[Cite as *State v. Stepp*, 2010-Ohio-3540.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	Case No. 09CA3328
	:	
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
VICKIE L. STEPP,	:	
	:	**Released 7/20/10**
Defendant-Appellant.	:	

APPEARANCES:

James H. Banks, Dublin, Ohio, for appellant.

Mark E. Kuhn, SCIOTO COUNTY PROSECUTOR, and Pat Apel, SCIOTO COUNTY ASSISTANT PROSECUTOR, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} After pleading no contest to aggravated possession of drugs, Vickie Stepp appeals the trial court's denial of her motion to suppress. She contends that her statements must be suppressed because law enforcement failed to *Mirandize* her prior to custodial interrogation. However, the trooper who initiated the stop testified that he gave Stepp the requisite warnings, and video footage from the cruiser camera confirms this. And although a brief period of un-*Mirandized* questioning occurred before the trooper administered the warnings, at that time, a reasonable person in Stepp's position would not have felt that the situation had elevated beyond the realm of an ordinary, non-custodial traffic stop. Thus, we reject Stepp's argument.

{¶2} Next, Stepp argues that the trial court erred in denying her motion to suppress evidence seized during a warrantless search of her vehicle. But because

there is some evidence to support the trial court's conclusion that Stepp voluntarily consented to the search, she waived the protection of the Fourth Amendment against unreasonable searches. And because the trooper made it clear that he suspected the vehicle contained illegal drugs in the form of pills, a reasonable person would have understood Stepp's general consent to search the vehicle to include consent to search containers within the vehicle that might contain such drugs. Therefore, the trooper did not exceed the scope of Stepp's consent by looking for drugs in a pill bottle, small change purse or makeup case, and suitcase inside the vehicle. Thus, the trial court properly overruled Stepp's motion to suppress.

{¶3} Finally, Stepp argues that because the court relied on evidence that indisputably negated the existence of an essential element of the charged offense, the trial court erred when it accepted her no contest plea and found her guilty. She claims that uncontroverted evidence from the suppression hearing proves police did not seize enough oxycodone to support a first-degree felony conviction. Stepp's argument presumes that the bulk amount of oxycodone is 20 grams. However, at trial the State could have argued for a different bulk amount related to the maximum daily dose listed in a standard pharmaceutical reference manual. Nothing in the record indicates that the State's evidence was insufficient to support a first-degree felony conviction under this alternative method of establishing the bulk amount. Because the evidence at the suppression hearing did not reveal an obvious, unarguable and dispositive deficiency in the State's case, we reject Stepp's argument and affirm the trial court's judgment.

I. Facts

{¶4} Sergeant John Howard of the Ohio State Highway Patrol initiated a traffic

stop of a vehicle occupied by the driver, Vickie Stepp, and William Skeens, a passenger. A search of the vehicle resulted in the recovery of 722 pills Howard believed were Oxycontin. Based on this incident, the Scioto County Grand Jury indicted Stepp on one count each of aggravated possession of drugs, trafficking in drugs, and conspiracy to traffic drugs. Stepp pleaded not guilty to the charges and filed a motion to suppress her statements to law enforcement and all evidence obtained from the vehicle search.

{¶5} At the suppression hearing, Howard testified that he had been employed as a state trooper for approximately fifteen years. While patrolling on August 29, 2008, he observed a vehicle that appeared to be traveling "far in excess of the speed limit" on U.S. 23 in Scioto County. Howard activated his radar device and confirmed the vehicle was going 71 mph in a 55 mph zone, so he initiated a traffic stop. He caught up with the vehicle as Stepp pulled into a Speedway gas station in Lucasville, Ohio and stopped next to a fuel pump.

{¶6} Howard testified that "within moments" after the traffic stop, he observed the passenger making "furtive movements" in the vehicle. He elaborated that "it appeared that [Skeens] was leaning far forward and I saw his shoulders dip as he appeared to be * * * I thought he was putting something underneath the front seat[.]" Howard testified that such conduct was "very, very untypical" for a traffic stop.

