[Cite as *State v. Davis*, 2010-Ohio-5704.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010CA00088
TOMMY DAVIS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas Case No. 2009-CR-1829(A)
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	November 15, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, Tommy Davis, appeals from the judgment of the Stark County Court of Common Pleas, finding him guilty of one count of trafficking in cocaine and one count of possession of cocaine, both felonies of the first degree. The State of Ohio is Plaintiff-Appellee.

{¶2} In November, 2009, members of an FBI drug task force, working in conjunction with the Jackson Police Department in Stark County, became aware of drug activity taking place in room 319 at the Microtel in Jackson Township. Special Agent Mark McMurtry of the FBI led the task force after receiving complaints from the Microtel hotel staff regarding the number of people going in and out of room 319. Such activity, according to McMurtry, was indicative of drug activity. The room was occupied by Appellant, one other male, and two females.

{¶3} The task force established surveillance on the room and instructed a confidential information to make a controlled buy of cocaine from the occupants of the room. During the buy, the informant observed a large amount of cash and cocaine in the room. Although the informant did not notice any weapons, based on Appellant's prior criminal record, McMurtry believed that Davis may be armed. After the informant obtained the cocaine, the officers requested a search warrant, which was granted.

{¶4} Based on the construction of the hotel doors at the Microtel, which McMurtry had recent experience with, he assessed the situation and determined that attempting to gain access to the room via a "no knock" warrant with a battering ram would be unsuccessful. Accordingly, in order to not put the occupants of the room or the officers and other guests at the hotel at risk, McMurtry chose to approach the two

female occupants of the room as they were returning to the hotel from a trip to Wal-Mart.

{¶5} At the same time that McMurtry approached the females, Jackson Township Detective Goldenbogen was obtaining the search warrant from a judge. The warrant and affidavit were signed by the judge at 11:25 p.m.

{¶6} When the two females from room 319 returned to the hotel, the officers stopped then and took them into the hallway. The officers then entered the room with the females and detained Appellant and his male companion. The room was secured at that point, but was not searched.

{¶7} At 11:25 p.m., when the warrant was signed, Goldenbogen contacted officers at the hotel to inform them that the warrant had been signed. At that time, officers proceeded to search the room and found approximately 100 grams of crack cocaine and $5,000.00 in cash.

{¶8} The Stark County Grand Jury indicted Appellant on one count of trafficking in cocaine, in violation of R.C. 2925.03, a felony of the first degree, and one count of possession of crack cocaine, in violation of R.C. 2925.11, a felony of the first degree.

{¶9} Appellant pled not guilty to the charges. In January, 2010, Appellant filed a motion to suppress, claiming that the search warrant was not obtained until after the officers and agents had searched his room and that he was questioned prior to being given *Miranda* warnings. Appellant argued that since an inventory sheet listed 11:30 p.m. as the date and time evidence was received based on the execution of the search warrant, that the officers must have began their search prior to the signing of the warrant by the judge. Following a hearing on these issues, the trial court sustained

Appellant's motion with respect to statements made without the benefit of *Miranda* warnings, but overruled the motion with respect to the timing of the search. Specifically, the trial court stated that when the search was considered in conjunction with all of the inventory documents, it was more logical to conclude that the search of the room took place between 11:30 p.m. and 2:00 a.m.

{¶10} On March 30, 2010, Appellant entered a no contest plea to both counts of the indictment. The court found him guilty, and sentenced him to four years in prison on both counts, and ordered that the sentences be served concurrently.

{¶11} Appellant raises one Assignment of Error:

{¶12} "I. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS."

I.

{¶13} In his sole assignment of error, Appellant argues that the trial court erred in failing to suppress evidence obtained as the result of a search of his hotel room prior to the warrant being physically delivered to the place of the search.

{¶14} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 713 N.E.2d 1. During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, (1996), 75 Ohio St.3d 148, 661 N.E.2d 1030. A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf* (1996), 111 Ohio App.3d 142, 675 N.E.2d 1268. Accepting these facts as true, the appellate court must independently

determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141.

{¶15} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 Ohio B. 57, 437 N.E.2d 583; and *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. Second, an appellant may argue that 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, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a 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 623, 620 N.E.2d 906.

