

DISSENT BY LEONARD, J.

Respectfully, I dissent.

Plaintiff-Appellant State of Hawai'i (**State**) raises two points of error on appeal, challenging the Circuit Court of the Third Circuit's (**Circuit Court**) Conclusions of Law (**COLs**) 9 and 11, which are best described as Findings of Fact (**FOFs**), or mixed FOFs and COLs, subject to the clearly erroneous standard of review:

9. The Search Warrant in this case describes with particularity the upstairs residence located at 74-5166 Puuhalo Street. It does not describe at all the separate studio unit located downstairs. The Affidavit describes very carefully how one must travel to the upstairs residence, what the upstairs residence looks like from the outside, as well as the number of bedrooms and bathrooms in the upstairs unit.

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11. The Affidavit and the search warrant simply do not describe and therefore do not authorize the search of the separate downstairs studio unit.

Specifically, with respect to COL 9, the State contends that "[t]he trial court erred in making such finding because Officer Segobia included all the information he had a duty to discover in the affidavit in support of search warrant and based upon that information a district [court] found probable cause for the search of the entire dwelling." With respect to COL 11, the State argues that "[t]he facts set forth in the affidavit to search warrant and testified to as to Officer Segobia, the search warrant affiant's, knowledge was that this was a single unit to include downstairs and the warrant describes such."

The State does not challenge any of the Circuit Court's other FOFs and COLs, including the following:

FINDINGS OF FACT

1. On May 11, 2017, Officer Marco Segobia obtained a search warrant for a residence located at 74-5166 Puuhalo Street in Kailua-Kona. Ex. B.
2. The affidavit For Search Warrant requests the search of:

"A residence located within the County and State of Hawaii and within the District of Kona. Your affiant describes the residence as a two story light colored wood siding structure with white colored rooftop. The residence is located at the North West corner of the intersection of Konalani Street and Puuhalo Street. Fronting just east of the residence is a wood post with two (2) mailboxes affixed side by side, the mail box on the left has black colored numbers "74 5166", the mailbox on the right has the black colored numbers "74 5164". The property and the residence can be located by traveling east on Konalani Street from Palani Road, continue approximately 0.4 miles, then execute a left turn onto Puuhalo Street, the residence is located approximately 33 feet on the left hand side of Puuhalo Street. Your affiant checked the Hawaii County Property Tax website and located the residence, which is owned by Yolanda M. RODRIGUES of address 74-5166 Puuhalo Street, Kailua-Kona, Hawaii 96740. Tax Map Parcel Number 7401200100000; To include but not limited to all rooms, and other parts therein, the patio or lanai of such unit, and any attached garages and carport, attached storage rooms, garbage cans and containers located within."

Ex. A at bates 63.

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5. The Affidavit [for Search Warrant] does not mention the separate downstairs residential unit.
6. The Affidavit does not mention an entrance on the lower story and Konalani Street side of residence.
7. On May 11, 2017, Officer Segobia obtained search warrant 2017-079K permitting the search of

"A residence and property located within the County and State of Hawaii and within the District of Kona. Your affiant describes the residence as a two story light colored wood siding structure with white colored rooftop. The residence is located at the North West corner of the intersection of Konalani Street and Puuhalo Street in Kailua-Kona. Fronting just east of the residence is a wood post with two (2) mailboxes affixed side by side, the mailbox on the left has black colored numbers "74 5166", the mail box on the right has the black colored numbers "74 5164". The property and residence can be located by traveling east on Konalani Street from Palani Road, continue approximately 0.4 miles, then execute a left turn onto Puuhalo Street, the residence is located approximately 33 feet on the left hand side of Puuhalo Street To include but not limited to all rooms, and other parts therein, the patio or lanai of such unit, and

any attached garages ad carport, attached storage rooms, garbage cans and containers located within."

Ex. B.

