[Cite as *State v. Davis*, 2009-Ohio-5888.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MATTHEW K. DAVIS Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 2009CA0023 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No's. 2008-CR-95H and 2008-CR-96H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 3, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES MAYER, JR. PROSECUTING ATTORNEY RICHLAND COUNTY, OHIO	PAUL MANCINO, JR. 75 Public Square, Ste. 1016 Cleveland, Ohio 44113-2098
BY: KIRSTEN L. PSHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	JACEDA BLAZEF 409 Park Avenue West Mansfield, Ohio 44906

Hoffman, P.J.

{¶1} Defendant-appellant Matthew K. Davis appeals his convictions and sentence entered by the Richland County Court of Common Pleas, on one count of trafficking in drugs with a forfeiture specification, and one count of tampering with evidence, after the trial court found him guilty upon his entering a plea of no contest. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 8, 2008, the Richland County Grand Jury indicted Appellant on four counts of possession of drugs, one count of trafficking in drugs with a forfeiture specification, and one count of tampering with evidence. Appellant executed a waiver of presence at his arraignment on March 7, 2008.

{¶3} On May 28, 2008, Appellant filed a Motion to Suppress, moving the trial court to suppress drug evidence found by law enforcement officers, arguing such evidence was illegally and unconstitutionally obtained because the officers entered his home without a warrant and failed to advise him of his *Miranda* rights. The State filed a Response on August 1, 2008, asserting exigent circumstances justified the initial entry into the home, the search was conducted with consent, and the Appellant's statements were not made during an interrogation which would require *Miranda* warnings. The trial court conducted an oral hearing on the motion. The following evidence was presented.

{¶4} Officer Michael Beasley with the Lexington Police Department testified he arrived at the station for the beginning of his shift on January 23, 2008, and was dispatched to 16 Cambridge Court, in response to a 911 call just received. Officer

Beasley entered his cruiser, activated his lights, and proceeded to the residence. The officer recalled the 911 call for service came in as a domestic violence call from an individual by the name of Mac Davis, Appellant's father. Mr. Davis advised the dispatcher there was some kind of disturbance going on at his home. He explained he had received three telephone calls from his home, but was repeatedly cut off. Mr. Davis stated he was at work, and his wife and two sons were at home. Mitchell Davis, Appellant's brother, had called Mr. Davis and said something about Appellant being in the bathroom, shooting up heroin. Mr. Davis heard screams in the background during the phone conversations, but when he tried to call back after being disconnected, no one answered.

{¶5} When Officer Beasley arrived at the residence, he found Mitchell Davis outside in the driveway. Mitchell told the officer he had been trying to get into the bathroom to get ready for school, but Appellant would not let him in. Mitchell kicked open the door, and the two brothers started fighting. Mitchell and Appellant exchanged punches, and after the two separated, Appellant threw a boot at Mitchell, hitting him in the side of the face. Officer Beasley noticed a scuff mark from the boot on Mitchell's cheek bone. While the officer was speaking with Mitchell, he heard screaming coming from inside the house. Officer Beasley recognized the screams of Appellant's mother, Mary Sue Davis. As Officer Beasley walked toward the house, he could hear Appellant screaming at his mother. Officer Beasley approached the front door and looked inside. He did not see anyone, but still heard screaming.

{¶6} The officer entered the residence. Mrs. Davis came out from the hallway and told him Appellant was down the hall. Mrs. Davis did not seem surprised to see the officer, did not instruct him to leave the residence, and directed him to Appellant's location. Officer Beasley turned the corner and proceeded down the hallway where he observed Appellant standing outside the bathroom. Appellant said, "Hello", and told the officer he wanted to tell his side of the story, but first he had to wash his hands. Appellant walked into the bathroom. Officer Beasley followed Appellant into the bathroom and saw Appellant trying to wash what appeared to be black tar heroin down the sink. Appellant did not heed the officer's instructions to stop, and as a result, Officer Beasley pulled him away from the sink and placed him in handcuffs. Officer Beasley conducted a pat down search. During the pat down search, Officer Beasley located four unit doses of heroin in Appellant's pants pocket. Officer Beasley retrieved the heroin from the sink. Officer Little, who had arrived shortly beforehand, escorted Appellant to the cruiser. Officer Beasley advised Mrs. Davis they planned to conduct a search of the home. The officers asked Appellant for consent to search his room, which he gave to the officers. Appellant was with the officers while they searched his room, and showed them where he had hidden drugs in a bedroom located across the hall from his bedroom. In Appellant's bedroom, the officers found marijuana on the bed, marijuana and a baggie of heroin under the pillow as well as marijuana and pills in other areas of the room.

{¶7} Officer Andy Little testified he was getting ready to leave for work on January 23, 2008, when he received a call for assistance at 16 Cambridge Court. Officer Beasley was inside the residence when Office Little arrived. Officer Little

entered the residence and found Officer Beasley handcuffing Appellant. Officer Little lead Appellant out of the house and placed him in the cruiser. When he reentered the residence, Officer Little heard Mrs. Davis tell Officer Beasley they (the officers) could go ahead and do what they needed to do, but she was going to take a bath. The officers subsequently decided to secure the house and obtain a warrant to search the entire residence.

