**[Cite as *State v. Thomas*, 2015-Ohio-1778.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellant, | : | No. 14AP-185<br>(C.P.C. No. 12CR-5279) |
| v. | : | (REGULAR CALENDAR) |
| Jerry A. Thomas, | : | |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on May 12, 2015

*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellant.

*Yeura R. Venters*, Public Defender, and *John W. Keeling*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

**{¶ 1}** This is an appeal by plaintiff-appellant, State of Ohio, from a judgment of the Franklin County Court of Common Pleas granting a motion to suppress filed by defendant-appellee, Jerry A. Thomas.

**{¶ 2}** On October 16, 2012, appellee was indicted on one count of possession of cocaine, in violation of R.C. 2925.11, a felony of the fourth degree. On August 14, 2013, appellee filed a motion to suppress evidence found by police officers during a warrantless search of a hotel room where he was arrested. On August 28, 2013, the state filed a memorandum contra the motion to suppress.

**{¶ 3}** On November 26, 2013, the trial court conducted a hearing on the motion. At the outset of the hearing, before any witnesses were called, the trial court noted on the record its understanding of the basic facts as set forth in the written memoranda of both parties; specifically, that on the date of appellee's arrest, two police officers "were on bicycle patrol. They smelled marijuana. They followed it to a particular room at a hotel. The windows were open. They saw a bag on the bed which they believed to be cocaine. They knocked on the door. The defendant opened the door." (Tr. 4.) The officers "saw it and entered the room and confiscated the evidence as well as arrested the defendant." (Tr. 4.) The parties generally agreed with the trial court's account of the facts and indicated they would supplement the record with testimony and argument as necessary.

**{¶ 4}** The state's first witness was Columbus Police Officer Timothy Stout, a 14-year veteran of the police force and member of the department's community response team. On the evening of August 5, 2011, Officer Stout and his partner, Officer Jeffrey Mays, were on bicycle patrol. As they approached the vicinity of a Days Inn hotel, located near the intersection of 17th Avenue and Clara Street, the officers observed appellee inside room 160 of the hotel. Officer Stout testified that "every light" in the room was on, and "the window was wide open." (Tr. 11.)

**{¶ 5}** Officer Stout then gave the following account of the events:

> * * * Those rooms are really small. They have two beds in them. And on the bed nearest the window, which is only enough space between the bed and the window for one person to walk through, at the foot of the bed I could see the defendant there standing over top of a plastic baggie with white rock-like substance inside of it. * * * I immediately recognized that to be packaged in the same manner that they package crack cocaine in.
>
> I motioned him to the door. The doors are metal framed, they are really hard to -- to boot down so I was hoping that he would just open the door and * * * he did come to the door, the defendant, and as soon as the door opened, he looked confused. He looked at me. He looked at the crack cocaine. Now, mind you, the crack cocaine from where the doorway is to the actual bed is approximately two steps, it's less than six feet.

> So as he looked at me and then looked at the crack cocaine, I see it in plain view. I know what it is. I'm concerned for what he's going to do with it if I don't, you know, get ahold of that. I stepped two steps in, I secured the crack cocaine while my partner had grabbed ahold of the defendant to start handcuffing him.

(Tr. 11-13.)

**{¶ 6}** After arresting appellee, the officers checked the bathroom to make sure no other individuals were present. The plastic baggie containing the white substance later field-tested positive for cocaine. On cross-examination, Officer Stout testified that he thought the best way to protect the crack cocaine was to walk past appellee and take the drugs. According to Officer Stout, he "grabbed the cocaine while my partner was grabbing [appellee] at the same time." (Tr. 19.)

**{¶ 7}** Officer Mays, a 13-year member of the police force, gave the following testimony regarding the events. As he was approaching the hotel room, the officer looked through the window and observed what appeared to be crack cocaine on the bed. Officer Mays and his partner "went to the doorway, motioned to the individual who answered the door. At that point I took that individual and began taking him into custody as Officer Stout went inside the room, retrieved the suspect's bag of crack cocaine that was sitting on the bed." (Tr. 24.) On cross-examination, Officer Mays stated that appellee came to the door and opened it based on a gesture by the officers from the window.

**{¶ 8}** Appellee, who testified on his own behalf, stated that he was spending the night at the hotel with a female. The woman had left the hotel room to go to a nearby restaurant prior to the officers' arrival.

**{¶ 9}** Following the hearing, at the trial court's request, the parties filed supplemental memoranda regarding whether the good-faith exception to the exclusionary rule was applicable. By decision and entry filed February 26, 2014, the trial court granted appellee's motion to suppress.

**{¶ 10}** On appeal, the state sets forth the following assignment of error for this court's review:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUSTAINING THE DEFENSE'S MOTION TO SUPPRESS.

**{¶ 11}** Under its single assignment of error, the state asserts that the trial court erred in granting appellee's motion to suppress. The state contends the trial court should not have suppressed the evidence because the police complied with the Fourth Amendment "every step of the way."

**{¶ 12}** An appellate court's review of a motion to suppress "presents a mixed question of law and fact." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In considering a motion to suppress, "the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id*., citing *State v. Mills,* 62 Ohio St.3d 357, 366 (1992). An appellate court must therefore "accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* at ¶ 8. Further, "[a]ccepting 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." *Id*., citing *State v. McNamara,* 124 Ohio App.3d 706 (4th Dist.1997).

**{¶ 13}** Both "[t]he 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, and require warrants to be particular and supported by probable cause." *State v. Harris,* 8th Dist. No. 84591, 2005-Ohio-399, ¶ 31. The Fourth Amendment protection against unreasonable searches and seizures is not limited to the "sanctity of the home," but also "extends to any area where one has a legitimate and reasonable expectation of privacy, including a motel room." *State v. Keith,* 178 Ohio App.3d 46, 2008-Ohio-4326, ¶ 7. The "[w]arrantless entry by law enforcement personnel into premises in which an individual has a reasonable expectation of privacy is per se unreasonable, unless, it falls within a recognized exception to the warrant requirement." *Harris* at ¶ 31, citing *Minnesota v. Olson*, 495 U.S. 91 (1990). Valid exceptions to the warrant requirement include the following: "search of arrestee's immediate area incident to arrest; inventory search; consent; investigatory stop with protective search incident to arrest or incident to investigatory stop; hot pursuit; exigent circumstances; and plain view." *State v. Adams,* 7th Dist. No. 08 MA 246, 2011-Ohio-5361, ¶ 34.

**{¶ 14}** In the instant case, the state argued before the trial court that it should deny appellee's motion to suppress based on the following exceptions to the warrant

requirement: (1) exigent circumstances, (2) plain view, (3) inevitable discovery, and (4) good faith.[1] The trial court, after addressing each of those exceptions, found that the warrantless search of appellee's hotel room was "per se unreasonable and not based on any recognized exception to the Fourth Amendment's warrant requirement."

**{¶ 15}** One of the well-recognized exceptions to the warrant requirement is "[t]he existence of exigent circumstances, coupled with probable cause." *Harris* at ¶ 32, citing *Olson* at 100. The United States Supreme Court has recognized "four situations which form the appropriate standard for determining the existence of exigent circumstances: (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent escape, and (4) the risk of danger to police or others." *Id*. Law enforcement agencies "bear a heavy burden when attempting to demonstrate exigent circumstances that might justify a warrantless entry." *Id*.

**{¶ 16}** On appeal, the state focuses on two of the above exigent situations; specifically, hot pursuit and imminent destruction of evidence. The state cites the testimony of one of the officers that feared appellee would attempt to destroy the evidence in the room if it was not seized. The state further argues that, once appellee opened the door, the hot pursuit doctrine permitted the officers to enter the room "as much as necessary" to make the arrest.

**{¶ 17}** The trial court, in addressing the state's argument that the warrantless search fell within the exigent circumstances exception, initially considered the issue of probable cause and concluded, based on the totality of the circumstances, that the officers did not have probable cause to enter the common area of the hotel property where they made the observation. Additionally, noting the officers' testimony that they were drawn to appellee's hotel room by the strong odor of burning marijuana, the court found less than credible the officers' account of smelling "an odor of marijuana outdoors, at a distance from their location, and in a closed room."

**{¶ 18}** The trial court further found that, even assuming the existence of probable cause, the state failed to articulate facts sufficient to support a warrantless search based on exigent circumstances. Specifically, the court held in part:

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[1] We note that the state did not argue appellee consented to the search. In its decision, the trial court found that, while appellee voluntarily opened the door, the officers "entered the room without a warrant and without any evidence that [appellee] granted them permission to do so."

> The defendant opened the door voluntarily, whether after being motioned to do so as alleged by the State, or after the police knocked on the door. The officers immediately entered the room, without asking permission, on the basis that the defendant could have reached for and destroyed the evidence. Imminent destruction of evidence is one of the factors to be considered when determining the presence of exigent circumstances.
>
> There is, however, absolutely no evidence that the defendant attempted to destroy the evidence. Had the defendant made an effort to do so or to shut the door, that might support the State's argument. The "imminent destruction of evidence" is highly unlikely because, according to the officers' account of the event, the defendant saw the officers through the window and then opened the door. If the defendant was going to destroy the evidence he would have done so before he opened the door, not after.

**{¶ 19}** In *Payton v. New York*, 445 U.S. 573, 590 (1980), the United States Supreme Court held: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." The court in *Payton* emphasized that " 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Id*. at 585, quoting *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972).

**{¶ 20}** We note that the state, while asserting that exigent circumstances existed, initially contends that the arrest of appellee was proper because the officers effectuated the arrest in a "public place" based on probable cause. Specifically, the state relies on *United States v. Santana*, 427 U.S. 38 (1976), for the proposition that the arrest was proper because the threshold of a door to a dwelling is a "public place." According to the state, the moment appellee opened the door he exposed himself to warrantless arrest.

**{¶ 21}** As noted by one federal court, however, the United States Supreme Court issued the *Santana* decision before its decision in *Payton*, and *Santana* "did not hold that the threshold was a public place under the Fourth Amendment in all cases." *United States v. Saari*, 88 F.Supp.2d 835, 842 (W.D.Tenn.1999). Instead, the decision in *Santana* "established that the constitutional inquiry begins with whether the arrestee was

located in a public place 'when the police first sought to arrest [the individual].' " *Mitchell v. Shearrer,* 729 F.3d 1070, 1076 (8th Cir.2013), quoting *Santana* at 42.

**{¶ 22}** Under the facts of *Santana,* police officers drove to within 15 feet of "Mom" Santana's residence, a drug house. *Id.* at 40. The officers observed Santana standing in the doorway of the house with a brown paper bag in her hand. As the officers exited their van, shouting "police" and displaying identification, Santana "retreated into the vestibule of her house." *Id*. The United States Supreme Court found that a suspect may not defeat an arrest that has been "set in motion in a public place" by escaping to a private place. *Id*. at 42. The United States Supreme Court further observed that the facts in that case involved "a true 'hot pursuit' " situation. *Id*. at 42-43.

**{¶ 23}** *Santana,* therefore, "did not hold that a warrantless arrest in a doorway satisfied the Fourth Amendment." *United States v. Herrold*, 772 F.Supp. 1483, 1492 (M.D.Pa.1991). Rather, that decision held that "retreating from an open doorway upon the arrival of the police was a retreat from a public place and because the defendant retreated after the police identified themselves, there were exigent circumstances" due to the officers' "hot pursuit" of the defendant. *Id*. *See also Cummings v. Akron*, 418 F.3d 676, 686 (6th Cir.2005) (the United States Supreme Court in *Santana* "upheld the effectuation of a warrantless arrest of the defendant inside her home, because the police initiated the arrest while she was standing in the open doorway of her house, and she retreated inside before the police could apprehend her"). *Cummings* at 686, citing *Santana* at 42.

**{¶ 24}** Ohio courts have had occasion to consider the application of *Payton* to circumstances in which an officer knocks on the door of a residence. In *State v. Cranford,* 2d Dist. No. 20633, 2005-Ohio-1904, an officer went to the defendant's home and knocked on her door. The defendant opened the door, but did not step into the open doorway or exit her home. When she attempted to close the door, the officer placed his foot inside the door and entered the residence, placing the defendant under arrest slightly inside the front door. In *Cranford,* the state argued that the trial court properly relied on *Santana* to conclude that the defendant was in a public place when she stood at the open front door, "and that she could not retreat into her apartment to elude arrest." *Id*. at ¶ 14. On appeal, the court held that the arrest was unconstitutional, as the defendant "was, at

all times, within her apartment" and "not in a public place." *Id*. at ¶ 18. Thus, the court held, "absent exigent circumstances, [the officer] was required to have a warrant to effectuate her arrest." *Id*. *See also State v. Norris,* 2d Dist. No. 17689 (Nov. 5, 1999) (where the defendant "was at all times *inside* his motel room, if only by a few feet" at the time officers entered the room and arrested him, "*Payton* clearly commands that, absent exigent circumstances, his arrest could only be by warrant"). (Emphasis sic.) By contrast, an arrest occurs in a public place where a defendant has "left the hotel room" and begins walking down the public hallway, as he "was no longer in a private dwelling with the expectation of privacy." *State v. Fornone,* 7th Dist. No. 11 CO 36, 2012-Ohio-5339, ¶ 29.

**{¶ 25}** Federal courts have similarly declined to read the holding in *Santana* as "allowing physical entry past *Payton's* firm line * * * without a warrant or an exigency." *McClish v. Nugent,* 483 F.3d 1231, 1246 (11th Cir.2007). *See also Herrold* at 1490, quoting *United States v. McCraw,* 920 F.2d 224, 228 (4th Cir.1990) (finding *Santana* distinguishable where the defendant's door was closed when police approached; "when a person answers a knock at a hotel room door he 'does not surrender his expectation of privacy nor consent to the officer's entry by so doing, and * * * his arrest inside his room under such circumstances is contrary to the fourth amendment and the United States Supreme Court's decision in *Payton*' ").

**{¶ 26}** In the instant case, unlike the facts in *Santana,* appellee was not in a public place at the time officers first encountered him. Rather, the evidence is undisputed that he was at all times inside the hotel room, including at the time of his arrest. Thus, because appellee was not in a public place, "absent exigent circumstances," the officers were "required to have a warrant to effectuate" his arrest. *Cranford* at ¶ 18. *See also State v. Maddox,* 8th Dist. No. 98484, 2013-Ohio-1544, ¶ 7 (finding *Santana* "has no application" where facts show detectives arrested the defendant inside his apartment).

**{¶ 27}** We therefore turn to the evidence with respect to exigent circumstances. In support of its claim that exigent circumstances existed, the state points to the officer's testimony that he feared appellee would destroy evidence inside the room. Specifically, the state cites testimony by Officer Stout that, after opening the door, appellee "looked at me and then looked at the crack cocaine." (Tr. 12.) According to the state, appellee's glance back at the drugs added to the officer's concern that he would make a move to

destroy the drugs. Officer Stout also testified that he had been involved in a prior incident in which an individual was able to "break free from my grip trying to handcuff them, and then ingest cocaine." (Tr. 13.) Officer Stout stated that he "just didn't want that to happen again." (Tr. 13.)

**{¶ 28}** The state asserts that the exigent circumstances exception does not require that there be an actual attempt to destroy the drugs. The state maintains that, although appellee was being handcuffed at the time, he was only two steps away from the drugs, i.e., that he was close enough to still access them.

**{¶ 29}** Ohio courts have held that "[w]hen police officers seek to rely on the destruction of evidence exception in justifying a warrantless entry, they must show an objectively reasonable basis for concluding that the loss or destruction of evidence is imminent." *N. Royalton v. Bramante,* 8th Dist. No. 74019 (Apr. 29, 1999). *See also State v. Hatfield,* 4th Dist. No. 98CA2426 (Mar. 11, 1999) (In order to "justify a warrantless search to seize evidence under the rubric of exigency, the state must establish: (1) probable cause and (2) some real likelihood that the evidence is in danger of being moved or destroyed in the time that it would take to get a warrant."). In this respect, a police officer can show an objectively reasonable belief that contraband "is being, or will be, destroyed within a residence if he or she can demonstrate: 1) a reasonable belief that third parties are inside the dwelling; and 2) a reasonable belief that these third parties may soon become aware the police are on their trail, so that the destruction of evidence would be in order." *Bramante.* Other factors for a court's consideration "include the degree of urgency, the time it would take to get a warrant, and the ready destructibility of the evidence." *State v. Norman,* 12th Dist. No. CA2014-02-033, 2014-Ohio-5084, ¶ 51.

**{¶ 30}** Ohio courts have recognized that exigent circumstances may arise "particularly where drugs are involved." *State v. Johnson,* 187 Ohio App.3d 322, 2010-Ohio-1790, ¶ 14 (2d Dist.). Courts have also recognized, however, " '[n]otwithstanding the ease in which narcotics can be destroyed, a warrantless entry into the home of a suspected drug trafficker, effected without an objectively reasonable basis for concluding that the destruction of the evidence is imminent, does not pass constitutional muster.' " *Norman* at ¶ 52, quoting *United States v. Haddix,* 239 F.3d 766, 768 (6th Cir.2001). Thus, "[t]he 'mere possibility of the loss or destruction of evidence is an insufficient basis for the

warrantless entry of a house to prevent the destruction of evidence.' " *Id.*, quoting *United States v. Ukomadu,* 236 F.3d 333, 337 (6th Cir.2001). Instead, "there must be a 'real likelihood' that the evidence is in danger of being destroyed." *Id.*, quoting *State v. Christopher,* 12th Dist. No. CA2009-08-041, 2010-Ohio-1816, ¶ 32.

**{¶ 31}** In the instant case, as found by the trial court, the evidence is undisputed appellee made no attempt to destroy the drugs. While the state maintains that an actual attempt to destroy drugs is unnecessary before police may enter a home, we do not construe the trial court's decision as requiring such evidence. Rather, the trial court noted such a scenario was unlikely given the officers' account that appellee observed the officers through the window but made no attempt to destroy the drugs before answering the door. Further, the trial court found "no evidence that the defendant even knew that the officers saw the contraband."

**{¶ 32}** A review of cases in which Ohio courts have upheld warrantless searches based on the threatened destruction of drugs reveals, in general, the existence of circumstances not present in this case. *See, e.g., State v. Martin,* 1st Dist. No. C-040150, 2004-Ohio-6433 ([e]xigent circumstances existed where police entered defendant's apartment to secure evidence they believed defendant was in the process of destroying based on sounds audible through the door, including glass shattering, a person running about, and repeated toilet flushing); *State v. Prater,* 2d Dist. No. 06-CA-89, 2008-Ohio-6730 (exigent circumstances justified warrantless entry where (1) individual who was arrested after exiting the defendant's residence admitted he obtained bag containing marijuana from the defendant, (2) police officers observed the defendant's daughter removing large bags, similar to the type used to package drugs, from the residence, and (3) the police worried that a call had been made to alert the defendant of individual's arrest and the discovery of marijuana).

**{¶ 33}** Upon review, we find no error with the trial court's determination that the warrantless entry cannot be justified by the officers' need to preserve evidence from imminent destruction. As noted, even accepting the officers' testimony that appellee saw the officers through the window before opening the door, there was no evidence appellee made any effort to destroy the drugs. While the officers checked the bathroom for any third parties subsequent to appellee's arrest, the officers offered no testimony that they

observed the presence of any other individuals inside the hotel room at the time they first observed appellee through the window. Further, although Officer Stout testified that he had been involved in another incident in which an individual attempted to ingest drugs, the trial court was not required to credit the officer's generalized concern, based on a previous incident, as proof that the officer reasonably believed the destruction of evidence was imminent in the instant case. *See, e.g., Wauseon v. Leveck,* 6th Dist. No. F-13-020, 2014-Ohio-3360, ¶ 15 (investigating officer's past knowledge of juvenile's earlier drug arrest did not support officer's testimony that he was concerned that juvenile was hiding evidence of illegal drug use so as to create "emergency situation" warranting exception to warrant requirement). As also noted, the trial court cited a lack of evidence that appellee was even aware the officers had observed the contraband. Here, the record supports the trial court's determination that the state failed to establish it was reasonable for the officers to conclude that destruction of evidence was imminent before a warrant could be obtained. *See State v. West,* 8th Dist. No. 87234, 2006-Ohio-4267, ¶ 19 (where there was no indication occupants were aware that officers knew of drugs inside apartment, "there was no basis justifying the officers entering the apartment without first obtaining a warrant").

**{¶ 34}** Further, the facts of this case do not support the state's reliance on the exigency of "hot pursuit." Ohio courts have noted that "[t]he reasoning behind the 'hot pursuit' exception to the warrant requirement is that a person should not be able to avoid arrest simply by fleeing from a public place to a private place." *State v. Cummings,* 9th Dist. No. 20609 (Jan. 16, 2002). Thus, "[e]ssential to the 'hot pursuit' exception, as articulated in *Santana* and its progeny, is that the arrest be initiated *in a public place.*" (Emphasis sic.) *Id.*, citing *Santana* at 42. Accordingly, "[a] 'hot pursuit' scenario simply does not exist when the suspect is already in a private dwelling." *Id.* In the instant case, as we have previously noted, appellee was at all times inside the hotel room (i.e., not in a public place).

**{¶ 35}** Under the United States Supreme Court's holding in *Payton,* "absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Id.* at 587-88. In the instant

case, even accepting the presence of probable cause based upon the officers' observations, we agree with the trial court that the record does not support a finding that exigent circumstances justified the officers' warrantless entry into the hotel room to arrest appellee.

**{¶ 36}** We also find no error with the trial court's failure to apply the plain view doctrine to the facts of this case. Under this exception, a law enforcement officer's warrantless seizure "of an object in plain view does not violate the Fourth Amendment if (1) the officer did not violate the Fourth Amendment in arriving at the place from which the object could be plainly viewed, (2) the officer had a lawful right of access to the object, and (3) the incriminating character of the object is immediately apparent." *State v. Robinson,* 103 Ohio App.3d 490, 494 (1st Dist.1995). Ohio courts have noted that "[w]hile the plain view exception to the warrant requirement creates probable cause to support a warrant, it does not and cannot create justification to enter a home or property without a warrant." *State v. Booker,* 8th Dist. No. 96935, 2012-Ohio-162, ¶ 14. Rather, "the Fourth Amendment prohibits warrantless entry into a home to make an arrest unless there is both probable cause and the existence of exigent circumstances." *Id*. at ¶ 15. Here, because the officers were not lawfully present in the room at the time of the search, and in the absence of exigent circumstances, "the plain view doctrine does not apply." *State v. Zax-Harris,* 166 Ohio App.3d 501, 2006-Ohio-1855, ¶ 21 (2d Dist.). *See also State v. Alihassan,* 10th Dist. No. 11AP-578, 2012-Ohio-825, ¶ 20 (while officer's "seeing the drugs" in common area outside defendant's apartment gave him probable cause to obtain a search warrant, the plain view exception was inapplicable because officer "had no right to be inside the apartment" and no exigent circumstances existed).

**{¶ 37}** The state argues for the first time on appeal that Officer Stout could also access the drugs by conducting a search incident to an arrest and based on the need to conduct a protective sweep.[2] In general, issues not raised by a party during a suppression

[2] We note that the state does not challenge on appeal the trial court's finding that the inevitable discovery doctrine was inapplicable to the facts of this case based on the court's determination that "[n]o other search or investigation was underway or anticipated that would have led to the lawful entry into defendant's hotel room." *See, e.g., State v. Parrish,* 10th Dist. No. 01AP-832, 2002-Ohio-3275, ¶ 38, quoting *State v. Taylor,* 138 Ohio App.3d 139, 151 (2d Dist.2000) ("In order for the inevitable discovery exception to apply, the state must establish that 'the police possessed the leads making the discovery inevitable at the time of the misconduct and that the police were actively pursuing an alternate line of investigation prior to the misconduct.' ").

hearing cannot be raised for the first time on appeal. *State v. Bing*, 134 Ohio App.3d 444, 449 (9th Dist.1999) (state's arguments that search was justified by exigent circumstances and the inevitable discovery rule were not raised at the suppression hearing before the trial court and, therefore, state is "precluded from raising these issues before this court as they were waived"). Further, the state's arguments are premised upon its assertion that the arrest itself was lawful and therefore the drugs were within the area searchable incident to the arrest because they were within appellee's immediate control. We have found, however, that the trial court properly concluded the facts did not constitute exigent circumstances and, therefore, the officers were not lawfully inside the hotel room to effect a warrantless arrest.

**{¶ 38}** The final issue raised by the state is whether the trial court erred in failing to apply the good-faith exception to the facts of this case. The state maintains that, even if the officers violated the Fourth Amendment leading up to the seizure of the drugs, suppression would still be unwarranted because they acted in good faith.

**{¶ 39}** As noted under the facts, following the hearing on the motion to suppress, the trial court permitted the parties to file supplemental briefing on the issue of whether the good-faith exception to the exclusionary rule was applicable. With respect to that issue, the trial court, as well as the parties in their supplemental filings, referenced this court's decision in *Alihassan* (hereafter "*Alihassan I*") and its companion decision on reconsideration, *State v. Alihassan*, 10th Dist. No. 11AP-578 (July 12, 2012) (memorandum decision) (hereafter "*Alihassan II*").

**{¶ 40}** In *Alihassan I*, this court reversed the trial court's denial of the defendant's motion to suppress on the basis that the police officers' warrantless entry into the defendant's apartment was not justified by exigent circumstances, and that the seizure of evidence was not lawful under the plain-view doctrine. The state subsequently filed an application for reconsideration, arguing that the trial court should have addressed the final argument raised in its brief relating to the good-faith exception as set forth in *Herring v. United States*, 555 U.S. 135 (2009). In *Alihassan II*, this court granted the state's motion for reconsideration and remanded the matter for the trial court to consider, "in the first instance," whether the good-faith exception to the exclusionary rule applies.

*Id.* at ¶ 4. In our decision, we also discussed the "framework" that a trial court should follow in addressing the good-faith exception. *Id*. at ¶ 8.

**{¶ 41}** The trial court in the instant case, upon consideration of the supplemental filings, found that the state failed to meet its burden with respect to the good-faith exception. In its decision, the trial court applied the balancing test discussed in *Alihassan II,* and concluded that the officers "acted in a deliberate, reckless or grossly negligent manner."

**{¶ 42}** Upon review, we find that the trial court properly rejected the state's reliance on the good-faith exception, although for a different reason. As noted above, in *Alihassan II,* this court granted the state's application for reconsideration and remanded the matter to the trial court "to consider * * * whether the good-faith exception to the exclusionary rule applies." *Id*. at ¶ 11. In our reconsideration decision, however, we did not specifically address the issue of the good-faith exception in the context of a warrantless search.

**{¶ 43}** The good-faith exception to the exclusionary rule was first recognized by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). This exception "provides that the exclusionary rule should not be applied to bar use of evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *State v. Hoffman,* 141 Ohio St.3d 428, 2014-Ohio-4795, ¶ 29, citing *Leon* at 918-23, 926. The rationale in *Leon* for applying the good-faith exception to a police officer's objectively reasonable reliance on a warrant later held invalid is that "[t]he error in such a case rests with the issuing magistrate, not the police officer, and 'punish[ing] the errors of judges' is not the office of the exclusionary rule." *Davis v. United States*, 131 S.Ct. 2419, 2428 (2011), quoting *Leon* at 916. The good-faith exception set forth in *Leon* was adopted by the Supreme Court of Ohio in *State v. Wilmoth,* 22 Ohio St.3d 251 (1986). *Hoffman* at ¶ 29.

**{¶ 44}** The United States Supreme Court has extended the good-faith exception to circumstances other than an invalid search warrant. *See, e.g., Illinois v. Krull,* 480 U.S. 340 (1987) (applying good-faith exception to evidence obtained by officers who acted in objectively reasonable reliance upon a legislative statute authorizing warrantless

administrative searches but which is subsequently found to violate the Fourth Amendment); *Arizona v. Evans*, 514 U.S. 1 (1995) (applying good-faith exception to evidence seized by officers who reasonably relied on mistaken information in a court's database computer records); *Herring* (extending good-faith exception where officer reasonably relied on county clerk's assertion that the defendant had an outstanding warrant based on finding that the error relied upon did not rise to the level of "deliberate, reckless, or grossly negligent conduct"); *Davis* (applying good-faith exception where officers relied on binding appellate precedent).

**{¶ 45}** As noted by one federal court, however, "[t]he Supreme Court has never applied the good faith exception to excuse an officer who was negligent himself, and whose negligence directly led to the violation of the defendant's constitutional rights." *United States v. Camou*, 773 F.3d 932, 945 (9th Cir.2014). Further, as one commentator has observed, "the prevailing view of the lower courts is that a 'good faith' exception to the exclusionary rule does not apply in situations in which a police officer relies upon his *own* judgment to conduct a warrantless search or arrest." (Emphasis sic.) 2-11 Criminal Constitutional Law, Section 22.02(1)(d)(iv) (2014). In this respect, "[w]here there is no outside authority on which the officer reasonably relied, the principal rationale relied upon by the Supreme Court in *Leon* and its progeny—that it would serve no deterrent purpose to punish the officer, acting in good faith, for the error of the magistrate, the legislature, or by a negligent mistake by a court or police employee—is not present." *Id*. Therefore, "evidence obtained during a warrantless search by a police officer must be excluded from the prosecution's case-in-chief when the search subsequently is held unreasonable under the Fourth Amendment, even though the officer acted with the objectively reasonable belief that the search was constitutionally valid." *Id*.

**{¶ 46}** Ohio courts, including this court, have declined to apply the *Leon* good-faith exception in cases in which officers, conducting warrantless searches, relied on their own belief that they were acting in a reasonable manner, as opposed to relying upon another's representations. *See, e.g., State v. Forrest*, 10th Dist. No. 11AP-291, 2011-Ohio-6234, ¶ 17-18 (distinguishing *Herring* on the basis that the officers in *Herring* made an arrest based upon a warrant listed in a county's database, whereas the officers involved in the search and seizure in the case sub judice "had no warrant and had no basis for believing

that a warrant existed"); *State v. Simon*, 119 Ohio App.3d 484, 488-89 (9th Dist.1997) (good-faith exception inapplicable to officers' mistaken belief about location of defendant's apartment entrance because "exclusion of this evidence would sanction negligence of police officers").

**{¶ 47}** Federal courts have similarly held, in the context of warrantless searches, that "*Leon's* good-faith exception applies only narrowly, and ordinarily only where an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer." *United States v. Herrera*, 444 F.3d 1238, 1249 (10th Cir.2006) (refusing to extend *Leon* in case where a state trooper conducted a random, warrantless seizure to effect an administrative search based upon the officer's own mistaken belief that the defendant's truck was subject to such a random inspection). *See also United States v. Crist*, 627 F.Supp.2d 575, 588 (M.D.Pa.2008) (declining to apply good-faith exception to warrantless search of defendant's computer; even if officers acted in good faith, "they did not rely in good faith on the conduct of a neutral third-party that was later determined to be a mistake"); *Camou* at 945 (refusing to apply good-faith exception to excuse officer's own negligence in warrantless search of cell phone).

**{¶ 48}** In the instant case, as in those cited above, "[i]t is significant that the mistake * * * was not made by a third person, but by the officers themselves." *Simon* at 488. Here, because the officer's entry into the room was not pursuant to a warrant, nor based on the officers' reasonable reliance on "an external source, which turned out to be erroneous," we conclude that the good-faith exception is inapplicable. *Camou* at 945. Thus, we agree, albeit for different reasons, with the trial court's ultimate conclusion not to apply the good-faith exception.

**{¶ 49}** Based upon the foregoing, the trial court did not err in granting appellee's motion to suppress. Accordingly, the state's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

KLATT and LUPER SCHUSTER, JJ., concur.

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