Ms. Hyde, Mr. Neder, and Mr. Combs were insufficient to sustain a conviction of Mr. Trogdon. There is only circumstantial evidence that it was Mr. Trogdon that stole items from their homes, as no direct evidence was presented. And while circumstantial evidence is often used in cases of burglary, *Pena v. People*, 147 Colo. 253 (1961), the circumstantial evidence here lacked a critical element, namely the recentness of the crime and the finding of the property at Mr. Trogdon's house. Only in cases where stolen goods are "shortly thereafter found in the possession of the accused" will a conviction be sustained. *People v. Davis*, 321 P.2d 1103, 1104 (Colo. 1958). Here, Mr. Neder's property was stolen in 2008, Ms. Hyde's in 2009. Indeed, all the convictions lack the "recent" requirement of *Davis*. Moreover, without the property photographed, catalogued, and seized from Mr. Trogdon's house subsequent to the November 30, 2010 search warrant, which, as outlines above was done without a valid warrant and without a search warrant exception, no property owners would have been able to later come forward and claim items that were stolen several years prior.

The People argue that Mr. Trogdon's conclusory arguments regarding sufficiency of the evidence on counts not specifically connected to evidence in the

opening brief should not considered. However, with the specific evidence identified in the opening, none of the witnesses could have supported their testimony without conjecture.

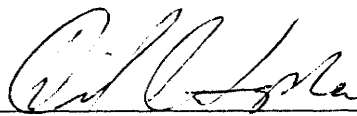
CONCLUSION

The search of Mr. Trogdon's home was conducted in a methodical, exploratory fashion, outside the scope of a valid search warrant. The plain view exception simply does not apply here, and, as the People concede, neither does the exigent circumstances doctrine. For the foregoing reasons, Mr. Trogdon's respectfully requests that his convictions be vacated and the matter remanded for entry of judgments of acquittal on the counts of conviction. In the alternative, further proceedings should be had regarding the Motion to Suppress evidence.

Dated this 8TH day of September, 2014

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF** has been served on the following either by US Mail or by ICCES, on this 8th day of September, 2014:

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