{¶7} Footage from Howard's cruiser camera depicts Skeens making some type of movement after the stop. Stepp then exited the vehicle, and Skeens opened the passenger door. Howard asked Stepp for her license and registration, and while Stepp reached into her vehicle to find it, Howard asked Skeens for identification. Skeens then

exited the vehicle and told Howard he needed to use the restroom. Howard testified that he thought it was unusual for someone to do this during a traffic stop, but he did not pat Skeens down at that time.

{¶8} While Skeens used the restroom, Howard apparently asked Stepp to sit in the front passenger seat of his cruiser while he prepared the speeding citation. He did not handcuff Stepp or pat her down at that time. He asked Stepp who Skeens was in relation to her. Stepp told Howard that he was just a friend and that they were headed up to a bike week, which Howard testified was an event in Chillicothe, Ohio, also known as the "Rodeo." On the video footage, Howard then commented about Skeens moving around in the vehicle. As Stepp started to explain that Skeens was looking for her driver's license, Howard *Mirandized* her. Howard asked her if Skeens had anything illegal on him. Stepp claimed that neither of them had anything illegal. Howard then told her that the Rodeo was known for being a place people brought illegal items.

{¶9} Howard asked Stepp if she had been arrested before, and Stepp admitted that she had been arrested for a DUI about 15 years ago. She also told him that she had been charged with some type of crime when police found pills in her pocket. But Stepp claimed she had a prescription for the pills, so she was not convicted of the offense. Howard asked if she currently had a prescription for any medication, and Stepp told him she did not.

{¶10} Then, Howard explained that he *Mirandized* Stepp because he thought she and Skeens might have something illegal in the car. Howard told her that if she had any pills in the car, she should just tell him. Stepp told him there were no pills in the car. Howard asked, "You don't mind if I search your car?" And Stepp immediately said,

"No." Next, Howard asked if Skeens had any pills on him, and Stepp told him Skeens did not. Stepp asked Howard if she was going to jail for something since she wanted to use the bathroom first. Howard did not respond to her inquiry. Instead, he explained that because of Skeens' "furtive movement," he was going to look in her vehicle. He explained that if Skeens had something illegal and she knew about it, he would charge them both. Howard asked Stepp if she wanted to "take a chance" of him finding something in the vehicle, and Stepp responded, "I mean, if you want to look, I mean, that's fine with me[.]" Then Howard told Stepp that he really did not need her permission because some laws permitted him to conduct a search anyway.

{¶11} In the meantime, Skeen returned from the restroom, pumped gas, and reentered the front passenger seat of Stepp's vehicle. Howard testified that he gave Stepp a speeding citation. Then he did a pat down search of Skeens and performed a "protective search for weapons" in the front passenger area of the vehicle. Howard testified that he found an open pill bottle containing 22 pills a hospital later identified as Oxycontin beneath the front passenger seat. Then Howard proceeded to conduct a full vehicle search. He found a small change purse or makeup case with six small baggies inside it protruding from the side pocket of the driver's side door. Each baggie contained 100 pills. In addition, Howard found a suitcase on the back seat of the car containing an unopened bottle that purportedly had 100 Oxycontin pills in it. Howard testified that in all, his search revealed approximately 722 pills and that between Stepp's person and the suitcase, he found $2,088 in cash. A lab report admitted at the suppression hearing showed that the Bureau of Criminal Investigation only tested 414 of the pills and identified them as oxycodone.

{¶12} After the trial court had an opportunity to "assess the credibility of the witnesses and review the videotape of the stop[,]" the court denied Stepp's motion to suppress. The court found that the speeding violation gave Howard an "articulable suspicion" to stop the vehicle and that Howard had "probable cause" to search the vehicle based on the "furtive actions of the individuals in the car as well as the demeanor of the occupants." The Court also found that Howard "eventually received consent to search the vehicle." Subsequently, Stepp pleaded no contest to aggravated possession of drugs, and the State dismissed the remaining counts of the indictment. After the court found Stepp guilty and sentenced her, this appeal followed.

II. Assignments of Error

{¶13} Stepp assigns the following errors for our review:

> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS EVIDENCE. [Judgment Entry filed July 13, 2009]
>
> THE TRIAL COURT ERRED IN FINDING DEFENDANT-APPELLANT GUILTY ON HER "NO CONTEST" PLEA BASED UPON THE EVIDENCE BEFORE THE COURT, SUCH THAT HER CONVICTION MUST BE REVERSED. [Judgment Entry filed October 1, 2009; Sentencing Hearing Transcript at p. 10]

III. Motion to Suppress

A. Standard of Review

{¶14} In her first assignment of error, Stepp contends that the trial court erred by denying her motion to suppress the statements she made to law enforcement and evidence obtained from the search of her vehicle. Our review of a trial court's decision on a motion to suppress presents a mixed question of law and fact. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, at ¶100, citing *State v. Burnside*,

100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8. When considering a motion to suppress, the trial court acts as the trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. Id. Accordingly, we defer to the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Landrum* (2000), 137 Ohio App.3d 718, 722, 739 N.E.2d 1159. Accepting those facts as true, we must independently determine whether the trial court reached the correct legal conclusion in analyzing the facts of the case. *Roberts* at ¶100, citing *Burnside* at ¶8.

B. Statements to Law Enforcement

{¶15} Stepp argues that the trial court erred by denying the motion to suppress her statements because Howard failed to *Mirandize* her prior to custodial interrogation, in violation of her Fifth Amendment privilege against self-incrimination. In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the United States Supreme Court held that statements made during custodial interrogation are admissible only upon a showing that law enforcement officials followed certain procedural safeguards. *In re W.B. II*, Highland App. No. 08CA18, 2009-Ohio-1707, at ¶21. To comply with *Miranda*, law enforcement officials must inform the suspect that: 1.) she has the right to remain silent; 2.) her statements may be used against her at trial; 3.) she has the right to have an attorney present during questioning; and 4.) if she cannot afford an attorney, one will be appointed. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, at ¶67, citing *Miranda* at 478-479.

{¶16} Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of

action in any significant way." *Miranda* at 444. The determination of whether a suspect is in custody presents a mixed question of fact and law. *In re R.H.*, Montgomery App. No. 22352, 2008-Ohio-773, at ¶15. "We defer to the court's findings of fact, when articulated, but evaluate de novo whether on those facts, [the suspect] was in custody." Id. A motorist temporarily detained as the subject of an ordinary traffic stop is not "in custody" for purposes of *Miranda*. *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, at ¶13, citing *Berkemer v. McCarty* (1984), 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317. However, if the motorist "thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." Id., quoting *Berkemer* at 440. "The 'only relevant inquiry' in determining whether a person is in custody is 'how a reasonable man in the suspect's position would have understood his situation.'" Id. at ¶14, quoting *Berkemer* at 442.

{¶17} When it denied the motion to suppress, the trial court did not issue and Stepp did not request findings of fact regarding the rejection of her *Miranda* argument. See Crim.R. 12(F) ("Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."). However, we find that the record provides us with an adequate basis to review Stepp's claim. See *State v. Brown*, 64 Ohio St.3d 476, 1992-Ohio-96, 597 N.E.2d 97, at syllabus (Although the *Brown* court interpreted former Crim.R. 12(E), the pertinent language now appears verbatim in Crim.R. 12(F)); see, also, *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, at ¶96 (holding that trial counsel did not render ineffective assistance by failing to request Crim.R. 12(F) findings because extensive record of suppression

hearing was "sufficient to allow full review of the suppression issues").

{¶18} Here, it is clear from the video footage that no custodial interrogation occurred before Stepp entered Howard's cruiser – Howard simply asked Stepp for her driver's license and registration. And contrary to Stepp's argument, ample evidence shows that Howard did *Mirandize* her once she entered his cruiser. Howard testified to that effect and the footage confirms his testimony.

