[Cite as *State v. Manning*, 2009-Ohio-2605.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1278

Appellee — Trial Court No. CR200703579

v.

Craig Manning — **DECISION AND JUDGMENT**

Appellant — Decided: June 5, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Kevin A. Pituch and Anita Mathew, Assistant Prosecuting Attorneys, for appellee.

Gerald A. Baker, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which, following a plea of no contest, found appellant, Craig Manning, guilty of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(b), a felony of the fourth degree. Appellant was sentenced on July 18, 2008, to serve 15 months in the Ohio Department of Rehabilitation and Corrections. Appellant appeals the trial court's denial of his motion to suppress and raises the following sole assignment of error:

{¶ 2} "The trial court committed reversible error in denying Defendant's Motion to Suppress Physical Evidence and Statements."

{¶ 3} A hearing regarding appellant's motion to suppress was held on February 29, 2008, and March 4, 2008.[1] The following relevant evidence was adduced. Officer Danielle Kasprzak, Toledo Police Department, testified that on September 16, 2007, she, and about five other officers, were sent to investigate some men in the hallway at Tiffany Square Apartments. Kasprzak testified that Sergeant William Shaner was surveilling the apartment complex and had informed the officers that there were men in the apartment building who were engaged in disorderly conduct, by running in and out of the building and hollering, loitering, and who were suspected of illegal drug activity. Kasprzak testified that as she and the other officers approached the building, the group of men, standing in the doorway that led to the outside, fled to the interior of the building. Kasprzak, however, was 15 to 20 steps behind the other officers and did not see appellant

[1]Although appellant requested in his August 19, 2008 praecipe that all transcripts should be included in the record, appellant failed to identify the specific hearing dates he required. On September 15, 2008, appellant filed a docketing statement which indicated that the ordered transcripts consisted of approximately 92 pages and that the transcripts had already been prepared. On September 29, 2008, however, the Lucas County Clerk of Courts notified counsel that there was only one transcript of proceedings filed with the court, that it was from the hearing held on February 29, 2008, and consisted of 63 pages. This information agrees with the June 3, 2008 certification filed by the court reporter. Appellant did not subsequently request a transcript from the March 4, 2008 hearing. Accordingly, the only transcript of proceedings before this court on appeal is the February 29, 2008 hearing. With respect to the March 4, 2008 hearing, we note that, when portions of the transcript necessary to resolve issues are not part of the record, we must presume regularity in the trial court proceedings and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

enter his apartment on the second floor. Kasprzak testified that appellant was outside his apartment, in the hallway, with Officer Eric Board when she first saw him.

{¶ 4} Shaner, command officer with the Toledo Police Department, testified that a couple of months prior to the incident in this case, Shaner's captain told him that there had been a number of drug complaints from the residents in Tiffany Square Apartments and he was asked to rectify the situation. Shaner testified that a lot of surveillance and traffic stops were done on the complex. On September 16, 2007, Shaner had positioned himself in a nearby business in order to surveil the complex. Shaner stated that, while he was observing for about a half an hour, cars would pull in and people would exit from appellant's building, approach the cars, engage in hand-to-hand transactions, and then the cars would leave. Shaner identified the behavior as being indicative of drug trafficking activity. A car that Shaner had seen engage in hand-to-hand activity was stopped by police; however, Shaner testified that no contraband was recovered.

{¶ 5} Shaner also testified that there was a large group of males in the common hallway who were being loud and were coming in and out of the building. Shaner testified that he was approximately 50 to 60 yards from the complex, but could "hear them very easily cussing, yelling, talking back and forth running up and down the stairs." After observing the large group of males in the common hallway, Shaner alerted other officers located on the perimeter that he wanted to go in and investigate the people in the hallway. When police entered the building, Shaner testified that the group went running up the stairs to the second floor.

{¶ 6} Shaner got in his vehicle and drove to the complex. When he arrived, appellant was in custody outside of his apartment in the building's common hallway. Board told Shaner that there was a large amount of crack cocaine inside the apartment. Shaner testified that he then went in to make sure that there was no one else inside the apartment who could pose a threat. While inside, he also observed the contraband on the kitchen counter. Other than ensuring that no one else was in the apartment, Shaner testified that he did not search the apartment.

{¶ 7} On cross-examination, Shaner testified that the reason for entering the apartment building was "to investigate what the people were doing in the hallway, the disorderly conduct that they were observed doing * * *, to see if they did live on the premises, asked by the management that we make sure there is no loitering and criminal trespass in the area." Shaner further testified that the reason he sent the other officers in to investigate the group of men was based upon Shaner seeing the hand-to-hand transactions, which, based on his experience, was indicative of drug transactions, the complaints previously received regarding that location, past history of drug investigations conducted at that building, and the belief that drugs were being dealt from that apartment.

{¶ 8} Board testified that he was sent by Shaner to investigate the disorderly men in the apartment building. Board testified that when the officers approached the building, the men ran inside and up the steps and the officers chased them. Board testified that some of the men went into the apartment on the left and that appellant "went into an apartment on the right, entered the doorway, and then turned around." Board stated that, as he was approaching appellant, appellant "just made it into the apartment," after

opening the door, but "turned around and * * * kind of gave up." Board testified that appellant was standing in the open doorway and that crack cocaine was visible on the counter, approximately six feet from the door. Appellant was arrested while standing in his doorway.

{¶ 9} On cross-examination, Board testified that another officer, possibly Officer Joseph Trudeau, entered the building in front of Board and arrested appellant while standing in the open doorway of appellant's apartment. Board again testified that Trudeau did not open appellant's apartment door. Board further testified that he stopped a vehicle exiting the complex based upon an indication from Shaner that the occupants had just engaged in a hand-to-hand transaction with the men in the apartment building. Board testified that he stopped the vehicle after it failed to use its turn signal twice. Board searched the driver, with his permission, and found no drugs on his person. The passenger told Board that he threw the drugs out the window when Board activated the lights on the police vehicle. A crack pipe was recovered from the stopped vehicle, but the drugs were never found. A ticket was issued for the crack pipe.

{¶ 10} On July 15, 2008, the trial court denied appellant's motion to suppress. Specifically, the trial court held that, upon fleeing from officers, appellant opened the door to his apartment, just prior to being apprehended. The trial court held that the officers had a reasonable and articulable suspicion that appellant and the other men in the group were involved in criminal activity, based upon the apparent hand-to-hand drug sales and disorderly conduct, and, therefore, were justified in conducting a *Terry* stop of the individuals in the apartment's hallway. Alternatively, because the group was engaged

in disorderly conduct, the trial court found that the officers were justified, pursuant to the hot pursuit exception to the warrant requirement, to follow the individuals into the apartment building. Having found that the officers were lawfully in the apartment building, the trial court held that the plain view doctrine applied to the crack cocaine that was visible from the hallway, through the open door, on the kitchen counter. After appellant was arrested, the trial court found that Shaner lawfully entered the apartment, pursuant to the protective sweep exception to the warrant requirement, to determine if there were any other people inside. Shaner found no other people, but also observed the crack cocaine on the counter.

{¶ 11} On appeal, appellant argues that the state did not establish its burden of demonstrating that the officers' warrantless search fell within an exception to the warrant requirement and the Fourth Amendment. Appellant argues that the officers forced their way into appellant's apartment and that there was no evidence of any underlying criminal activity which would have justified the officers' actions. Appellant also argues that the rule permitting warrantless entry into a private residence in the case of exigent circumstances and emergencies, i.e., hot pursuit, is limited to serious offenses, not minor offenses. Finally, appellant argues that the fact that appellant fled from police, alone, was insufficient to justify a *Terry* stop.

{¶ 12} As stated by the Ohio Supreme Court, "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.

Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. [Citations omitted.]" *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶ 13} "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus. To justify an investigatory stop, law enforcement officials must demonstrate reasonable articulable suspicion of unlawful activity. *Terry v. Ohio* (1968), 392 U.S. 1, 21. Reasonable articulable suspicion means that the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion [or stop]." Id., 21-22. This is a lesser evidentiary burden to satisfy in comparison with a probable cause determination. *State v. Cowan*, 6th Dist. No. WD-05-090, 2006-Ohio-6177, ¶ 9.

{¶ 14} In making an assessment regarding the existence of "reasonable articulable suspicion," the facts must be judged pursuant to an objective standard, i.e., whether those facts available to the officer, at the time of the search, would warrant a reasonable man in the belief that the action taken was appropriate. *Terry* at 21-22. Although no single factor is dispositive, as the decision must be based on the totality of the circumstances, the Ohio Supreme Court has identified several factors that may be considered in determining the reasonableness of an investigative stop: (1) whether the location where

the actions occurred had a reputation of being an area for criminal activity; (2) surrounding circumstances, such as the time of day or night that the stop was made, which may increase the danger to the officer, or whether the officer had backup available; (3) the officer's experience, training or knowledge, including particular knowledge of crimes in the area; and (4) whether the suspect's conduct or appearance was suspicious, such as, he was making furtive gestures or movements and/or was ducking down or hiding. *Bobo*, 37 Ohio St.3d at 179-180.

{¶ 15} Additionally, citing *Adams v. Williams* (1972), 407 U.S. 143, 145-146, the Ohio Supreme Court in *Bobo* recognized that "' * * * The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. * * *"' *Bobo*, 37 Ohio St.3d at 180.

{¶ 16} Initially, we find that the trial court's findings of fact were supported by competent, credible evidence in the record and, therefore, accept the trial court's findings to be true. Upon making an independent determination, we find that the facts in this case establish that the officers had a reasonable articulable suspicion to question appellant regarding his presence in the apartment's hallway. There was a history of drug complaints surrounding that building, Shaner observed behavior that was indicative of

drug transactions being conducted, and Shaner observed the group engaged in disorderly conduct. We find that, based upon the totality of the circumstances in this case, the officers were justified in executing a *Terry* stop of appellant and the other individuals in the hallway.

{¶ 17} Alternatively, because the individuals were engaged in disorderly conduct, as witnessed by Shaner, and fled when the officers identified themselves, the officers were justified in following appellant into his apartment. See *Middletown v. Flinchum*, 95 Ohio St.3d 43, syllabus ("When officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor.") In this case, the facts establish that appellant opened his apartment door and then surrendered himself to police while standing in the open doorway. We find that the officers were lawfully in the hallway outside of appellant's apartment under either the doctrine of hot pursuit or to effectuate a *Terry* stop.

{¶ 18} The evidence presented in this case establishes that, approximately six feet away, through the open apartment door, crack cocaine could be seen on the kitchen counter. To justify the warrantless seizure of an item under the plain view doctrine, the seizing officer must be lawfully present at the place from which he can plainly view the evidence, the officer must have a lawful right of access to the object, and it must be immediately apparent that the item seized is incriminating on its face. *Horton v. California* (1990), 496 U.S. 128, 136-37; *State v. Buzzard*, 112 Ohio St.3d 451, 2007-

Ohio-373, ¶ 16. We find that the state established that the officers were lawfully in a position to view the crack cocaine, which was readily identifiable and in plain view, through appellant's open door. Additionally, upon detaining appellant, Shaner made a protective sweep of the apartment to ensure that no one else was present. In so doing, Shaner also saw and identified the crack cocaine on the counter.

{¶ 19} Based on the foregoing, we find that the trial court correctly denied appellant's motion to suppress. The officers were lawfully in a position to observe the crack cocaine which was in plain view in appellant's apartment. Appellant's sole assignment of error is therefore found not well-taken.

{¶ 20} On consideration whereof, this court affirms the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____

_____
JUDGE

Arlene Singer, J. _____

Thomas J. Osowik, J. JUDGE

CONCUR.

JUDGE