**[Cite as *State v. Lumpkin*, 2018-Ohio-5339.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**PORTAGE COUNTY, OHIO**

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|---|---|---|
| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2017-P-0091** |
| - vs - | : | |
| SEAN A. LUMPKIN, JR., | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2017 CR 00282.

Judgment: Affirmed.

*Victor Vigluicci*, Portage County Prosecutor, and *Pamela Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*John Laczko*, Assistant Public Defender, 209 South Chestnut Street, Suite 400, Ravenna, OH 44266 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

**{¶1}** Appellant, Sean A. Lumpkin, Jr., appeals from the November 15, 2017 judgment of the Portage County Court of Common Pleas, sentencing him for trafficking in marijuana and possessing criminal tools following a no contest plea. For the reasons stated, we affirm.

**{¶2}** On April 12, 2017, appellant was indicted by the Portage County Grand Jury on two counts: count one, trafficking in marijuana, a felony of the fifth degree, in violation of R.C. 2925.03(A)(2) and (C)(3)(a); and count two, possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24(A) and (C). Appellant was appointed counsel and pleaded not guilty at his arraignment.

**{¶3}** On October 4, 2017, appellant filed a motion to suppress. Appellant challenged the search of a home owned by his father, Sean Lumpkin, Sr., located at 421 South Walnut Street, Ravenna, Portage County, Ohio. Appellant resided at the home with his father, his father's girlfriend Tressa Rome, and Breanna Sawders.

**{¶4}** A suppression hearing was held on October 30, 2017. Detective Eric Centa, with the Portage County Sheriff's Office, testified for appellee, the state of Ohio. The Portage County Drug Task Force had an arrest warrant for Sawders with information from two confidential informants that she could be located at Sean Lumpkin, Sr.'s home, where she was staying. Officers observed a vehicle belonging to Sawders in the driveway of the residence. Upon approaching the home, Rome was on the front porch and whispered and pointed toward the front door stating that "Breanna" was inside. Officers entered the residence and observed Sawders in a room with appellant along with marijuana and criminal tools**,** i.e., a digital scale and plastic baggies, in plain view. Sawders was arrested and taken into custody. The homeowner, Sean Lumpkin, Sr., provided both verbal and written consent to search the residence. Appellant was also charged with offenses resulting from that search.

**{¶5}** On November 6, 2017, the trial court overruled appellant's motion to suppress. Two days later, appellant pleaded no contest to both counts in the indictment and the trial court found him guilty.

**{¶6}** On November 15, 2017, the trial court sentenced appellant to one year in prison on each of the two felony counts. The court ordered the sentences to be served concurrently to each other and concurrent to appellant's sentence in another case, Case No. 2017 CR 0274. Appellant filed a timely appeal and raises the following two assignments of error:

**{¶7}** "[1.] The trial court erred as a matter of law and to the prejudice of appellant and violated his right to due process of law under the Fourteenth Amendment by overruling appellant's motion to suppress evidence.

**{¶8}** "[2.] The trial court erred as a matter of law in entering a judgment of guilty after a no contest plea to the charge of possession of criminal tools and for sentencing appellant for that offense."

**{¶9}** In his first assignment of error, appellant argues the trial court erred in overruling his motion to suppress.

**{¶10}** "Unlike a plea of guilty, a plea of no contest does not preclude a defendant from asserting on appeal that the trial court erred in ruling on a motion to suppress. *State v. Delarosa,* 11th Dist. Portage No. 2003-P-0129, 2005-Ohio-3399, * * *, ¶25; Crim.R. 12(I)." *State v. Link*, 11th Dist. Lake No. 2015-L-078, 2016-Ohio-4597, ¶18.

**{¶11}** "Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. 'An appellate court reviewing a motion to suppress is bound to accept the

trial court's findings of fact where they are supported by competent, credible evidence.' *State v. Warner,* 11th Dist. Portage No. 2013-P-0056, 2014-Ohio-1874, ¶20. Accepting the facts as true, the reviewing court independently determines, as a matter of law and without deference to the trial court's determination, whether its conclusion was consistent with the applicable legal standard. *Id.*" *State v. Nasca*, 11th Dist. Ashtabula No. 2016-A-0026, 2016-Ohio-8223, ¶16.

**{¶12}** "Generally, the Fourth Amendment prohibits the police from making a warrantless nonconsensual entry into a suspect's home in order to make a felony arrest. *Payton v. New York,* 445 U.S. 573, 588-589 (1980). The *Payton* Court held, however, that 'an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.' *Id.* at 603. Accordingly, pursuant to *Payton,* an arrest warrant is sufficient to enter a person's residence to effectuate the warrant if the police have reason to believe that the suspect lives in the home and is in fact at the home at the time the arrest warrant is executed. 'Reasonable belief is established by looking at common sense factors and evaluating the totality of the circumstances.' *United States v. Pruitt,* 458 F.3d 477, 482 (6th Circ.2006), citing *United States v. McKinney,* 379 F.2d 259 (6th Circ.1967)." *State v. Zerucha*, 11th Dist. Ashtabula No. 2015-A-0031, 2016-Ohio-1300, ¶13.

**{¶13}** "'A search conducted pursuant to a valid consent is constitutionally permissible.' *Bainbridge v. Kaseda,* 11th Dist. Geauga No. 2007-G-2797, 2008-Ohio-2136, ¶28 * * *. * * * '[T]he proper test is whether the totality of the circumstances demonstrates that the consent was voluntary.' *Kaseda* at ¶28 * * *. 'The state has the

burden to prove consent was freely and voluntarily given by clear and convincing evidence.' *Kaseda* at ¶28, * * * (1997)." (Internal citation omitted.) *State v. Driscol*, 11th Dist. Lake No. 2013-L-129, 2014-Ohio-5608, ¶47.

**{¶14}** In this case, trial counsel narrowly tailored the suppression challenge at the hearing to a single legal issue, namely whether the entry of the residence was lawful. The record before us reveals the entry of the home was valid.

**{¶15}** As stated, appellant challenged the search of a home owned by his father, Sean Lumpkin, Sr., located at 421 South Walnut Street, Ravenna, Portage County, Ohio. Appellant resided at the home with his father, his father's girlfriend Tressa Rome, and Breanna Sawders.

**{¶16}** At the suppression hearing, Detective Eric Centa, with the Portage County Sheriff's Office, testified for the state regarding his training and experience on the Portage County Drug Task Force and indicated his familiarity with the location of the residence at issue from a prior Drug Task Force investigation. Detective Centa testified that the Drug Task Force had a valid felony arrest warrant for Sawders with information from two confidential informants that she could be located at Sean Lumpkin, Sr.'s home, where she was staying. The tip was within two hours of entry. Officers conducted surveillance and watched traffic of the house prior to entry. Officers observed Sawders' vehicle in the driveway of the residence. Upon approaching the home, Rome was on the front porch and whispered and pointed toward the front door stating that "Breanna" was inside. Officers entered the residence and observed Sawders in a room with appellant along with marijuana and criminal tools in plain view.

**{¶17}** As Sawders was staying at Sean Lumpkin, Sr.'s and his residence is 421 South Walnut Street, Ravenna, Portage County, Ohio, then at the time Detective Centa and the officers entered the residence, Sawders was also a resident of that home. The totality of the circumstances demonstrates a reasonable belief that Sawders would be found inside the residence. *See Payton, supra,* at 603; *Zerucha, supra,* at ¶13. Officers had limited authority to enter the residence to effectuate the arrest of Sawders. Once legally inside, officers seized items that were in plain view and on appellant's person. After Sawders was in custody, the homeowner, Sean Lumpkin, Sr., also provided voluntary verbal and written consent to search the premises. *See Driscol, supra,* at ¶47.

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

**{¶19}** In his second assignment of error, appellant contends the trial court erred in entering a guilty judgment after a no contest plea to the charge of possessing criminal tools and for sentencing him for that offense. He maintains the trial court erred in convicting him of possessing criminal tools under R.C. 2923.24 for items that are properly classified as drug paraphernalia under R.C. 2925.14(C)(1).

**{¶20}** R.C. 2925.14(C)(1) states: "Subject to division (D)(2) of this section, no person shall knowingly use, or possess with purpose to use, drug paraphernalia."

**{¶21}** R.C. 2925.14(D)(2) provides: "Division (C)(1) of this section does not apply to a person's use, or possession with purpose to use, any drug paraphernalia that is equipment, a product, or material of any kind that is used by the person, intended by the person for use, or designed for use in storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body marihuana."

**{¶22}** Contrary to appellant's assertion, the use or possession to use drug paraphernalia with marijuana is not a viable offense under R.C. 2925.14(C)(1). The trial court was without statutory authority to consider a charge under R.C. 2925.14(C)(1) in his case.

**{¶23}** Here, appellant entered a no contest plea to two counts: count one, trafficking in marijuana, a felony of the fifth degree, in violation of R.C. 2925.03(A)(2) and (C)(3)(a); and count two, possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24(A) and (C). Regarding count two, the indictment provides that the Grand Jury found that appellant did "possess or have under his control a substance, device, instrument, or article, to wit: digital scale and plastic baggies, with purpose to use it criminally in the commission of a felony offense."

**{¶24}** The facts in this case reveal that the digital scale and plastic baggies are criminal tools as they are "commonly used for criminal purposes." *See State v. Painson*, 9th Dist. Summit No. 24164, 2008-Ohio-6623, ¶8-10 (holding that to uphold a conviction for possessing criminal tools, "[t]he State need only prove that an item is commonly used for criminal use and that the defendant intended such a use for the item[;] * * * it is common practice for people dealing in illegal narcotics to use digital scales and plastic baggies[;] * * * drug dealers usually weigh the amount of their product on such a scale and that marijuana is normally packed in small quantities and sealed in the type of small Ziploc baggies that [were] recovered[;] * * * the presence of a digital scale and plastic baggies generally indicates that an individual intends to or is engaging in drug trafficking[;] * * * digital scales and baggies are items commonly associated with the packaging of controlled substances.")

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

**{¶26}** For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.