[Cite as *State v. Thomas*, 2010-Ohio-4627.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

OSCAR THOMAS

Defendant-Appellant

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09 CA 106

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 438D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 24, 2010

APPEARANCES:

For Plaintiff-Appellee

JAMES J. MAYER, JR.
PROSECUTING ATTORNEY
KIRSTEN L. PSCHOLKA-GARTNER
ASSISTANT PROSECUTOR
38 South Park Street
Mansfield, Ohio 44902

For Defendant-Appellant

R. JOSHUA BROWN
32 Lutz Avenue
Lexington, Ohio 44904

Wise, J.

{¶1} Appellant Oscar Thomas appeals from his conviction, in the Richland County Court of Common Pleas, for aiding or abetting aggravated burglary and aiding or abetting assault. The Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows

{¶2} On the afternoon of March 16, 2009, Allando Grose went to appellant's home at 248 Rowland Avenue in Mansfield, Ohio, in an effort to reclaim money purportedly owed to him by appellant. This resulted in a verbal altercation between the two men.

{¶3} Later that afternoon, sixteen-year-old Eric Salyers, an acquaintance of both Allando Grose and appellant, was at home babysitting his five-year-old sister when he received a phone call from Quaina Thomas, appellant's sister. Eric had somehow been accused of being involved in the money dispute between Allando Grose and appellant, and Quaina asked Eric to come across the street to her house. However, Eric said he could not. Shortly after that phone conversation, appellant, along with Michael White and Vincent Hess, entered Eric's home and began punching and kicking him.

{¶4} After the assault ended, Eric didn't feel safe, so he called Allando Grose and asked if he could give him a ride. Eric then took his little sister and headed toward Sixth Street and Penn Avenue where he would await Allando, who would be driving his mother's car. As Eric left his house, he saw appellant and Michael White begin to follow him and his sister down the street. Eric made it to the Groses' car, which had Allando, his two brothers, and a female, Moea Troche, inside. Eric put his sister into the front seat and got into the back seat. Before they could drive away, another car pulled up.

Someone inside that car lowered the window and fired several gunshots at the Groses' car. One of those shots struck the vehicle.

{¶5} When the gunfire stopped, the shooter's car headed toward appellant's home at 248 Rowland, at which time appellant got out and ran toward the house. The Grose brothers then drove quickly to their father's home on South Mulberry Street. In the meantime, an area resident called the police. Officers responded to the area of Fourth and Rowland, but they did not find any victims or suspects.

{¶6} The Grose brothers told their father what had happened, and then proceeded to the residence of their mother, located on Newman Street. When they got there, Eric Salyers called the police and reported that someone had broken into his house, assaulted him, and then shot at the Groses' car. Officer David Johnson was dispatched to the home to take statements from Eric and the Grose brothers. When he arrived, he found Eric with visible injuries to his face. He was also shown a bullet imbedded in the door of the Groses' car.

{¶7} The victims advised Officer Johnson that the three suspects were appellant, Thomas, Michael White, and a man with the first name "Vince." They indicated that appellant and some of the other suspects lived at 248 Rowland, across the street from Eric Salyers' house. Additionally, the victims were able to provide a description of appellant's clothing (a blue tank top basketball jersey with gold trim, a pair of matching knee-length shorts with gold trim, and white tennis shoes) and the gun that was used in the shooting (a silver handgun equipped with a scope). Officer Johnson relayed this information to Sergeant Bret Snavely, who responded to that address along with Officers Steven Brane and Orlando Chatman.

{¶8} When Sergeant Snavely knocked on the door of 248 Rowland, it was answered by Quaina Thomas. A short time later, appellant also came to the door. Both Quaina and appellant repeatedly and adamantly denied that appellant had left the house all day. However, because appellant's clothing matched the description provided by the victims, Sergeant Snavely believed they were not being truthful.

{¶9} In response to the question by Sergeant Snavely, Quaina and appellant stated there was no one else inside. However, a few minutes later, Snavely saw another man emerge from the kitchen. This individual was identified as Vincent Hess. Since the victims had indicated that the third suspect was named Vince, he believed he had two out of the three suspects, and that the third was in the home, likely still armed. As a result, he decided that entry into the home would be necessary to prevent the escape of that individual.

