[Cite as *State v. McCabe*, 2015-Ohio-2677.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio	Court of Appeals No. F-14-004
Appellee	Trial Court No. 13CR130
v.	
Marc A. McCabe	**DECISION AND JUDGMENT**
Appellant	Decided: June 30, 2015

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, for appellee.

Stacey A. Stiriz, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Marc A. McCabe, appellant, appeals his conviction and sentence in the Fulton County Court of Common Pleas on the offense of illegal cultivation of marihuana, a violation of R.C. 2925.04(A), and a third degree felony. The conviction is based upon a guilty verdict returned by jury at trial on April 1, 2014, and a finding by the jury that the

marihuana involved was equal to or exceeding one thousand grams but less than five thousand grams. In a June 3, 2014 judgment, the trial court sentenced appellant to serve a 12-month prison term for the offense. The court also suspended appellant's driver's license for a period of six months.

{¶ 2} In August 2013, a marihuana plant, approximately seven to seven and one-half feet tall, was seen growing above a six-foot wooden privacy fence at the residence located at 205 South Shoop Avenue in Wauseon, Ohio. At the time, appellant, Wendy Westhoven, and Westhoven's adult son, Frederic Pope, resided together at the residence. The Wauseon Police Department executed a search warrant at the residence on August 30, 2013. During the course of the search, the police recovered five growing marihuana plants in the backyard and other marihuana at the residence. Appellant also made incriminating statements to Officer David Dick of the Wauseon Police Department during the search.

{¶ 3} On November 19, 2013, the Fulton County Grand Jury indicted appellant on the cultivation of marihuana charge. Appellant filed a motion to suppress evidence of any statements made by appellant to police at the time of the search on February 18, 2014. After a hearing, the trial court denied appellant's motion to suppress on March 13, 2014.

{¶ 4} Appellant raises two issues in his appellate brief which we treat as assignments of error:

1. Whether a verbal, group only Miranda warning, which included no verbal response from the defendant, is sufficient when interviewed by a different officer at a different location.

2. Without evidence of planting, watering, fertilizing, or tilling a marihuana plant, there is insufficient evidence to convict a defendant of "cultivation."

Denial of Motion to Suppress on *Miranda* Grounds

{¶ 5} Assignment of error No. 1 restates arguments raised by appellant in his motion to suppress evidence. Appellant, citing *State v. Roberts*, 32 Ohio St.3d 225, 513 N.E.2d 720 (1987), argues that the *Miranda*[1] warnings provided by Officer William McConnell to appellant at the time police began the search of his residence were stale and did not extend for constitutional and *Miranda* purposes to subsequent questioning of appellant by Officer David Dick at the residence. Office Dick did not provide a *Miranda* warning to appellant prior to appellant's making incriminating statements to the officer. The trial court conducted a hearing on the motion on March 11, 2014, and denied the motion in a judgment filed on March 13, 2014.

{¶ 6} Appellate review of a trial court's denial of a motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In *State v. Burnside*, the Ohio Supreme Court identified our standard of review:

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

> [A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539. *Id.*

{¶ 7} Two witnesses testified at the hearing on the motion to suppress, Officers William McConnell and David Dick of the Wauseon Police Department. Officer McConnell is the Assistant Chief of Police for the department. Officer Dick testified that he has held the position of drug team leader for the department for five years.

{¶ 8} On August 30, 2013, the Wauseon Police Department executed a search warrant at appellant's residence located at 205 South Shoop Avenue in Wauseon. Officer McConnell testified that he was responsible for watching the three residents of the house (appellant, Wendy Westhoven, and Frederic Pope) while others conducted the search. The three were handcuffed and detained in the living room of the house while the search was conducted. Officer McConnell testified that he read the three their *Miranda* rights together as a group while they were detained in the living room. He testified that he also asked them as a group if they understood their rights and that "each one of them nodded their head or said yes."

{¶ 9} Officer Dick testified that later, when he walked back through the house from the backyard, he was told by Officer McConnell that appellant wanted to talk to him. According to Officer Dick, appellant first asked for a cigarette and stated his cigarettes were upstairs. Dick testified that he went upstairs, got a cigarette and returned. Appellant stated that he had to smoke outside. Dick and appellant went to the front porch.

{¶ 10} Officer Dick testified that when they were on the front porch he asked appellant what he wanted to say to him. Dick testified that appellant stated, "Well, the marihuana was mine," and that he did not want Wendy to get charged for it. Officer Dick did not provide any *Miranda* warnings to appellant before the statement. Appellant also made other incriminating statements to Officer Dick concerning where marihuana was kept in the residence.

{¶ 11} "[A] defendant who is subjected to custodial interrogation must be advised of his or her *Miranda* rights and make a knowing and intelligent waiver of those rights before statements obtained during the interrogation will be admissible." *State v. Treesh*, 90 Ohio St.3d 460, 470, 739 N.E.2d 749 (2001). Where a suspect receives "adequate *Miranda* warnings" prior to custodial interrogation, the police need not warn the suspect again before each subsequent interrogation. *Id.*, citing *Wyrick v. Fields*, 459 U.S. 42, 48-49, 103 S.Ct. 394, 396-397, 74 L.Ed.2d 214, 219 (1982); *State v. Barnes* 25 Ohio St.3d 203, 208, 25 OBR 266, 270, 495 N.E.2d 922, 926 (1986).

{¶ 12} "Police are not required to readminister *Miranda* warnings to a suspect when a relatively short period of time has elapsed since the initial warnings." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 119. In determining whether initial *Miranda* warnings remain effective for subsequent interrogations, courts are to look to the totality of the circumstances as outlined by the Ohio Supreme Court in *State v. Roberts. Powell* at ¶ 119; *Treesh* at 470. *Roberts* requires consideration of the following factors in making that determination:

> (1) [T]he length of time between the giving of the first warnings and subsequent interrogation, * * * (2) whether the warnings and the subsequent interrogation were given in the same or different places, * * * (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, * * * (4) the extent to which the subsequent statement differed from any previous statements; * * * [and] (5) the apparent intellectual and emotional state of the suspect. *Roberts*, 32 Ohio St.3d at 232, 513 N.E.2d 720, quoting *State v. McZorn*, 288 N.C. 417, 434, 219 S.E.2d 201 (1975).

{¶ 13} Officer McConnell testified that 20-25 minutes elapsed between his providing *Miranda* warnings to the group and when appellant and Officer Dick went outside to the front porch. Officer Dick testified that the time period was "fifteen, twenty minutes, somewhere around there." Officer McConnell testified that during the period appellant appeared calm and collected and that appellant appeared calm when he returned

to the living room after speaking to Officer Dick on the porch. Officer Dick testified that appellant did not appear emotional when they talked.

{¶ 14} Both appellant and the state have argued the totality of the circumstances under *Roberts* as applied to this case. Appellant acknowledges that the length of time between the giving of the *Miranda* warnings and the subsequent statements to Officer Dick alone is insufficient to warrant a finding that the original warnings were stale. Appellant argues that factors supporting a conclusion that the original *Miranda* warnings were insufficient include: (1) that the original warning was verbal and made to a group, (2) that any statement as to an understanding of *Miranda* rights made by appellant may have been nonverbal, (3) that the subsequent questioning was in a different location and by a different officer, and (4) that prior statements by appellant denied knowledge of the marihuana.

{¶ 15} The state argues that the totality of the circumstances demonstrates that the time period was very short and that appellant was interviewed at the same location, his home. Although a different officer was involved, Officer Dick was present when Officer McConnell gave the original *Miranda* warnings. The state also argues that the evidence demonstrates appellant was calm and appeared to understand the circumstances and his rights.

{¶ 16} In its judgment denying the motion to suppress, the trial court concluded that appellant's statement to Officer Dick was after the *Miranda* warnings and "during the course of the search. The time was short. There is no evidence of coercion, or of a

lack of voluntariness." The court ruled under the totality of the circumstances the statements to Officer Dick was admissible.

{¶ 17} We find competent credible evidence in the record supports the trial court's findings that *Miranda* warnings were initially given to appellant and that there was no evidence of coercion or lack of voluntariness with respect to appellant's subsequent statements to Officer Dick.

{¶ 18} We conclude under the totality of the circumstances that the original *Miranda* warnings were sufficient and that appellant knowingly and voluntarily waived his *Miranda* rights in his subsequent statements to Officer Dick. The time period from the original warnings was short. There was no evidence of coercion or lack of voluntariness. The evidence was that appellant remained calm throughout. Appellant initiated the conversation with Officer Dick and made his statements with a purpose to protect Wendy Westhoven from criminal responsibility for the marihuana.

{¶ 19} We find assignment of error No. 1 not well-taken.

Sufficiency of the Evidence

{¶ 20} Under assignment of error No. 2 appellant contends that there is insufficient evidence in the record to support a conviction for knowingly cultivating marihuana, a violation of R.C. 2925.04(A).

{¶ 21} A challenge to a conviction based upon the sufficiency of the evidence to support a conviction presents a question of law on whether the evidence at trial is legally adequate to support a jury verdict on all elements of a crime. *State v. Thompkins*, 78

Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). An appellate court does not weigh credibility when reviewing the sufficiency of evidence to support a verdict. *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. A reviewing court considers whether the evidence at trial "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶ 22} R.C. 2925.04(A) provides: "(A) No person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." R.C. 2925.01(F) defines the word "cultivate" to include "planting, watering, fertilizing, or tilling."

{¶ 23} Appellant does not dispute that the plants recovered from the property were marihuana plants. Appellant argues that there was no testimony by anyone stating they saw appellant plant, water, fertilize, or till the plants. Also appellant argues there was no evidence of any tools or fertilizers at the property.

{¶ 24} The state may establish the elements of a crime through either direct or circumstantial evidence. *Jenks* at 272-273; *State v. Alcala,* 6th Dist. Sandusky No. S-11-026, 2012-Ohio-4318. ¶ 15. Proof of cultivation of marihuana for purposes of showing a violation of R.C. 2925.04 may be provided by circumstantial evidence. *State v. Mitchell,* 9th Dist. Summit No. 24730, 2009-Ohio-6950, ¶ 26.

{¶ 25} The evidence of cultivation by appellant begins with his statement that the plants were his. The state acknowledges that all remaining evidence of cultivation is circumstantial. Both Officer Dick and Deputy Steven A. Waxler, Jr. of the Fulton County Sheriff's Office testified that the plants had been pruned. Officer Mitchel Huner of the Wauseon Police Department took photographs of the plants. Both Huner and Waxler testified at trial how a photograph demonstrated evidence of pruning of a marihuana plant.

{¶ 26} The plants seized from appellant's residence were found growing behind a shed in the backyard. The plants were very large, clumped together and had large stalks and roots. The area around the base of the plants was bare and contained packed dirt.

{¶ 27} Officer Dick testified that the plants are annuals and were good sized healthy plants—one was a "good foot, foot and-a-half taller" than a six-foot wooden fence at the property. Officer Dick testified that the marihuana plants were larger than other marihuana plants he had seized during the summer and that volunteer plants are usually stunted, because they have not been taken care of.

{¶ 28} Deputy Waxler described the largest plant as "thriving" and testified that in his opinion the condition of the plants demonstrated that they were being watered.

{¶ 29} Construing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the crime of knowingly cultivating marihuana, a violation of R.C. 2925.04(A), were proven beyond a reasonable doubt at trial.

{¶ 30} We find assignment of error No. 2 not well-taken.

{¶ 31} We conclude that appellant was afforded a fair trial and affirm the judgment of the Fulton County Court of Common Pleas. Pursuant to App.R. 24, we order appellant to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE