[Cite as *State v. White*, 2011-Ohio-503.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23905
v.	:	T.C. NO. 09CR2613
ADRIAN WHITE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 4th day of February, 2011.

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DONOVAN, J.

{¶ 1} Defendant-appellant Adrian White appeals a decision of the Montgomery County Court of Common Pleas, General Division, overruling his motion to suppress. White filed the motion to suppress on October 14, 2009. On November 6, 2009, a hearing

was held on said motion. White filed a post-hearing memorandum in support of his motion to suppress on November 13, 2009. The State filed a memorandum in opposition on November 20, 2009. On December 11, 2009, the trial court filed a brief judgment entry overruling White's motion to suppress.

I

{¶ 2} As part of their assignments as members of the Community Initiative to Reduce Gun Violence Task Force ("CIRGV"), police officers were patrolling the area in and around the Deercreek Apartment complex in Trotwood, Ohio, in late May and early June of 2009.[1] At the time, the task force was attempting to locate a fugitive named Darnell Jackson, who was wanted in Indiana on charges of receiving stolen property. The task force eventually discovered that Jackson was living at 736 Kildare Place in the Deercreek Apartment complex after locating a vehicle in the parking lot registered to Jackson's father.

{¶ 3} On June 2, 2009, members of the task force went to 736 Kildare Place in order to apprehend Jackson. Upon arriving, the officers observed Jackson's vehicle parked in front of the apartment. Officer Ronald Smith of the Trotwood Police Department, and a member of the CIRGV, testified at the suppression hearing that he and several other officers knocked on the door to the apartment, but no one answered the door. Officer Smith testified that as he and the other officers were about to leave, they observed a vehicle enter the parking lot and park next to Jackson's vehicle.

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[1]The CIRGV Task Force is a multi-jurisdictional unit consisting of deputies from the Montgomery County Sherriff's Office, the Dayton Police Department, the Trotwood Police Department, the Montgomery County Prosecutor's Office, and the FBI Street Task Force to help reduce gun, gang, and drug violence in Montgomery County.

{¶ 4} The officers approached the vehicle and identified themselves to the driver and passenger. The officers identified the passenger as the appellant, White, and the driver as White's girlfriend, Sherina Bunch. Officer Smith testified that the initial encounter between the police and White was entirely consensual. Officer Smith testified that he informed White that they had a warrant for Jackson's arrest and had received information that he was staying at 736 Kildare Place. Officer Smith further testified that White stated that the apartment was his. White also told Officer Smith that Jackson had been staying in his apartment, but was no longer there. Officer Smith testified that White was not handcuffed or in custody while being questioned regarding Jackson's whereabouts.

{¶ 5} Officer Smith testified that he asked White for consent to search the apartment for Jackson. Officer Smith testified that White stated that he wanted to see the warrant for Jackson's arrest before allowing the officers to search his apartment. Officer Smith testified that White sat in the back of a police cruiser where he viewed Jackson's warrant. After he examined the warrant, White agreed to allow the officers to search his apartment, but only on the condition that they confine their search to locating Jackson and nothing else. Officer Smith testified that while he and the other officers were concerned that White might attempt to contact Jackson in order to warn him that the police were looking for him, White was not in custody and could have left at any time. Moreover, Officer Smith testified that he did not handcuff White, nor did he coerce his compliance in any way.

{¶ 6} White unlocked the door to his apartment and allowed the officers to search the apartment for Jackson. Officer Michael Fuller of the Dayton Police Department

testified that as he passed through the kitchen area of White's apartment he observed a set of digital scales in plain view on the counter. Officer Fuller further testified that he observed what appeared to be cocaine residue on the scales and the kitchen counter. During the search of White's bedroom, Sergeant Mark A. Spiers, also of the Dayton Police Department, discovered a gel capsule of suspected heroin sitting on a dresser in plain view. The officers, however, did not locate Jackson in White's apartment. In light of the discovery of the contraband and digital scales, Officer Smith arrested White for possession of heroin and criminal tools and placed him in the back of a police cruiser. Officer Smith testified that he asked White for additional consent to search the apartment for further evidence of illegal acts, but White refused. Officers Smith and Officer Fuller then transported White to the Montgomery County Jail for processing. Sgt. Spiers testified that he eventually secured a warrant to search the remainder of the apartment, but no additional evidence was discovered.

{¶ 7} White was subsequently indicted on September 18, 2009, for one count of possession of heroin, in violation of R.C. 2925.11(A), a felony of the fifth degree; and one count of possession of criminal tools, in violation of R.C. 2923.24(A), a felony of the fifth degree. At his arraignment on October 6, 2009, White pled not guilty to the charged offenses. On October 14, 2009, White filed a motion to suppress asserting that White did not consent to a warrantless search of his apartment. After a hearing held on November 6, 2009, the trial court ultimately issued a written decision overruling the motion to suppress.

{¶ 8} On February 11, 2010, White plead no contest to possession of heroin and possession of criminal tools, and the trial court sentenced White to a term of community control. White filed a timely notice of appeal with this Court on March 3, 2010.

II

{¶ 9} White's sole assignment of error is as follows:

{¶ 10} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED AS A RESULT OF THE SEARCH OF DEFENDANT'S APARTMENT."

{¶ 11} In his sole assignment, White contends that the trial court erred when it overruled his motion to suppress the physical evidence obtained during the initial search of his apartment. Specifically, White argues that the court erred when it found that he had orally consented to the search of his apartment. White also asserts that even if he did consent to the search of his apartment, the police exceeded the scope of his consent when they seized the heroin and drug paraphernalia that were in plain view.

{¶ 12} In regards to a motion to suppress, "the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac* (July 15, 2005), Montgomery App. No. 20662, 2005-Ohio-3733, citing *State v. Retherford* (1994), 93 Ohio App.3d 586. Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. Id.

Oral Consent to Search

{¶ 13} "The Fourth Amendment to the United States Constitution protects

individuals from unreasonable searches and seizures. * * * In general, the warrantless entry of a person's house is unreasonable *per se*. (Internal citations omitted). However, a police officer may validly enter and search a home, without a warrant, when the officer has obtained the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a non-present co-occupant." *State v. Keggan*, Greene App. No. 2006 CA 9, 2006-Ohio-6663.

{¶ 14} "It is * * * well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (citations omitted). "To rely on the consent exception of the warrant requirement, the state must 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). 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*, 412 U.S. at 227, 93 S.Ct. at 2048.

{¶ 15} Six factors to be taken into account when assessing the voluntary nature of

the consent are as follows: 1) the voluntariness of the defendant's custodial status; 2) the presence of coercive police procedures; 3) the extent and level of the defendant's cooperation with the police; 4) the defendant's awareness of his right to refuse consent; 5) the defendant's education and intelligence; and 6) the defendant's belief that no incriminating evidence will be found. *State v. Sanchez* (April 24, 1998), Greene App. No. 97-CA-32; citing *State v. Forrester* (February 6, 1998), Greene App. No. 95-CR-397.

{¶ 16} Officer Smith testified that the encounter between the police officers and White was "casual" and entirely consensual. Officers Smith and Fuller approached White and his girlfriend and explained that they were there to execute a warrant for the arrest of Jackson. Officer Smith allowed White to view the arrest warrant. Officer Smith testified that during the initial encounter, White was not handcuffed, nor was he threatened in any way. White testified that he was entirely cooperative with the officers throughout the investigation and that he "had no problem" speaking with the officers. We note that White testified that he was enrolled as a student at Sinclair College and was attending classes. Officer Smith testified that after he was allowed to view Jackson's arrest warrant, White consented to the search of his apartment, but limited the scope of the search to finding Jackson if he was present. Officer Smith testified that White was not handcuffed or restrained in any way until after the police discovered the scales and the heroin capsule in the apartment.

{¶ 17} Conversely, White and his girlfriend, Bunch, testified that the police swarmed her vehicle as soon as the two drove up and ordered them to exit the vehicle. White also testified that he was immediately handcuffed and put in the back of a police cruiser. Most

importantly, however, White testified that he never gave the officers permission to search his apartment. Rather, White claims that he permitted the police to search his apartment while under duress because he was afraid that he would be arrested if he did not comply with their demands.

{¶ 18} On December 3, 2009, the trial court overruled White's motion to suppress orally in open court on the record. In the State's appellate brief, it points out that the court found that White had voluntarily given the police permission to search his apartment. The State asserts, however, that the trial court made no specific factual findings in support of its decision to overrule White's motion to suppress. Nevertheless, the State contends that the totality of the competent, credible testimony offered during the suppression hearing supports the court's decision "by clear and positive evidence."

{¶ 19} "Regarding criminal motions such as motions to suppress, Crim. R. 12(E) [revised Crim. R. 12(F)] indicates that '[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record.' Although findings of fact are not required, the trial court should provide reasons on the record that are 'sufficiently specific to permit a reviewing court to understand the reason the trial court ruled in the manner in which it did.' On the other hand, if the defendant does not object to the lack of findings, the error is harmless if the evidence is sufficient to demonstrate the basis for the trial court's decision. (Internal citations omitted)." *State v. Sanchez* (April 24, 1998), Greene App. No. 97-CA-32.

{¶ 20} Although appellant has failed in her duty to provide a written transcript of the December 3, 2009, scheduling conference pursuant to App. R. 9(A), we have elected to

review the DVD, wherein the court states the following with respect to White's motion to suppress:

{¶ 21} "The Court: I reviewed the testimony from the motion to suppress hearing. I've reviewed the filings of both the State and [defense counsel]. I appreciate them. *** What I was focused in on was someone who gives them partial permission, as in Mr. White's case, he gave permission to the police to go look for the other person. Whether that barred any discovery of other evidence that would be in plain view during the course of that investigation. The Second District seems to indicate that, indeed, if it is in plain view, it's easily seen, then, indeed, it does not have to be suppressed.

{¶ 22} "So, I am going to overrule the motion to suppress. As to the consensual issue of the search, I'm going to find that you don't have to have it in writing. If you consented to it, then you do, and I believe that by more than a preponderance of the evidence that the evidence showed that, in fact, the defendant did consent to the search for this other gentleman in the apartment."

{¶ 23} Upon review, we conclude that the trial court made sufficient factual findings in open court on December 3, 2009, regarding the issue of whether White voluntarily consented to the limited search of his apartment. In fact, this very issue was briefed for the court, and the court referenced reviewing the filings. In overruling the motion to suppress, the court explicitly found that White gave Officer Smith permission to search his apartment in order to see if Jackson was present. Moreover, the evidence adduced during the suppression hearing established that under the totality of the circumstances, White voluntarily gave his consent to Officer Smith to conduct the search.

{¶ 24} The trial court's conclusion was supported by competent, credible evidence in the form of testimony from Officer Smith and his colleagues. Thus, we are bound to accept the trial court's finding in that regard. *State v. Hilton*, Champaign App. No. 08-CA-18, 2009-Ohio-5744. "The 'rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' *In re J.Y.*, Miami App. No. 07-CA-35, 2008-Ohio-3485, at ¶33, quoting from *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. The trial court in the case before us was presented with two different accounts, and chose to believe the police officers." *Hilton*, Champaign App. No. 08-CA-18, 2009-Ohio-5744.

B. Illegal Items in Plain View

{¶ 25} White also argues that even if he did consent to the search of his apartment, the police exceeded the scope of his consent when they seized the heroin capsule and drug paraphernalia that were in plain view.

{¶ 26} "[O]bservations of things in plain sight made from a place where a police officer has a right to be do not amount to a search in the constitutional sense. On the other hand, when observations are made from a position to which the officer has not been expressly or implicitly invited, the intrusion is unlawful * * * ." *State v. Peterson*, 173 Ohio App.3d 575, 2007-Ohio-5667, citing *Lorenzana v. Superior Court* (1973), 9 Cal.3d 626, 634, 511 P.2d 33.

{¶ 27} Objects falling in plain view of an officer who has a right to be in a position

to have that view are subject to seizure when their criminal character is readily apparent. *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067. White does not contend that the criminal character of the digital scales and heroin seized by the officers was not immediately apparent. White's contention is that the officers had no right to seize the illegal items in plain view because they were only supposed to be looking for Jackson. At the time both officers observed the contraband, they were legally permitted to be in the kitchen and bedroom in light of White's voluntary consent to search for Jackson in the apartment. The officers did not look in drawers or cabinets, rather, they were only searching areas where an adult male could hide when they observed the contraband in plain view sitting on the kitchen counter and on the top of a dresser where the items were clearly visible. The trial court's finding that the officers were authorized to act as they did in discovering the contraband in plain view was supported by the record.

{¶ 28} Lastly, White argues that a consent form should be required by police prior to entering a residence when there is no warrant. Other than his bare assertion in that regard, White cites to no authority supporting his position, and we find that in the presence of a valid oral consent, there is no requirement that the police also acquire a written consent. We further note that while written consent would have eliminated any factual dispute regarding whether White gave consent, it would not have avoided a factual dispute concerning whether White's consent was voluntarily given. *Hilton*, Champaign App. No. 08-CA-18, 2009-Ohio-5744. In the instant case, the trial court explicitly found that White voluntarily gave the officers oral consent to search his apartment in order to see if Jackson was present, and that finding was supported by clear and convincing evidence.

{¶ 29} White's sole assignment of error is overruled.

IV

{¶ 30} White's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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

Copies mailed to:

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