{¶10} By the time officers made entry into 248 Rowland, appellant had been handcuffed and secured in a police car; however, Quaina Thomas and Vincent Hess were unrestrained and were remaining around the front porch and first floor area of the home. Officer Orlando Chatman stayed downstairs with them while the other officers conducted a protective sweep of the upstairs area of the home. A short time later, the third suspect, Michael White, was found hiding in the attic. The officers who had gone upstairs took White into custody and brought him downstairs.

{¶11} While this was going on, Officer Chatman noticed that one of the couch cushions in the living room was crooked. Chatman later testified that he had not been advised at that time that the house was cleared of other occupants. The couch cushion aroused his suspicion because he had previously seen items such as guns hidden

under such cushions. Since Quaina Thomas and Vincent Hess still had access to that area, he decided to look under the couch cushion for officer safety. When Chatman lifted the cushion, he discovered a gray or silver .44 caliber revolver with a scope, which matched the description of the gun used in the shooting. The revolver was held as evidence concerning the earlier car shooting.

{¶12} As a result of the events of March 16, 2009, appellant was indicted by the Richland County Grand Jury as follows, on an "aiding and abetting" basis:

{¶13} One count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree;

{¶14} One count of aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the first degree;

{¶15} One count of kidnapping in violation of R.C. 2905.01(A)(3), a felony of the first degree;

{¶16} One count of kidnapping in violation of R.C. 2905.01(A)(2), a felony of the second degree;

{¶17} One count of assault in violation of R.C. 2903.13(A), a misdemeanor of the first degree, and;

{¶18} Six counts of felonious assault in violation of R.C. 2903.11(A)(2), felonies of the second degree.

{¶19} Firearm specifications were attached to some of the above counts; however, all such specifications were dismissed by the prosecutor prior to consideration by the jury.

{¶20} On June 16, 2009, appellant appeared at arraignment and pled not guilty to all charges. The court at that time appointed counsel to represent him at trial.

{¶21} On July 23, 2009, appellant filed a motion to suppress the evidence obtained from the police entry into his residence. The trial court thereafter denied the motion to suppress.

{¶22} The matter proceeded to a jury trial on July 30-31, 2009. After hearing the evidence, the jury found appellant guilty on one count aiding or abetting aggravated burglary and one count of aiding or abetting assault. Appellant was found not guilty on all remaining counts.

{¶23} On August 3, 2009, the trial court conducted a sentencing hearing. The court thereupon sentenced appellant to nine years in prison on the aggravated burglary count, plus six months, concurrent, on the assault count.

{¶24} On September 2, 2009, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶25} "I. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS. THE COURT COMMITTED FURTHER ERROR BY ALLOWING TESTIMONY OF THE DISCOVERY OF THE FIREARM INTO EVIDENCE AFTER ALL FIREARM SPECIFICATIONS HAD BEEN DISMISSED."

I.

{¶26} In his sole Assignment of Error, appellant contends the trial court erred in overruling his motion to suppress a firearm found under a couch cushion following his arrest at home and thereafter allowing testimony of the discovery of the firearm. We disagree.

Standard of Review

{¶27} 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 finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this third 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 the 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; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

Warrantless Entry Suppression Issue

{¶28} The Fourth Amendment to the United States Constitution and Section 14, Article I, Ohio Constitution, prohibit the government from conducting unreasonable searches and seizures of persons or their property. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271. It is well-established in American law that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-

delineated exceptions." *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576.

{¶29} The burden is upon the state to overcome the presumption that warrantless searches of homes are per se unreasonable by demonstrating that the search fell within one of these well recognized exceptions to the warrant requirement. *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, 455 91 S.Ct. 2022. The doctrine of exigent circumstances is one of these judicially recognized exceptions to the search warrant requirement. See, e.g., *State v. Akron Airport Post 8975* (1985), 19 Ohio St.3d 49, 51, 482 N.E.2d 606. A test for exigent circumstances, similar to that which the trial court relied upon in the case sub judice, is spelled out in *United States v. Scott* (C.A. 6, 1978), 578 F.2d 1186, 1190. Some of the factors to be considered as to whether a situation exists that will permit a warrantless police intrusion include: (1) whether the offense is a crime of violence; (2) whether it is reasonably believed that the suspect is armed; (3) whether there is strong reason to believe that the suspect is on the premises; and (4) whether it is likely that the suspect will escape if not swiftly apprehended. See, also, *State v. Hayes* (Nov. 25, 1992), Cuyahoga App. No. 61396.

{¶30} Upon review, and in light of the facts as set forth earlier in this opinion, we concur with the trial court's decision that the warrantless police entrance into the home was reasonable and justified. The police in this instance were faced with a "shots fired" call, with witness descriptions of the three men involved in creating this type of danger on a public street. Upon proceeding to appellant's Rowland Avenue residence, the officers had a reasonable basis to suspect that the two other men involved in the car

shooting were in the residence, with no weapons having yet been discovered and with other persons possibly present inside. The trial court thus correctly applied proper criteria to find exigent circumstances existed at the scene.

"Protective Sweep" Suppression Issue

{¶31} Finding the police entry into 248 Rowland constitutionally valid, we thus reach the specific question of the propriety of the officers' seizure of the handgun discovered in the couch after the warrantless entry. Appellant contends the trial court erred in denying the motion to suppress in this regard, and also makes a brief argument that the trial court erred in permitting the officers to testify regarding the discovery of the gun during his trial.

{¶32} "[A] protective sweep by police in conjunction with an in-home arrest does not violate the Fourth Amendment if the searching officer has a belief justified by reasonable and articulable facts that a person in the area is a danger to police at the arrest scene." *State v. Harris* (May 4, 1994), Hamilton App.Nos. C-930452, B-920183, 1994 WL 164185, citing *Maryland v. Buie* (1990), 494 U.S. 325, 110 S.Ct. 1093. "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Buie, supra*, at 327.

{¶33} In the case sub judice, at the conclusion of the suppression hearing, the trial court found credible Officer Chatman's testimony that he was not sure if the residence was cleared of all persons. See Tr. at 74, 100. Thus, we find a protective sweep per se would be constitutionally valid in these circumstances in the interest of

officer safety. However, Officer Chatman's actions in moving the couch cushion went beyond the parameters of a "cursory visual inspection" of areas of the living room where a person might reasonably be able to hide. *Buie*, supra.[1] Nonetheless, we are mindful that the "harmless error" doctrine applies to suppression issues. See, e.g., *State v. Howard*, 146 Ohio App.3d 335, 766 N.E.2d 179, 2001-Ohio-1379. The Ohio Supreme Court has held: "In a criminal prosecution, the allegedly erroneous admission in evidence of items unlawfully seized is harmless beyond a reasonable doubt and does not provide grounds for a reversal of the conviction where the pertinent testimony of witnesses at trial is not the product of such seizure and is overwhelmingly sufficient to independently establish the elements of the offense beyond a reasonable doubt." *State v. Tabasko* (1970), 22 Ohio St.2d 36, 257 N.E.2d 744, syllabus.

{¶34} Under the circumstances of the case sub judice, because appellant was found not guilty of the felonious assault charges relating to the shooting, he cannot establish that he was prejudiced by the admission of testimony pertaining to the gun found in the couch. Appellant was only convicted of the aggravated burglary of Eric Salyers' home, which alleged that physical harm was inflicted, attempted or threatened during the commission of the offense, and the misdemeanor assault on Eric during the course of the aggravated burglary. Neither of these charges involved an allegation that a weapon was used in the commission of the offense, and all gun specifications were

[1] We recognize that in *Warden v. Hayden* (1967), 387 U.S. 294, the United States Supreme Court had upheld the authority of police officers, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and also to search for weapons. See, e.g., *State v. Morrison*, Cuyahoga App.No. 88129, 2007-Ohio-3895, ¶ 10. But *Buie*, which was decided twenty-three years later, appears to be more restrictive regarding a warrantless police weapons search.

dropped prior to the jury's verdict. Moreover, in regard to the use of the weapon testimony at trial, we note defense counsel did not raise an objection thereto. Therefore, we would additionally apply a plain error standard of review, wherein appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus; *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 191, 616 N.E.2d 909.

{¶35} Upon review, even though we conclude the trial court erroneously denied the motion to suppress the .44 caliber revolver, we find this merely constitutes harmless error in this instance.

{¶36} Appellant's sole Assignment of Error is therefore overruled.

{¶37} For the foregoing reasons, the judgment of the Court of Common Pleas, Richland County, Ohio, is hereby affirmed.

By: Wise, J.

Edwards, P. J., and

Hoffman, J., concur.

_____

_____

_____

JUDGES

JWW/d 0817

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

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
OSCAR THOMAS	:	
Defendant-Appellant	:	Case No. 09 CA 106

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

Costs assessed to appellant.

_____

_____

_____

JUDGES