8. Officer Marco Segobia testified on direct examination that "where Mr. Rodney Rodrigues was living is a downstairs unit of the residence located on, I guess, the south portion of the residence. If you are coming up Konalani Street, there's an entrance right there along the side portion of the house. So I observed the CI walk downstairs and go to the downstairs unit." (Transcript of Proceedings for August 9, 2017 ("Tr.") page 9)
9. Officer Segobia testified the downstairs unit is separate from the upstairs unit with its own bedroom, bathroom and kitchen. (Tr. 12.)
10. Officer Segobia admitted he did not describe the downstairs unit and side doorway in his application for search warrant. (Tr. 11)
11. Officer Segobia searched the downstairs unit which is completely separate from the upstairs unit described in the search warrant. (Tr.10)
12. Officer Segobia testified he did not search the three bedroom, two bathroom residence with light colored siding and white rooftop. (Tr. 11.)
13. Officer Segobia testified that he had been aware at one time that the house had been inhabited by multiple individuals. Officer Segobia was personally acquainted with the previous resident and had visited the house. (Tr. 22.)
14. Officer Segobia testified that in his Affidavit he "didn't want to specify too much without knowing a hundred percent." He further testified that he "didn't want to get too specific" in his affidavit "since the CI could not confirm the information." (Tr. 21)
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18. Defendant's mother, Yolanda Rodrigues, testified that Defendant rented the downstairs unit. She described the downstairs unit as a studio that is not accessible from the upstairs unit. It has its own door to the outside and the door has a lock. The studio has its own bathroom, bedroom and kitchen. She has the keys to unit [sic]. But she considers herself the landlord. She testiifed Defendant pays her rent of \$1000 per month. There are no shared areas between the upstairs and downstairs unit. (Tr. 36-38, 40.)
19. Defendant had a reasonable expectation of privacy in the downstairs studio unit.
20. Yolanda Rodrigues described the outside of the house as green on the bottom and brown on the top. The top portion has new lumber and has a different color from the downstairs. (Tr. 37)

CONCLUSIONS OF LAW

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3. For an affidavit to support a finding of probable cause, the affidavit must set forth some of the underlying circumstances from which the police concluded that the objects sought to be recovered are where they claimed they are, and must disclose some of the underlying reasons from which the affiant concluded that the information was reliable. State v. Sepa, 72 Haw. 141, 808 P.2d 848 (1991). The failure of the affidavit to establish probable cause will render the warrant invalid and the evidence recovered as a result thereof inadmissible at trial. Monick v. State, 64 Haw 399, 641 P.2d 1341 (1982); State v. Knight, 63 Haw. 90, 621 P.2d 370 (1980).
4. Where a search warrant is directed at a multiple occupancy dwelling or multiple-office building, the warrant will generally be held invalid unless it describes the particular room or sub-unit to be searched with sufficient definiteness to preclude a search of other units in the building occupied by innocent persons. State v. Matsunaga, 82 Haw. 162, 920 P.2d 376 (1996).

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9. [challenged by the State]
 10. Nothing in the Affidavit describes the studio unit on the bottom floor despite Officer Segobia having ample facts about this downstairs unit, its separate entrance and identifying characteristics.
 11. [challenged by the State]
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13. The Affidavit For Search warrant in this case, sets forth facts sufficient to issue a warrant for the upstairs unit of 74-5166 Puuhalo Street and to justify a search of that unit, only. It does not set forth any facts sufficient to justify a warrant for and/or a search of the separate studio unit.

14. "A determination of whether a search warrant complies with constitutional particularity requirement must be made on a case-by-case basis, taking into account all of the surrounding facts and circumstances. State v. Kealoha, 62 Haw. 166 at 170-171, 613 P.2d at 648. The cornerstone of such a determination is "the language of the warrant itself." *Id.* at 171, 613 P.2d at 648. Also relevant to this decision are the executing officer's prior knowledge as to the place intended to be searched, United States v. Goodman, 312 F.Supp. at 588, . . . and the description of the place to be searched appearing in the probable cause affidavit in support of search warrant. State v. Bisaccia, 58 N.J. 586, 279 A.2d 675, 678 (N.J. 1971)." State v. Matsunaga, 82 Haw. 162 at 167; 920 P.2d 376 at 381 (1996)

15. At the time he applied for the warrant, Officer Segobia knew or should have known that the residence was a multi-unit dwelling with more than one occupant. Officer Segobia knew the previous resident, and had been to the residence.
16. The outward appearance of the residence suggests that the downstairs is a separate unit. The downstairs has a separate entrance, is painted a different color with a different type of siding, and is accessed from Konalani Street, rather than Puuhalo Street.
17. The Affidavit and search warrant in this case failed to describe with particularity the place to be searched, despite the officer having sufficient information to do so.
18. The search in this case exceeded the scope of the warrant, that described with particularity only the upstairs unit of residence, not the downstairs studio.
19. There is no probable cause based on the facts set forth in the Affidavit in support of the search warrant to justify a search of the downstairs studio unit.

While this court may freely review the Circuit Court's legal conclusions, factual findings that are not challenged on appeal generally are binding on the appellate court. See, e.g., State v. Rapozo, 123 Hawai'i 329, 351, 235 P.3d 325, 347 (2010); Okada Trucking Co. v. Bd. of Water Supply, 97 Hawai'i 450, 459, 40 P.3d 73, 82 (2002).

As the majority recognizes, under the Fourth Amendment of the U.S. Constitution and article I, section 7 of the Hawai'i Constitution:

[N]o search warrants shall issue except upon a finding of probable cause supported by oath or affirmation, and **particularly describing the place to be searched** and the persons or things to be seized. The constitutional requirement that **the warrant must describe with particularity the place to be searched is to limit the police as to where they can search**, for otherwise the constitutional protection against warrantless searches is meaningless.

State v. Woolsey, 71 Haw. 638, 640, 802 P.2d 478, 479 (1990) (emphasis added).

As discussed by the majority, the property in Woolsey was a "multiple occupancy dwelling," i.e., one in which "several persons or families share common living areas but have separate bedrooms." Id. at 641, 802 P.2d at 479. Here, Officer Segobia testified, *inter alia*, as follows:

Q. But isn't it true that the entrance to the residence that's located on Puuhalo Street is an upstairs unit to the house; right?

A. The entrance to the residence is upstairs, correct.

Q. Correct, and, in fact, the downstairs unit that you searched is not part of the house, the upstairs portion of the house?

A. It's part of the house. It's just a downstairs unit.

Q. Okay, but it's not connected to the house in any way internally?

A. It's connected to the house. There's just not a stairwell from within his room.

Q. Right. So the upstairs unit is completely separate from the downstairs unit?

A. Yes.

. . . .

Q. You only described the upstairs unit with the upstairs entrance?

A. I described the residence because it's owned by a single owner, Yolanda Rodrigues, who happens to be the mother of the defendant.

Q. Specifically, though, in your affidavit for search warrant you . . . say your affiant requests the search of a residence, et cetera, a three bedroom, two bathroom residence that's light colored and has white colored rooftop. That's what you asked to be able to search?

A. That's correct, yes.

Q. That's not the unit you searched; right?

A. That's not the unit I searched. . . . It is a bedroom that's located downstairs of the residence.

Q. Actually, that's not true. There's also a kitchen and a bathroom downstairs; right?

A. That is correct.

Q. Okay.

A. Being a downstairs unit.

Q. It's a downstairs unit with its own kitchen?

A. Correct.

Q. And its own bathroom; right?

A. Yes.

Q. And its own bedroom; right?

A. Yes. . . .

Thus, Woolsey is distinguishable. Here, Officer Segobia acknowledged that Rodrigues's downstairs unit was a "completely separate" unit with its own bedroom, bathroom, and kitchen, it did not share common living areas, it had a separate entrance, and it was not connected to the upstairs unit by a stairway or other internal means of access. Officer Segobia was asked, "[I]n your affidavit for search warrant you . . . say your affiant requests the search of a residence, et cetera, a three bedroom, two bathroom residence that's light colored and has white colored rooftop. . . . That's not the unit you searched; right?" He answered, "That's not the unit I searched." He nevertheless viewed the property as a single residence based on unitary ownership, not based on how it was utilized as separate upstairs and downstairs residential units.

The majority also discussed the supreme court's opinion in State v. Anderson, 84 Hawai'i 462, 935 P.2d 1007 (1997), which recognized:

A search warrant for an apartment house or hotel or other multiple-occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately. . . .

[However, s]ome courts have recognized a significant exception to the above rule: if the building in question from its outward appearance would be taken to be a single-occupancy structure and neither the affiant nor other investigating officers nor the executing officers knew or

had reason to know of the structure's actual multiple-occupancy character until execution of the warrant was under way, then the warrant is not defective for failure to specify a subunit within the named building.

Id. at 468, 935 P.2d at 1013 (citation omitted; emphasis added).

Anderson was somewhat distinguishable from Woolsey because the defendant's bedroom door was locked; nevertheless, "a locked bedroom door does not, by itself, automatically elevate the bedroom to the status of a separate residential unit." Id. at 469, 935 P.2d at 1014 (citations omitted). Significantly, the supreme court explained that, even if the bedroom door was locked

the search warrant was nevertheless valid with respect to the bedroom if the objective facts available to the police officers at the time they obtained the search warrant did not reasonably suggest that the bedroom was a residential unit that was separate and distinct from the remainder of the dwelling at 2253 Mokuhau Road. For example, in an analogous case, although a defendant maintained a second, completely separate apartment on a third floor premises that a search warrant incorrectly described as being a single premises, the United States Supreme Court held that the search warrant for a single apartment was validly issued and executed because circumstances were such that police officers "reasonably believed that there was only one apartment on the premises described in [their search] warrant." Maryland v. Garrison, 480 U.S. 79, 80, 107 S.Ct. 1013, 1014, 94 L.Ed.2d 72 (1987).

Id. (emphasis added).

The Hawai'i Supreme Court quoted and relied on the following passage from the U.S. Supreme Court's opinion in Garrison:

Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude [Garrison]'s apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted.

Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers

disclosed, or had a duty to discover and to disclose, to the issuing Magistrate. . . .

Id. at 470, 935 P.2d at 1015 (citation omitted; emphasis added).

The Anderson court continued:

Likewise, the record in the instant case indicates that, **based on the information that the police officers had when they were in the process of obtaining the search warrant for the dwelling at 2253 Mokuahau Road, the search warrant was validly issued.**

As in Garrison, **it is only with the benefit of hindsight that we now know that the search warrant's description of the dwelling at 2253 Mokuahau Road might have been overbroad because it was based on the possibly mistaken belief that there was only one residential unit in the dwelling at 2253 Mokuahau Road.** If the police officers had known, or even if they should have known, that there were two separate residential units located within the single dwelling at 2253 Mokuahau Road, then they would have been obligated to exclude Anderson's bedroom from the scope of the requested search warrant. But, like the Garrison court, **we must judge the constitutionality of the search warrant in light of the information available to the police officers at the time the search warrant was issued.**

Id.

In Garrison, the U.S. Supreme Court observed that the constitutionality of the execution of the warrant was "somewhat less clear." 480 U.S. at 86.

If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. **Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant.** The officers' conduct and the limits of the search were based on the information available as the search proceeded. While the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.

Id. at 86-87 (emphasis added);¹ see also State v. Matsunaga, 82 Hawai'i 162, 167-68, 920 P.2d 376, 381-82 (App. 1996) (concluding that the police were prohibited from searching a room on the same floor as the premises described in the warrant because, *inter alia*, there was no connection, proximity or affinity between the rooms, which were physically separated).

Here, the Circuit Court's *unchallenged* FOFs include that Officer Segobia, who was both the probable cause affiant and the officer executing the warrant, testified that the downstairs unit was a completely separate unit from the upstairs unit described in the search warrant, that he had personally visited the house when his acquaintance lived there, that he did not describe the downstairs unit and side doorway in his application for a search warrant, and that he did not want to get "too specific" in his affidavit. The *unchallenged* FOFs highlight that the downstairs unit is not accessible from the upstairs unit, the two units had no shared areas, the downstairs unit has its own locked door to the outside, its own bathroom, bedroom, and kitchen, and although Rodrigues's mother had a key, she considered herself the landlord and was paid monthly rent of \$1,000. COL 10, also *unchallenged* on appeal, contains further mixed findings and conclusions that "[n]othing in the Affidavit describes the studio unit on the bottom floor despite Officer Segobia having ample facts about this downstairs unit, its

¹ I note that Justice Blackmun, with Justices Brennan and Marshall joining, rejected the majority's analysis, and, in dissent, concluded that under U.S. Supreme Court precedent, the search at issue in that case violated the Fourth Amendment. Garrison, 480 U.S. at 89-101.

separate entrance and identifying characteristics." These findings are well-grounded in the testimony and evidence in the record and reasonable inferences therefrom.

COL 13, also unchallenged, concludes, *inter alia*, that based on the court's findings, the Affidavit "does not set forth any facts sufficient to justify a warrant for and/or a search of the separate studio unit." In unchallenged COL 16, the Circuit Court found and concluded that "[t]he outward appearance of the residence suggests that the downstairs is a separate unit. The downstairs has a separate entrance, is painted a different color with a different type of siding, and is accessed from Konalani Street, rather than Puuhalo Street." In unchallenged COL 15, the Circuit Court found and concluded that "[a]t the time he applied for the warrant, Officer Segobia knew or should have known that the residence was a multi-unit dwelling with more than one occupant. Officer Segobia knew the previous resident, and had been to the residence." As highlighted above, Officer Segobia himself repeatedly referred to the "upstairs unit" and the "downstairs unit" and appeared to be relying on common ownership, rather than any shared space or common use.

There is no basis in this record to conclude that the Circuit Court clearly erred because there is sufficient evidence that Officer Segobia knew or shown have known that the downstairs unit was a separate dwelling unit from the upstairs unit. The State's contention regarding COL 9, that "Officer Segobia included [in the affidavit] all the information he had a duty to discover," and therefore COL 9 is clearly erroneous, is without

merit. The State's contention regarding COL 11, that "Officer Segobia's . . . knowledge was that this was a single unit," is inconsistent with the Circuit Court's unchallenged findings and the record on appeal. The Circuit Court's conclusions are supported by the cases cited above.

For these reasons, I would affirm.

Associate Judge