[Cite as *State v. Striks*, 2015-Ohio-1401.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 26387
	:	
v.	:	Trial Court Case No. 2014-CR-1969
	:	
JULIE R. STRIKS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 10th day of April, 2015.

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WELBAUM, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from the judgment of the Montgomery County Court of Common Pleas granting defendant-appellee, Julie Striks's motion to suppress marijuana found in her apartment and statements she made to police officers at her apartment. For the reasons outlined below, the judgment of the trial court will be reversed and the matter will be remanded for further proceedings.

Facts and Course of Proceedings

{¶ 2} On July 28, 2014, Striks was charged with one count of trafficking in marijuana in the vicinity of a school or a juvenile in violation of R.C. 2925.03(A)(1), a felony of the fourth degree. The charge arose as the result of police officers searching Striks's apartment and discovering 92 grams of marijuana. On August 13, 2014, Striks filed a motion to suppress on the grounds that the search was conducted without: (1) a warrant; (2) Striks's consent; (3) exigent circumstances; or (4) probable cause. Specifically, Striks sought to suppress her statements made to the police while they were in her apartment, as well as the marijuana found therein.

{¶ 3} On September 8, 2014, the trial court conducted a hearing on Striks's motion to suppress. At the hearing, the State presented testimony from three Huber Heights police officers; Officer Terry Combs and Officer Ben Holbrook, who were present at the apartment, as well as Detective Greg Stose, who prepared and obtained the search warrant.

{¶ 4} Combs and Holbrook testified that they went to Striks's apartment with a woman named Stephanie Rooks at approximately 6:30 p.m. on April 9, 2014, in response

to Rooks's request for a peace officer. The officers testified that Rooks told them that the father of her child, Alex Philpot, lived in the apartment with Striks, and that Rooks wanted to retrieve some of the child's belongings and $150 or $160 that she had loaned to Philpot. According to the officers, Rooks stated that the purpose of the loan had been to enable Philpot to purchase a quarter pound of marijuana (113 grams). It was unclear from the officers' testimony whether the marijuana was to be purchased for Rooks or on Philpot's own behalf. According to Holbrook, Rooks stated that the original loan amount had been $300, but some of the money had already been repaid. Combs testified that the loan had allegedly been made earlier that day. Rooks did not state to the officers what she thought was going on in the house with regard to drugs.

{¶ 5} Combs, Holbrook, and Rooks approached the front door of the apartment together from the breezeway of the building. Rooks knocked on the door, and Striks opened it. When Rooks explained that she was there with the police, Striks immediately slammed and locked the apartment door. Holbrook testified that he had smelled marijuana in the breezeway as they approached the apartment. Combs also testified that he detected the odor of burnt marijuana emanating from Striks's apartment when Striks opened the door to speak with Rooks.

{¶ 6} After Striks closed the door, Combs remained in the breezeway, knocking on the door, while Holbrook went around the building and approached the apartment's rear sliding-glass door. A short time later, Striks stepped outside the front door, closing it behind her, and had a conversation with Combs. Combs testified that he explained to Striks why he was there and mentioned that he detected the odor of marijuana coming from her residence. Combs testified that he told Striks that "we were going to either go in

and secure the residence because we were going to be serving a search warrant on the residence or she would give us consent. It was completely up to her. I didn't care either way but we needed to secure the property so that stuff could not be destroyed or, you know, removed from the property." Suppression Hearing Trans. (Sept. 8, 2014), p. 11. Striks did not consent to a search, but she did open the door to reenter the apartment and Combs followed.

{¶ 7} Meanwhile, Holbrook testified that he observed two men and a toddler through the sliding-glass door at the back of the apartment. When Holbrook knocked on the door, the men opened it and Holbrook testified that "a very strong odor of marijuana came billowing out of the apartment[.]" *Id*. at 40. Holbrook then testified that he informed the men that he wanted to speak with them. The men refused, but Holbrook put his foot in the doorframe to prevent it from closing and told them, "by law, I'm coming inside, and that they can't obstruct me or else they could face charges." *Id*. at 41. Thereafter, the men stepped aside, and Holbrook entered the apartment.

{¶ 8} Combs and Holbrook converged in the living area of the apartment. They then did a quick "protective sweep" of the apartment to make sure they had accounted for everyone inside. No contraband or weapons were observed during the sweep. There were four adults, including Striks and Philpot, in the apartment, and one or two children. While Combs and Holbrook did not observe anyone smoking in the apartment, Holbrook testified that two of the adult occupants, identified as Victor Youngblood and Leonard Egan, showed physical signs of marijuana use. After the protective sweep, the officers told the adults that they were free to leave, but that they could not move around the apartment. Combs again presented Striks and Philpot with the options of consenting to

the search or having the officers obtain a search warrant. Striks and Philpot again refused to consent to a search.

{¶ 9} Although the two other men eventually left the apartment, Striks and Philpot stayed with Combs and Holbrook while they waited in the apartment for approximately two hours for a search warrant. During this time, neither officer attempted to question Striks or Philpot. Combs testified that at approximately 7:52 p.m., Striks said: "If I just give you the marijuana will you guys just leave?" Suppression Hearing Trans. (Sept. 8, 2014), p. 16. The officers declined her offer because they had "already started the [search warrant] process" and it was "almost completed." *Id*. Combs had been working with Detective Stose by phone to obtain the search warrant. After he made the initial request, he later advised Stose of Striks's offer to hand over the marijuana and Stose added her statement to the affidavit in support of the search warrant.

{¶ 10} At approximately 8:40 p.m., Officers Combs and Holbrook received word by phone that the search warrant had been signed. According to Holbrook, when Striks learned that the warrant had been signed, she said, "Can I finally give you the marijuana?" *Id*. at 44. Striks then took Holbrook to her bedroom and removed from her dresser drawer two mason jars of marijuana and a bag of marijuana. Holbrook testified that one of the mason jars had twelve individual packets of marijuana contained inside. A total of 92 grams of marijuana was discovered in the apartment. The officers did not uncover any other drugs, drug paraphernalia, or weapons during the search.

{¶ 11} Conflicting evidence was presented about when the search actually began. Combs testified that the search began when Stose arrived with the warrant, whereas Stose testified that the search had begun before he arrived. Holbrook testified that Striks

showed him where the marijuana was located after informing her that a search warrant had been signed.

{¶ 12} Striks also testified at the suppression hearing. Her testimony was substantially similar to the officers' with respect to the way in which the officers had entered the apartment and the length and nature of their presence in her apartment. She also testified that she had smoked "two or three blunts" before the encounter with the officers, which she agreed was a "fairly large amount" of marijuana. Suppression Hearing Trans. (Sept. 8, 2014), p. 63-64. Striks further testified that she had been high during the encounter to the extent that she could not remember certain details.

{¶ 13} After hearing the foregoing testimony, the trial court granted Striks's motion to suppress holding that there were no exigent circumstances, no indication that a serious criminal offense was occurring at the home, and no consent to the search from the occupants. The court also found that the affidavit in support of the search warrant improperly relied on statements made by Striks while the police were illegally occupying her home, which were fruit of the poisonous tree.

{¶ 14} The State now appeals from the trial court's decision granting Striks's motion to suppress, raising one assignment of error for review.

Assignment of Error

{¶ 15} The State's sole assignment of error is as follows:

> THE TRIAL COURT ERRED IN CONCLUDING THAT THE OFFICERS LACKED SUFFICIENT EXIGENT CIRCUMSTANCES TO ENTER STRIKS'[S] APARTMENT TO SECURE IT WHILE A SEARCH WARRANT

WAS OBTAINED.

{¶ 16} Under its single assignment of error, the State contends that the trial court erred in concluding that the offense the police suspected Striks of committing—possession of marijuana—was not serious enough to justify a warrantless entry into her apartment until a search warrant could be obtained. For the following reasons, we agree the trial court erred.