{¶19} Before *Mirandizing* her, Howard asked Stepp what her relationship to Skeens was. She told Howard that Skeens was just a friend and volunteered that they were heading to the bike week. Howard commented about Skeens' movement in the vehicle, but as Stepp began to tell him that Skeens was looking for her driver's license, Howard cut her off and gave the *Miranda* warnings. And Stepp fails to explain why a reasonable person in her position would have felt that Howard's behavior during this brief period of un-*Mirandized* interaction elevated the encounter beyond the realm of an ordinary traffic stop. Although Howard had asked Stepp to sit in the front of his cruiser, at that time he had not patted her down, searched her vehicle, indicated that he planned to search the vehicle, handcuffed her, or taken her keys away. Cf. *Farris*, supra, at ¶14 (Supreme Court of Ohio found suspect was in custody where officer patted suspect down, took his car keys, instructed him to sit in front seat of cruiser, and told suspect that he was going to search his car because of the scent of marijuana). Thus, we conclude that the court did not err in denying Stepp's motion to suppress her statements to law enforcement.

C. Vehicle Search

{¶20} Stepp also contends the trial court erred by denying her motion to

suppress the evidence seized from the vehicle because law enforcement found it during an illegal search. The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution guarantee the right of the people to be free from unreasonable searches and seizures. *State v. Orr*, 91 Ohio St.3d 389, 391, 2001-Ohio-50, 745 N.E.2d 1036. Because these provisions contain virtually identical language, the Supreme Court of Ohio has interpreted them as affording the same level of protection. Id., citing *State v. Robinette*, 80 Ohio St.3d 234, 238, 1997-Ohio-343, 685 N.E.2d 762.

{¶21} Searches conducted without a warrant are per se unreasonable under the Fourth Amendment, subject only to a few well-defined exceptions. *State v. Kessler* (1978), 53 Ohio St.2d 204, 207, 373 N.E.2d 1252, citing *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564; and *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. Once the defendant demonstrates that the state conducted a warrantless search or seizure, the burden shifts to the state to prove that its actions were constitutionally permissible. See *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 1999-Ohio-68, 720 N.E.2d 507. Here, the State concedes that law enforcement searched Stepp's vehicle without a warrant. Thus, the State had to prove that an exception to the warrant requirement applied.

{¶22} The State contends that Stepp voluntarily consented to the warrantless search of her vehicle, but Stepp claims that Howard coerced her consent. As we explained in *State v. Fry*, Jackson App. No. 03CA26, 2004-Ohio-5747, at ¶¶18-24 (footnote omitted):

> No Fourth Amendment violation occurs when an individual voluntarily consents to a search. See *United States v. Drayton* (2002), 536 U.S. 194, 207, 122 S.Ct. 2105, 153 L.Ed.2d 242 (stating that "[p]olice officers act in full accord with the law when they ask citizens for consent");

Schneckloth v. Bustamonte (1973), 412 U.S. 218, [222], 93 S.Ct. 2041, 36 L.Ed.2d 854 ("[A] search conducted pursuant to a valid consent is constitutionally permissible"); *State v. Comen* (1990), 50 Ohio St.3d 206, 211, 553 N.E.2d 640. Consent to a search is "a decision by a citizen not to assert Fourth Amendment rights." Katz, Ohio Arrest, Search and Seizure (2004 Ed.), Section 17:1, at 341. In *Schneckloth*, the United States Supreme Court acknowledged the importance of consent searches in police investigations, noting that "a valid consent may be the only means of obtaining important and reliable evidence" to apprehend a criminal. Id. at 227 * * *.

* * *

The state has the burden of proving, by "clear and positive" evidence, not only that the necessary consent was obtained, but that it was freely and voluntarily given. *Florida v. Royer* (1983), 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229; *Bumper v. North Carolina* (1968), 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797; *State v. Posey* (1988), 40 Ohio St.3d 420, 427, 534 N.E.2d 61. "Clear and positive evidence" is the equivalent of clear and convincing evidence. *State v. Danby* (1983), 11 Ohio App.3d 38, 41, 463 N.E.2d 47.

Whether an individual voluntarily consented to a search is a question of fact, not a question of law. See *Ohio v. Robinette* (1996), 519 U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347; *Schneckloth*, 412 U.S. at 227; [*State v.*] *Robinette*, 80 Ohio St.3d [234,] 248-249, [1997-Ohio-343], 685 N.E.2d 762 [(Cook, J., concurring)]; see, also, *State v. Southern* (Dec. 28, 2000), Ross App. No. 00CA2541. Because reviewing courts should defer to the trial court when it acts as a trier of fact, we must give proper deference to the court's finding regarding whether [the defendant] voluntarily consented to a search.

Thus, we review the court's finding that appellant voluntarily consented to the search under the weight of the evidence standard set forth in *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54. Even though the state's burden of proof is "clear and convincing," this standard of review is highly deferential and the presence of only "some competent, credible evidence" to support the trial court's finding requires us to affirm it. Id. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, [at] paragraph one of the syllabus. This principle applies to suppression hearings as well as to trials. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583.

Important factors for the trial court to consider in determining whether a consent was voluntary include: (1) the suspect's custodial status and the length of the initial detention; (2) whether the consent was

> given in public or at a police station; (3) the presence of threats, promises, or coercive police procedures; (4) the words and conduct of the suspect; (5) the extent and level of the suspect's cooperation with the police; (6) the suspect's awareness of his right to refuse to consent and his status as a "newcomer to the law"; and (7) the suspect's education and intelligence. See *Schneckloth*, 412 U.S. at 248-249; see, also, *State v. Lattimore*, Franklin App. No. 03AP-467, 2003-Ohio-6829, at ¶14; *State v. Dettling* (1998), 130 Ohio App.3d 812, 815-816, 721 N.E.2d 449.
>
> However, an individual's knowledge of the right to refuse consent "is not a prerequisite of a voluntary consent." *Schneckloth*, 412 U.S. at 234. Rather, it must be determined if a person felt compelled to submit to the officer's questioning in light of the police officer's superior position of authority. *Robinette*, 80 Ohio St.3d at 244-245, 685 N.E.2d 762. "The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." *Drayton*, 536 U.S. at 206 (citing *Ohio v. Robinette* (1996), 519 U.S. 33, 39-40, 117 S.Ct. 417, 136 L.Ed.2d 347; *Schneckloth*, 412 U.S. at 227). While knowledge of the right to refuse consent is one factor, the state need not establish such knowledge as the sine qua non of an effective consent. *Drayton*, 536 U.S. at 206-207. "Nor do this Court's decisions suggest that even though there are no *per se* rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning. See, e.g., *Schneckloth*, supra; *Robinette*, supra." *Drayton*, 536 U.S. at 207.

{¶23} Because the trial court did not expressly find that she "voluntarily" consented to the search or that her consent was "effective to validate the search," Stepp argues that we cannot uphold the search based on the consent exception to the warrant requirement. In its decision, immediately after finding that Howard had a reasonable, articulable suspicion to stop the vehicle and probable cause to search the vehicle, the court "further [found]" that Howard "eventually received consent to search the vehicle." Even though the court did not explicitly state that it found the consent was voluntary, the wording of the court's decision implies that it made this finding. The decision indicates that the court found two separate justifications for the search – probable cause, i.e. the

automobile exception to the warrant requirement applied, and consent. And although the court did not issue and Stepp did not request additional findings of fact regarding the consent issue, we find that the record provides us with an adequate basis to review this matter. See *Brown*, supra, at syllabus; see, also, *Sapp*, supra, at ¶96. Furthermore, contrary to Stepp's assertion, the trial court's entry gives no indication that the court ignored the State's burden to prove the voluntariness of her consent.

{¶24} An analysis of the seven factors leads us to conclude that clear and convincing evidence supports the trial court's finding that Stepp voluntarily consented to the search. Although Stepp was inside Howard's cruiser when she consented to the search, she was sitting in the front seat of the cruiser, the cruiser was parked in a public place, and she was not restrained in any manner. And even though the record is devoid of evidence about Stepp's educational history, Stepp's statements on the cruiser footage do not suggest that she suffered from any intellectual deficiency. Furthermore, the record contains evidence that Stepp is not a newcomer to the law, as Stepp admitted on the cruiser footage that she had been arrested for a DUI and for some type of drug offense related to her possession of pills. And nothing from Howard's testimony or the video footage indicates that Stepp was uncooperative during the traffic stop.

{¶25} In addition, within ten minutes of entering Howard's cruiser, Stepp consented to a search of her vehicle. Howard said, "You don't mind if I search your car?" Stepp immediately responded, "No." Even if we viewed this response as ambiguous, Howard later asked Stepp if she wanted to "take a chance" of him finding something in the vehicle, and she unequivocally responded, "I mean, if you want to look,

I mean, that's fine with me[.]" Thus Stepp, at a minimum, consented once to a vehicle search.

{¶26} The only evidence Stepp points to of any coercive police procedure was Howard's testimony at the suppression hearing. After reviewing the cruiser footage, he admitted that he told Stepp some laws and caselaw permitted him to search without her permission. Reading Howard's testimony in isolation, it is unclear when he made this statement to Stepp. However, upon reviewing the video footage, it is clear that Howard made this statement only after Stepp said, "I mean, if you want to look, I mean, that's fine with me[.]" Therefore, Howard's statement did not impact Stepp's decision to consent to the search. And because Stepp does not argue that Howard's statement prevented her from revoking her consent, we need not address that issue. Thus, based on our review of the evidence, we find that clear and convincing evidence supports the trial court's finding that Stepp voluntarily consented to the search.

{¶27} Stepp contends that even if her consent was voluntary, it is invalid because she was unlawfully detained when she gave it. She argues that she consented to the search only after Howard issued the speeding citation and his justification for the stop had ended. However, no evidence supports Stepp's timeline. Prior to Stepp giving her consent, none of her interaction with Howard on the video footage suggests he had issued the citation yet. In contrast, after Stepp consented, several minutes pass on the footage before Howard explains to her how to deal with the speeding citation, presumably because he just handed it to her. Thus, we reject Stepp's argument.

{¶28} In addition, Stepp argues that Howard exceeded the scope of her consent because she did not agree to a search of "any item in the vehicle." "The United States

Supreme Court has recognized that '[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *State v. Simmons*, Highland App. No. 05CA4, 2006-Ohio-953, at ¶29, quoting *Florida v. Jimeno* (1991), 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297.

{¶29} In *Jimeno*, police asked the defendant for permission to search his car for drugs. Jimeno gave his consent, and the police found a kilogram of cocaine inside a folded brown paper bag on the floorboard. *Jimeno* at 249-250. The issue before the Court was whether Jimeno's unqualified consent to the search of his car encompassed examination of the paper bag lying on the floor. Id. at 251. The *Jimeno* Court stated:

> The scope of a search is generally defined by its expressed object. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). In this case, the terms of the search's authorization were simple. Respondent granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search. Trujillo had informed respondent that he believed respondent was carrying narcotics, and that he would be looking for narcotics in the car. We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. "Contraband goods rarely are strewn across the trunk or floor of a car." Id., at 820, 102 S.Ct., at 2170. The authorization to search in this case, therefore, extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor.
>
> * * *
>
> Respondent argues, and the Florida trial court agreed with him, that if the police wish to search closed containers within a car they must separately request permission to search each container. But we see no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness. Cf. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). A suspect may of course delimit

> as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization. "[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Schneckloth v. Bustamonte*, supra, at 243, 93 S.Ct., at 2056.

Jimeno, at 251-252.

{¶30} Here, after Stepp told Howard about her prior arrest for possessing pills and that she currently had no prescriptions for medication, Howard told Stepp he thought there might be something illegal in the car. He told her that if she had pills in the car, she should just tell him. Immediately after Stepp denied having pills in the car, Howard asked, "You don't mind if I search your car?" Stepp said, "No." And again, even if we deem Stepp's response ambiguous, she later unequivocally told Howard, "I mean, if you want to look, I mean, that's fine with me[.]"

{¶31} So like the defendant in *Jimeno*, Stepp knew what law enforcement wanted to look for before she gave her general consent to search the vehicle, i.e. illegal drugs in the form of pills. And because Stepp placed no explicit limitation on the search, a reasonable person would have understood her general consent to search the vehicle to include consent to search containers within the vehicle that might contain drugs. Because a pill bottle, a small change purse or makeup case, and a suitcase might contain pills, Howard did not exceed the scope of Stepp's consent by looking in these items.

{¶32} Thus, we conclude that the trial court properly denied Stepp's motion to suppress evidence seized from her vehicle based on the consent exception to the warrant requirement. Accordingly, we overrule Stepp's first assignment of error. And

given our resolution of this assignment of error, we need not address the State's additional argument that 1.) the warrantless search was constitutionally permissible because Howard had reasonable suspicion to perform a protective search for weapons beneath the front passenger seat, and 2.) once Howard located pills there, he had probable cause to search the rest of the vehicle.

IV. Finding of Guilt

{¶33} In her second assignment of error, Stepp contends that the trial court erred by finding her guilty of first-degree felony aggravated possession of drugs because the court relied on evidence from the suppression hearing that negated the existence of an essential element of the offense. "Generally, a defendant who pleads * * * no contest waives all nonjurisdictional defects in the proceedings." *State v. Haney*, 180 Ohio App.3d 554, 2009-Ohio-149, 906 N.E.2d 472, at ¶18. In felony cases, Crim.R. 11 does not require that the prosecution explain the circumstances surrounding the offense before the trial court accepts a no contest plea and enters a judgment against the defendant. See *State v. Messer*, Clermont App. No. CA2008-04-039, 2009-Ohio-929, at ¶44, citing *State v. Watson*, Clinton App. No. CA2007-04-020, 2008-Ohio-629, at ¶9. By pleading no contest, the defendant admits the truth of the facts alleged in the indictment. Crim.R. 11(B)(2). And "[w]here the indictment * * * contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense." *State v. Bird*, 81 Ohio St.3d 582, 1998-Ohio-606, 692 N.E.2d 1013, at syllabus, following *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 425, 1996-Ohio-93, 662 N.E.2d 370.

{¶34} However, "[i]f the statement of facts reflects * * * 'an obvious, unarguable[,]

and dispositive deficiency in the state's case against the defendant,' the court should * * * refuse to accept the no contest plea, as it may under Crim.R. 11(C)(2), and instruct 'the defendant to enter a plea of not guilty, or to have entered such plea itself under Crim.R. 11(A) and (G). The state would then be required to elect whether to proceed to trial on a charge its evidence could not or might not sustain, or to proceed to a new indictment on a charge more in keepting [sic] with its anticipated evidence.'" *State v. Adams* (July 1, 1983), Ross App. No. 969, 1983 WL 3207, at *2, quoting *State v. Cohen* (1978), 60 Ohio App.2d 182, 396 N.E.2d 235. See, also, *Watson* at ¶9; *State v. Cooper,* 168 Ohio App.3d 378, 2006-Ohio-4004, 860 N.E.2d 135, at ¶6; and *State v. Adams*, Montgomery App. No. 22493, 2009-Ohio-2056, at ¶14, citing *State v. Wooldridge* (Oct. 6, 2000), Montgomery App. No. 18086, 2000 WL 1475699.

{¶35} In *Cohen*, the defendant pleaded no contest to robbery. The prosecutor gave a statement of facts and told the court that the defendant and a companion had rolled a "sleeping man onto his stomach, taking his watch and wallet in the process." *Cohen* at 182. The First District found that the prosecutor's uncontroverted statement of facts negated the existence of an essential element of the robbery offense, i.e. that the defendant used or threatened to use immediate force on his victim. Id. at 183. The Court rejected the argument that this deficiency in the State's case had no effect since the defendant admitted the truth of the facts in the indictment by pleading no contest:

> It is one thing to rely on Crim.R. 11(B)(2) to supply the fundament for the correction of an inadvertent omission in the statement of facts or even to furnish the dispositive weight where facts are in some dispute, but it is quite another to use it, as the state would have it, to paper over an obvious, unarguable, and dispositive deficiency in the state's case against the defendant. We take it that no one would argue that Crim.R. 11(B)(2) would sustain the trial court in accepting and proceeding to sentence under the indicted charge on a no contest plea to murder or manslaughter

> where the state's statement of facts conceded that the victim still lived. This would indeed be the elevation of shadow over substance; yet, in less dramatic form, it is the case at hand.

Cohen at 184.

{¶36} Here, the prosecutor did not present a statement of facts during the change of plea hearing. In fact, the trial court asked Stepp if she wanted to "waive" a reading of a statement of facts, and Stepp responded affirmatively. However, the Court went on to state: "[D]o you understand that by waiving a Statement of Facts I have reviewed the facts of this case at least for purpose [sic] of suppression and I'm aware of what those facts were, and do you understand today that with a waiver of [a] Statement of Facts and my knowledge of this case acquired from the suppression hearing that I'll be making a finding of guilty, do you understand that?" Stepp again responded affirmatively. And now, she argues that the evidence presented at the suppression hearing negated the existence of an essential element of the charged offense.

{¶37} The grand jury indicted Stepp on one count of aggravated possession of drugs, i.e. oxycodone, a first degree felony, in violation of R.C. 2925.11(A) and (C)(1)(d). R.C. 2925.11(A) provides that "No person shall knowingly obtain, possess, or use a controlled substance." And R.C. 2925.11(C)(1)(d) provides:

> (C) Whoever violates [R.C. 2925.11(A)] is guilty of one of the following:
>
> (1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:
>
> (d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms

prescribed for a felony of the first degree.

Oxycodone is a Schedule II opiate or opium derivative controlled substance. R.C. 3719.41, Schedule II(A)(1)(n). Therefore, the "bulk amount" of oxycodone is "[a]n amount equal to or exceeding twenty grams *or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual* * * *." R.C. 2925.01(D)(1)(d) (Emphasis added).

{¶38} Stepp argues that based on these statutory provisions, to obtain a first-degree felony conviction the State had to show that law enforcement seized at least 1,000 grams of oxycodone (50 multiplied by the bulk amount of 20 grams), but less than 2,000 grams of oxycodone (100 multiplied by the bulk amount of 20 grams). She contends that the evidence from the suppression hearing at best shows that police seized 90.46 grams of the drug – well below the required amount. But even if we presume the correctness of Stepp's calculation, as the State points out, her argument either misreads or ignores the complete definition of the "bulk amount."

{¶39} R.C. 2925.01(D)(1)(d) does not limit the State to using a bulk amount of 20 grams in its calculation. The statute also permits the State to argue for a different bulk amount by referencing the "maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual[.]" R.C. 2925.01(D)(1)(d). No evidence in the record indicates what this amount might be. Thus, we cannot say that law enforcement failed to seize the requisite amount of oxycodone to support a first-degree felony conviction. In other words, the evidence from the suppression hearing did not reveal an "obvious, unarguable, and dispositive deficiency" in the State's case. And because Stepp admitted the truth of the facts alleged in the indictment and does not

claim that those allegations were insufficient to sustain her conviction, we conclude that the trial court did not err in accepting the no contest plea and finding Stepp guilty. Accordingly, we overrule Stepp's second assignment of error.

V. Conclusion

{¶40} Having overruled each of the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.