{¶8} Later that same day, members of the Lexington Police Department executed a search warrant upon the residence located at 16 Cambridge Court, Lexington, Ohio. Officers located $1,125.00 in cash, found in a nightstand in Appellant's bedroom. Appellant was not employed at the time. Inside a backpack in Appellant's bedroom, officers found eleven syringes, two cook spoons, and a belt which had been modified for use as a tie-off for injection purposes. Officers also recovered additional syringes and pieces of foil used to package heroin throughout the bedroom. Officers discovered several stems of marijuana in another bedroom. In total, officers removed forty-four wrapped unit doses of black tar heroin; one unwrapped dose of black tar heroin; one baggie containing a small amount of heroin; one bud of marijuana; fourteen syringes; three cook spoons; one marijuana pipe packed with marijuana; a modified belt; eight Suboxone pills, a schedule three controlled substance, as well as several broken pieces of the drug; approximately one dozen generic Xanax pills, a scheduled four controlled substance; and one Hydromorphone pill, a scheduled two controlled substance.

{¶9} Upon conclusion of the hearing, the trial court gave both parties time to file additional briefs on the issues. The trial court overruled Appellant's Motion to Suppress

via Judgment Entry dated September 3, 2008. Appellant filed a Motion for Reconsideration, which the trial court overruled on September 26, 2008. Appellant appeared before the trial court on November 5, 2008, and withdrew his former pleas of not guilty and entered pleas of no contest to one count of trafficking in drugs, a felony of the second degree, and the attendant forfeiture specification; and one count of tampering with evidence, a felony of the third degree. The State dismissed the four remaining counts. The trial court accepted Appellant's no contest pleas, found him guilty of both counts, and sentenced him to an aggregate term of imprisonment of two years.

{¶10} It is from these convictions and sentence Appellant appeals, raising the following assignments of error:

{¶11} "I. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO SUPPRESS.

{¶12} "II. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED THE MOTION TO SUPPRESS CONCERNING THE QUESTIONING OF DEFENDANT WITHOUT BEING ADVISED OF HIS MIRANDA WARNING."

I

{¶13} In his first assignment of error, Appellant contends the trial court violated his constitutional right of due process by overruling his motion to suppress.

{¶14} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said

findings of fact are against the manifest weight of the evidence. See: *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See: *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; and *State v. Guysinger,* supra. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690 116 S.Ct. 1657, 134 L.E2d 911 "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶15} In the case sub judice, Appellant challenges the trial court's finding the responding officer's warrantless entry into the residence was legal because of exigent circumstances.

{¶16} "The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution secure an individual's right to be free from unreasonable searches and seizures." *State v. Moore,* 2d Dist. No. 20198, 2004-Ohio-

3783, at ¶ 10. “It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” *Payton v. New York* (1980), 445 U.S. 573, 586. Indeed, the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed * * *.” *United States v. United States Dist. Ct.* (1972), 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752. However, warrantless searches and seizures are not in violation of the Fourth Amendment when such falls within one of the few specifically established and well delineated exceptions.

{¶17} One such exception is an entry or search based on exigent circumstances. The exigent circumstances exception relies on the premise the existence of an emergency situation, demanding urgent police action, may excuse the failure to procure a search warrant. See, *Welsh v. Wisconsin* (1984), 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732. Although there is no precise list of all the exigent circumstances that might justify a warrantless search, exigent circumstances generally must include the necessity for immediate action that will “ ‘protect or preserve life or avoid serious injury’,” or will protect a governmental interest that outweighs the individual's constitutionally protected privacy interest. *State v. Price* (1999), 134 Ohio App.3d 464, 467, 731 N.E.2d 280, quoting *Mincey v. Arizona* (1978), 437 U.S. 385, 392-93, 98 S.Ct. 2408, 57 L.Ed.2d 290. The Ohio Supreme Court has expressly stated: “Exigent circumstances justify a warrantless entry into a residence by police when police are there pursuant to an emergency call reporting domestic violence and where the officers hear sounds coming from inside the residence which are indicative of violence.” *State v. Applegate* (1994), 68 Ohio St.3d 348, 626 N.E.2d 942, syllabus.

{¶18} In the instant action, the evidence presented at the hearing on the motion to suppress revealed Mac Davis, Appellant's father, telephoned 911 after receiving three phone calls from his son, Mitchell, and his wife. Mr. Davis told the 911 dispatcher he was disconnected during each of the telephone calls, and when he tried to call back, no one answered. Mr. Davis heard arguing in the background and something about Appellant being in the bathroom, shooting up heroin. When Officer Beasley arrived at the residence, he met Mitchell Davis, who was standing outside the house. Mitchell advised Officer Beasley, he and his brother Appellant, had just engaged in an altercation and Appellant had thrown a boot at him. While Officer Beasley was speaking with Mitchell, he heard screaming coming from inside the residence.

{¶19} Based upon the foregoing, we find exigent circumstances justified Officer Beasley's entry into the home and such required immediate action. Accordingly, the trial court did not err in overruling Appellant's motion to suppress on this ground.

{¶20} Appellant's first assignment of error is overruled.

II

{¶21} In his second assignment of error, Appellant contends the trial court violated his due process rights by overruling his motion to suppress relative to law enforcement officers' questioning of him without first advising him of his Miranda rights.

{¶22} In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694, the United States Supreme Court held the Fifth Amendment to the United States Constitution prevents the admission at trial of statements made by a defendant during custodial interrogation when the defendant has not been advised of certain rights. A "custodial interrogation" is defined as questioning initiated by law enforcement officers

after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

{¶23} We find Officer Beasley's asking Appellant for consent to search does not constitute an interrogation; therefore, the officer was not required to advise Appellant of his *Miranda* rights. See, *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631, citing *U.S. v. LaGrone* (C.A.7, 1994), 43 F.3d 332. Accordingly, we find Appellant's due process rights were not violated.

{¶24} Appellant's second assignment of error is overruled.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MATTHEW K. DAVIS	:	
	:	
Defendant-Appellant	:	Case No. 2009CA0023

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs to appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY