[Cite as *State v. Arnold*, 2011-Ohio-238.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 24195
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-2372
v.	:	
	:	
DAMON L. ARNOLD	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 21st day of January, 2011.

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FAIN, J.

{¶ 1} Defendant-appellant Damon Arnold appeals from his judgment of conviction and sentence, following a no-contest plea to possession of marijuana in an amount between 5,000 and 20,000 grams. Arnold contends that the trial court erred in denying his motion to suppress, and in finding that there was valid consent to search

his and his girlfriend's home.

{¶ 2} We conclude that the trial court did not err in overruling the motion to suppress. Evidence in the record, in the form of the searching officer's testimony, which the trial court found to be credible, supports the trial court's conclusion, by clear and positive evidence, that Arnold's girlfriend was a co-inhabitant with authority over the premises, and that she had voluntarily consented to the search. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} On July 16, 2009, Montgomery County Deputy Sheriff John Campbell stopped Damon Arnold for a routine traffic violation. Campbell originally thought Arnold did not have a front license plate, but the actual violation turned out to be one of improper display, because Arnold's front plate was in the front windshield, on the dashboard. Campbell obtained Arnold's driver's license number and insurance information, and consulted the police computer to verify that Arnold was a valid driver. While talking with Arnold, Campbell noticed tattoos on Arnold's arms suggesting that Arnold was involved with the Dayton View Hustlers (DVH). DVH is a known gang in Montgomery County, which Campbell believed was involved in multiple violent crimes, drug trafficking, and other, similar offenses.

{¶ 4} Campbell asked Arnold if he would consent to a search of his car, and Arnold agreed. Campbell did not find anything during the search. After issuing a warning for the improper license plate display, Campbell released Arnold. During the stop, Campbell also obtained Arnold's home address – 127 East Parkwood, in Dayton,

Ohio.

{¶ 5} The traffic stop began at approximately 7:25 p.m., and ended around 7:42 p.m. As soon as the stop ended, or maybe before, Campbell contacted two deputies who were assigned to the Community Initiative to Reduce Gun Violence Task Force (CIRGV Task Force). Campbell gave the deputies information about Arnold, in order to see if Arnold was on the CIRGV Task Force list for known gang members. Arnold was not on the list.

{¶ 6} After receiving the call from Campbell, Dayton Police Officer Michael Fuller and three other members of the CIRGV Task Force went to the East Parkwood address. They arrived at around 9:45 p.m., about two hours after the traffic stop had ended. Both Officer Fuller and a female resident at the premises (Je'Nane Bell), testified at the suppression hearing. Their accounts substantially differ. The trial court found the facts to be in accordance with Officer Fuller's testimony.

{¶ 7} According to Officer Fuller, he and three other members of the task force (Montgomery County Sheriff Deputies Harvey and Thornton, and Trotwood Police Officer Smith) were together when Harvey received the phone call from Campbell about Arnold. The officers then went to the house because they wanted to talk with Arnold. Fuller also freely admitted at the suppression hearing that he wanted to look through the residence for illegal substances. The officers were in uniform and were armed with handguns.

{¶ 8} Upon arriving, Fuller knocked at the door, which was answered by Bell, who told him that she lived there. Fuller identified himself and asked about Damon Arnold. Bell said that Arnold was not home. Fuller then asked if he could come in

and speak with her, and Bell agreed. Fuller told her that the officers were members of the community initiative to reduce gun violence, and that when an officer had stopped Arnold, it had come to their attention that he was involved with DVH. Fuller asked if the officers could look through the residence for illegal narcotics. Fuller testified that he told Bell that she could refuse to let them search, but he did not include that fact in his police report. Fuller also did not have Bell sign a consent form at that point. Bell told the officers that there were no illegal narcotics in the house, and invited the officers to walk around with her.

{¶ 9} Fuller did not observe any illegal drugs from the doorway. In walking into the residence, there was a living room that opened up into a family area, where the residents could sit and watch television. Fuller observed a digital scale sitting in front of the couch on a coffee table. The scale was coated with marijuana. A blue plastic bin was also in the room, and its lid was coated with marijuana. Officer Smith opened up the lid and saw a fairly large amount of marijuana inside, and some sandwich baggies, which is indicative of selling marijuana as opposed to personal use.

{¶ 10} The officers also found a substantial amount of marijuana in the basement, in the dryer. Bell seemed shocked and upset at the drugs that were found. Bell gave the officers the impression that she was basically worried about her children, and that she did not know the marijuana was in the house. After the officers found the drugs, Fuller asked Bell to sign a consent form for the search. The consent form was signed about a half hour after the officers arrived.

{¶ 11} Bell testified that she had been with Arnold for sixteen years, and that they had children together, but were not married. On the night in question, Bell and

her four children were at home. Bell was upstairs in the shower when her son came upstairs and said there were lots of lights around the house, and that the police were there. Bell came downstairs and heard the police banging on the door. When she opened the door, an officer (later identified as Fuller) already had the screen door open. Fuller also had his foot wedged between the front door to the point that she would not be able to shut the door. There were quite a few officers there, including sheriffs and Dayton police officers.

{¶ 12} Bell stated that she was frightened for herself and her children, because they had never encountered anything like this before. The officers first asked for Duwan Arnold, who is Damon's brother. After that, an officer said that the house was known as a drug house, and asked if they could come in and look around. Bell testified that she did not feel she could refuse, so she backed away from the front door. The officers came "storming in," and asked her after they came in the house if she knew a Damon Arnold. She said she knew him, and admitted that he lived there sometimes. That is when the officers told her that Damon was affiliated with gangs and was supposed to be a drug dealer. Bell stated that no one told her that she had a right to refuse the search. She also said the officers made her sit in one room and that she did not accompany them on the search.

{¶ 13} Bell indicated that she thought the police wanted to search for people, not drugs. However, she also admitted that if she knew they were looking for drugs, she would have said, "yeah, why not." Suppression Hearing Transcript, p. 79. Bell stated that she would still have told the officers to come in. Her house was not a drug house; it was a family house.

{¶ 14} Bell further stated that she did not read the consent form before signing it. She indicated that the officers told her that if she did not cooperate, they would have her evicted from her home, would have her children taken away, and would throw her in jail.

{¶ 15} After hearing the testimony, the trial court accepted the testimony of the State's witnesses, and overruled the motion for suppression of evidence. Arnold subsequently pled no contest to the charge of possession of marijuana in an amount between 5,000 and 20,000 grams, and was sentenced to one year in prison. Arnold now appeals from the judgment of conviction and sentence. The trial court has permitted Arnold to remain free on bond during his appeal.

II

{¶ 16} Arnold's sole assignment of error is as follows:

{¶ 17} "THE TRIAL COURT ERRED IN DENYING THE DEFENDANT/APPELLANT'S MOTION TO SUPPRESS AND FINDING THERE WAS VALID CONSENT TO SEARCH HIS AND HIS GIRLFRIEND'S HOME."

{¶ 18} Arnold contends that the consent to search was not voluntarily given, because Bell's agreement was based on the overwhelming show of force by the police. Arnold also maintains that the State failed to show by clear and positive evidence that the consent to search was not a mere submission to authority.

{¶ 19} The standards for reviewing decisions on motions to suppress are well established. In ruling on a motion to suppress, the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and

evaluate the credibility of the witnesses." *State v. Retherford* (1994), 93 Ohio App.3d 586, 592 (citation omitted). Accordingly, when we review suppression decisions, "we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." Id.

{¶ 20} Under applicable legal standards, the State has the burden of showing the validity of a warrantless search, because warrantless searches are " 'per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.' " *State v. Hilton*, Champaign App. No. 08-CA-18, 2009-Ohio-5744, ¶ 21-22, citing *City of Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218.

{¶ 21} Consent is one exception to the warrant requirement, and requires the State to show by " 'clear and positive' evidence that the consent was 'freely and voluntarily' given." *State v. Posey* (1988), 40 Ohio St.3d 420, 427 (citations omitted). "A 'clear and positive' standard is not significantly different from the 'clear and convincing' standard of evidence, which is the amount of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations to be proved. It is an intermediate standard of proof, being more than a preponderance of the evidence and less than evidence beyond a reasonable doubt." *State v. Ingram* (1992), 82 Ohio App.3d 341, 346 (citations omitted).

{¶ 22} In order to be valid, consent cannot be the product of coercion. " 'Consent' that is the product of official intimidation or harassment is not consent at all.

Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse." *Florida v. Bostick* (1991), 501 U.S. 429, 438, 111 S.Ct. 2382, 115 L.Ed.2d 389. Furthermore, "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854.

{¶ 23} "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *U.S. v. Matlock* (1973), 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242. "The authority which justifies the third-party consent does not rest upon the law of property * * * but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." Id., fn. 7.

{¶ 24} Bell's testimony, if believed, would establish the existence of coercion. But the trial court credited the testimony of the police officers, not Bell, and the record contains competent, credible evidence to support the trial court's findings of fact. Bell told the police that she lived in the house, and that Arnold also lived there at times. As a resident of the house, Bell had the authority to give permission for the search of the

premises. Officer Fuller's testimony indicates that Bell willingly agreed to let the officers enter, that Bell gave the officers permission to search, that Bell accompanied the officers during the search, and that Bell was shocked by the discovery of drugs. The testimony of both Bell and Officer Fuller indicates that Bell did not expect drugs to be present. In fact, Bell stated in her own testimony that she told the police that they might find a gun, and did not believe they would find anything else. Under the circumstances, there is competent credible evidence supporting the trial court's conclusion that Bell, as a co-inhabitant, voluntarily consented to the search.

{¶ 25} Accordingly, the trial court did not err in overruling Arnold's motion to suppress. Arnold's sole assignment of error is overruled.

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GRADY, P.J., and FROELICH, J., concur.

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