{¶16} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507.

{¶17} In *Segura v. United States* (1984), 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, the United States Supreme Court addressed the issue of whether law enforcement officers may secure a residence pending the issuance of a search warrant.

The court determined that where probable cause existed for the search warrant, officers may enter and secure the premises to preserve the integrity of the status quo while the officers secure the search warrant. Such actions were found not to run afoul of the Fourth Amendment protections against unreasonable searches and seizures. "[T]he Fourth Amendment protects people, not places." *Katz v. United States* (1967), 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576; see also *Payton v. New York* (1980), 445 U.S. 573, 615, 100 S.Ct. 1371, 1394, 63 L.Ed.2d 639 (WHITE, J., dissenting).

{¶18} Moreover, Ohio Courts have addressed this issue recently. The Second District has held that "[w]hen officers secure a residence pending a search warrant, they may enter that residence. *State v. Burns*, 2nd Dist. No. 22674, 2010-Ohio-2831, ¶11, citing *State v. Carroll* (Nov. 30, 1994), 9th Dist. Nos. 93CA005775 & 94CA005814, citing *State v. Swartz* (Sept. 12, 1990), 9th Dist. No. 14514, in turn citing *Segura*, supra, at 798. However, this intrusion must be limited in time and scope. *Illinois v. McArthur* (2001), 531 U.S. 326, 331, 121 S.Ct. 946, 148 L.Ed.2d 838. Therefore, any entry based upon exigent circumstances is "'strictly circumscribed by the exigencies which justif[ied] its initiation.'" *State v. Brewster*, 157 Ohio App.3d 342, 2004-Ohio-2722, ¶ 32, quoting *State v. Applegate*, 68 Ohio St.3d 348, 350, 1994-Ohio-356, in turn quoting *Terry v. Ohio* (1968), 392 U.S. 1, 26, 88 S.Ct. 1868, 20 L.Ed.2d 889. Thus, when a residence must be secured in order to preserve evidence, "the scope of the intrusion is limited to that necessary to secure the evidence." *State v. Martin*, 1st Dist. No. C-040150, 2004-Ohio-6433, ¶ 40, citing *United States v. Aquino* (C.A.10, 1970), 836 F.2d 1268, 1272; *Brewster*, supra, at ¶ 32. This may include securing "the people inside and any evidence in plain view." Id. See, also, *State v. Frankenhoff*, 5th Dist. No.2006CA00095,

2007-Ohio-2806, ¶ 6; *State v. Mitchell*, 8th Dist. No. 88131, 2007-Ohio-3896, ¶ 32; *State v. Sturdivant*, 8th Dist. No. 87498, 2006-Ohio-5451, ¶ 2.

{¶19} Given that the State's burden of proof at a suppression hearing is based upon a preponderance of the evidence, see *Athens v. Wolf* (1974), 38 Ohio St.2d 237, 241, 313 N.E.2d 405, we find that the State met its burden and that the trial court properly overruled Appellant's motion.

{¶20} McMurtry testified that officers developed probable cause based upon their observations of the occupants of room 319 at the Microtel. They observed multiple people entering and leaving the room, they orchestrated a controlled buy with a confidential informant, and were informed that there were large amounts of crack cocaine and cash in the room.

{¶21} The warrant was signed at 11:25 p.m. and the first inventory log began at 11:30 p.m., presumably when the search began. The room was secured to prevent the destruction of evidence and was entered in a means that was least destructive to property and least likely to cause injury to persons involved. According to McMurtry, he instructed all officers "not to look, not to search, to secure everybody. There would be no searching done…" until the warrant was signed. There is no requirement that the warrant be present at the scene when the search commences. *State v. Ealom*, 8th Dist. No. 91140, 2009-Ohio-1073, ¶13.

{¶22} Based on the foregoing, we find that the trial court properly denied the motion to suppress.

{¶23} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

[Cite as *State v. Davis*, 2010-Ohio-5704.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
TOMMY DAVIS	:	
	:	
Defendant-Appellant	:	Case No. 2010CA00088
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

_____
HON. WILLIAM B. HOFFMAN

_____
HON. SHEILA G. FARMER