[Cite as *State v. Harris*, 2015-Ohio-2480.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
TIMOTHY HARRIS	:	Case No. 14-CA-00032
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Perry County Court of Common Pleas, Case No. 14-CR-0020
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	June 22, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH A. FLAUTT Prosecuting Attorney 111 North High Street P.O. Box 569 New Lexington, OH 43764-0569	ERIC E. WILLISON 4876 Cemetery Road 2nd Fl. Hilliard, OH 43026

Baldwin, J.

{¶1} Defendant-appellant Timothy W. Harris, Jr. appeals from the partial denial by the Perry County Court of Common Pleas of his Motion to Suppress. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 26, 2014, the Perry County Grand Jury indicted appellant on one count of possession of drugs in violation of R.C. 2925.11(A) and (C)(2)(A), a misdemeanor of the first degree, one count of trafficking in heroin in violation of R.C. 2925.03(A)(1) and (C)(6)(a), a felony of the fifth degree, and one count of complicity to trafficking in heroin in violation of R.C. 2923.03(A)(2) and 2925.03(A)(2) and (C)(6)(e), a felony of the first degree. Appellant also was indicted on one count of conspiracy to commit trafficking in heroin in violation of R.C. 2923.01(A)(1) and 2925.03(A)(1) and (C)(6)(f), a felony of the second degree, and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32, a felony of the first degree. Two of the counts contained forfeiture specifications. At his arraignment on April 9, 2014, appellant entered a plea of not guilty to the charges.

{¶3} Thereafter, on May 2, 2014, appellant filed a Motion to Suppress. Appellant, in his motion, argued that there was no lawful cause to stop him, detain him and/or probable cause to arrest him without a warrant, that statements obtained from him were obtained in violation of his constitutional rights, and that there was no probable cause to issue a warrant to search his residence.

{¶4} A hearing on the motion was held on August 18, 2014 and August 21, 2014. Pursuant to an Entry filed on August 21, 2014, the trial court ordered the parties to submit Findings of Fact and Conclusions of Law. Both parties did.

{¶5} As memorialized in an Entry filed on September 16, 2014, the trial court granted the Motion to Suppress in part and denied it in part.

{¶6} Subsequently, on October 9, 2014, appellant withdrew his former not guilty plea and entered a plea of no contest to an amended count of complicity to trafficking in heroin, a felony of the third degree, along with the forfeiture specification. The remaining counts and specification were dismissed. Pursuant to a Judgment Entry filed on October 31, 2014, appellant was sentenced to 36 months in prison and fined $5,000.00. In addition, his driver's license was suspended for a period of six months and $1,945.16 was ordered to be forfeited to the Perry County Sheriff's Office.

{¶7} Appellant now raises the following assignment of error on appeal:

{¶8} THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS ALL EVIDENCE OBTAINED PURSUANT TO A DAYTIME WARRANT THAT WAS EXECUTED AFTER 8:00 P.M.

STANDARD OF REVIEW

{¶9} 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,* 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist .1998). 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,* 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are

supported by competent, credible evidence. *State v. Medcalf,* 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). 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,* 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶10} 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,* 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein,* 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). 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, Williams,* supra. 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,* 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994).

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{¶11} Appellant, in his sole assignment of error, argues that the trial court erred in failing to suppress evidence obtained from a search of his residence.

{¶12} Appellant has not provided this Court with a transcript of the hearing on the Motion to Suppress. The primary duty to provide a transcript for appellate review falls upon the appellant, as the appellant bears the burden of showing prejudicial error by reference to matters in the record. *Knapp v. Edwards Laboratories* , 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the appellate court has nothing to pass upon and, thus, presumes the validity of the lower court's proceedings and affirms the trial court's decision. *Knapp; State v. Thomas,* 170 Ohio App.3d 727, 2007-Ohio-1344, 868 N.E.2d 1061, ¶ 11.

{¶13} However, we note that the trial court provided some factual findings with its conclusions in its September 16, 2014 Entry ruling on appellant's Motion to Suppress. We shall review that decision for purposes of appellant's assignment of error.

{¶14} Appellant specifically argues that the trial court erred in failing to suppress evidence obtained during a search of appellant's residence because the search warrant was a daytime warrant and was executed after 8:00 p.m. Appellant notes that Crim.R. 41(C) provides, in part, that a "warrant shall be executed in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes it execution at times other than daytime…" and that, pursuant to Crim.R. 41(F), daytime is defined as meaning the hours from 7:00 a.m. to 8:00 p.m.

{¶15} "The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures. " *State v. Emerson,* 134 Ohio St.3d 191, 2012–Ohio–5047, 981 N.E.2d 787, ¶ 15. This constitutional guarantee is protected by the exclusionary rule, which mandates the

exclusion of the evidence obtained from the unreasonable search and seizure at trial. Id.

{¶16} However, as noted by the Court in *State v. Humphrey*, 2nd Dist. No. 25063, 2013-Ohio-40 at paragraph 28:

> Generally, however, "the exclusionary rule is not automatically invoked merely because the evidence to be admitted is obtained by officers during a nighttime search under a warrant which does not contain an 'appropriate provision' authorizing the warrant to be executed at night," and evidence obtained in technical violation of Crim.R 41(C) need not be suppressed where there is no showing of bad faith conduct on the part of the officers executing the warrant, or where the search did not result in prejudice to the defendant. *State v. Coburn,* 4th Dist. Scioto No. 1744, 1990 WL 85151, 4 (May 31, 1990) (citations omitted). "Only a 'fundamental' violation of Rule 41 requires automatic suppression, and a violation is 'fundamental' only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards." *Coburn,* quoting *United States v. Vassar,* 648 F.2d 507 (9th Cir.1980), certiorari denied 450 U.S. 928, 101 S.Ct. 1385, 67 L.Ed.2d 360 (1981).

{¶17} In the case sub judice, the trial court found that a search warrant had been signed for appellant's residence by a judge on November 20, 2013 at 6:45 p.m. and that deputies were on the porch of appellant's residence prior to 8:00 p.m. The trial court further found that a Lieutenant radioed the dispatcher to have the keys for appellant's residence retrieved from his office and brought, along with appellant, to the residence so that appellant could secure his dogs before the deputies entered. The trial court, in its Entry, found that the deputies gained access to appellant's residence "a few minutes after 8:00 pm." and that, in addition to securing the dogs, the deputies wanted to wait for the keys to avoid causing property damage.

{¶18} Based on the factual findings made by the trial court, we find that the trial court did not err in declining to suppress the evidence found in appellant's residence. There was no showing of bad faith or conduct on the part of the deputies who, although at appellant's house prior to 8:00 p.m., waited for the keys so that appellant's dogs could be secured and also to avoid damage to the property. We agree with appellee that there is nothing to "indicate any prejudice or increased burden on the defendant because of the few minute delay in executing the warrant." In short, we find that there was no fundamental violation of Crim.R. 41(C) that would rise to constitutional levels.

{¶19} Appellant's sole assignment of error is, therefore, overruled.

{¶20} Accordingly, the judgment of the Perry County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Farmer, J. concur.