{¶ 17} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution guarantee the right to be free from unreasonable searches and seizures. *State v. Orr*, 91 Ohio St.3d 389, 391, 745 N.E.2d 1036 (2001). "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant." (Citations omitted) *State v. Moore*, 90 Ohio St.3d 47, 49, 734 N.E.2d 804 (2000). "If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement applies. If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed." (Citations omitted.) *Id*.

{¶ 18} The Supreme Court of Ohio has recognized seven exceptions to the warrant requirement, including the " 'presence of exigent circumstances.' " *State v. Peck*, 2d Dist. Montgomery No. 25999, 2014-Ohio-2820, ¶ 8, citing *State v. Price*, 134 Ohio App.3d 464, 467, 731 N.E.2d 280 (9th Dist.1999). " 'It is well recognized that police may enter a home without a warrant where they have probable cause to search and exigent circumstances exist justifying the entry.' " *State v. Burns*, 2d Dist. Montgomery No. 22674, 2010-Ohio-2831, ¶ 20, quoting *State v. Carr*, 2d Dist. Montgomery No. 19121, 2002-Ohio-4201, ¶ 15. (Other citation omitted.) The exigent-circumstances exception

"is founded on the premise that the existence of an emergency situation, demanding urgent police action, may excuse the failure to procure a search warrant." (Citation omitted.) *State v. Cheadle*, 2d Dist. Miami No. 00CA03, 2000 WL 966167, *2 (July 14, 2000).

{¶ 19} In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), the United States Supreme Court placed a limitation on the exigent-circumstances exception with regard to warrantless home entries. The court held that "[a]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made" and that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed." *Id*. at paragraph (a) of the syllabus.

{¶ 20} While *Welsh* expresses concern about extending the exigent-circumstances exception to "minor offenses," it did not define the term and also declined to consider whether the Fourth Amendment imposes an absolute ban on warrantless home entries for certain minor offenses. *Willoughby v. Dunham*, 11th Dist. Lake No. 2010-L-068, 2011-Ohio-2586, ¶ 28, citing *Welsh* at fn. 11. In *Willoughby,* the Eleventh District Court of Appeals aptly noted that:

> While the holding in *Welsh* does not prohibit warrantless home arrests under exigent circumstances for "minor offenses," courts in Ohio are nevertheless split on the substantive implications of the case. Some appellate courts have required that the underlying offense be a felony before the exigency exception applies. [*See State v. Scott M*., 135 Ohio

> App.3d 253, 258, 733 N.E.2d 653 (6th Dist.1999); *State v. Banks*, 1st Dist. Hamilton No. C-980774, 1999 WL 632924 (Aug. 20, 1999); *Cleveland v. Shields*, 105 Ohio App.3d 118, 122, 663 N.E.2d 726 (8th Dist.1995)]. Other courts have concluded the exigency exception applies to any criminal offense, whether felony or misdemeanor. [*See Middletown v. Flinchum*, 12th Dist. Butler No. CA99-11-193, 2000 WL 1843199 (Dec. 18, 2000); *Beachwood v. Sims*, 98 Ohio App.3d 9, 16, 647 N.E.2d 821 (8th Dist.1994); *State v. Rouse*, 53 Ohio App.3d 48, 51, 557 N.E.2d 1227 (10th Dist.1988); *State v. Marlow* 9th Dist. Summit No. 17400, 1996 WL 84627 (Feb. 28, 1996)].

Willoughby at ¶ 29.

{¶ 21} The decision in *Welsh*, however, did give some insight as to what the court meant by "minor offenses" when it discussed the penalty imposed for the offense at issue in that case. The defendant in *Welsh* was arrested in his home for driving while intoxicated, which Wisconsin law considered a noncriminal traffic offense that was not punishable by imprisonment. *Welsh* at 753-754. The State of Wisconsin claimed that exigent circumstances existed warranting the warrantless entry into the defendant's home based on the need to preserve evidence of his blood-alcohol level. *Id*. The United States Supreme Court disagreed and stated that:

> The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. * * * This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified

> both by the courts and by officers faced with a decision to arrest. * * * Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. * * * To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.

Id. at 754.

{¶ 22} The court in *Welsh* further stated that:

> Nor do we mean to suggest that the prevention of drunken driving is not properly of major concern to the States. The State of Wisconsin, however, along with several other States, *see, e.g.*, Minn.Stat. § 169.121 subd. 4 (1982); Neb.Rev.Stat. § 39–669.07(1) (Supp.1983); S.D.Codified Laws § 32–23–2 (Supp.1983), has chosen to limit severely the penalties that may be imposed after a first conviction for driving while intoxicated. Given that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.

Welsh, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 at fn. 14.

{¶ 23} The idea that the penalty is a guiding factor in determining whether an offense is a “minor offense” for purposes of the *Welsh* analysis was elaborated on in the Twelfth District Court of Appeals’ decision in *Middletown v. Flinchum*, 12th Dist. Butler No.

CA99-11-193, 2000 WL 1843199 (Dec. 18, 2000), which stated that:

> *Welsh* did not preclude application of the exigent circumstances exception when the offense is a misdemeanor instead of a felony. Two Ohio courts of appeals have recognized that *Welsh* determined only that a warrantless intrusion into a home was unjustified when the offense involved was a noncriminal civil forfeiture offense, not punishable by imprisonment, and where the arrest was not commenced in a public place. [*State v. Rouse*, 53 Ohio App.3d 48, 51, 557 N.E.2d 1227 (10th Dist.1988); *State v. Marlow* 9th Dist. Summit No. 17400, 1996 WL 84627 (Feb. 28, 1996)].
>
> In *Rouse*, the court was faced with a defendant who had been arrested in his home without a warrant after a hot pursuit when he had committed the misdemeanor of operating a motor vehicle while intoxicated. * * * The court distinguished *Welsh* based on the nature of the underlying offense as classified by Ohio. * * * *Since Ohio had designated Rouse's crime as a misdemeanor warranting six months' imprisonment, the court determined that Rouse had not been arrested for a minor offense. Instead, Ohio's treatment of the misdemeanor as a jailable criminal offense manifested its intention to treat DUI as a "serious offense."* * * * Accordingly, Rouse had been lawfully arrested in his home for the misdemeanor under the exigent circumstances exception to the Fourth Amendment's warrant requirement. * * *
>
> While we cannot consider a first-degree misdemeanor a "serious offense" under the definition of that term in Crim.R. 2(a), we otherwise

> agree with *Rouse's* reasoning. *In essence, we reject the reasoning of the several appellate courts that have defined Welsh's "minor offense" on the basis of a crime's classification as either a felony or a misdemeanor. We decline to define all of Ohio's misdemeanors as "minor offenses" to which the exigent circumstances exception would not apply. Instead, we determine that, consistent with Welsh, the operative analysis for determining whether the underlying offense is a "minor" one for purposes of an officer's warrantless entry into a home is not whether the offense is a felony or a misdemeanor; the determinative factor is whether the offense is one that is punishable by jail or imprisonment.* * * *

(Emphasis added.) *Flinchum* at *3. *Accord Willoughby*, 11th Dist. Lake No. 2010-L-068, 2011-Ohio-2586 at ¶ 34 (finding a first-degree misdemeanor OVI offense was not a "minor offense" for constitutional purposes because it is punishable by imprisonment).

{¶ 24} The Supreme Court of Ohio subsequently affirmed the Twelfth District's decision in *Middletown v. Flinchum*, 95 Ohio St.3d 43, 765 N.E.2d 330 (2002), holding that "when officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor." *Id*. at 45. In so holding, the court noted that it was not giving "law enforcement unbridled authority to enter a suspect's residence at whim or with a blatant disregard for the constraints of the Fourth Amendment, but rather limited [it] to situations present in [*Flinchum*]." *Id*. While the Ohio Supreme Court's holding in *Flinchum* does not give any direct guidance as to

what constitutes a "minor offense," it does, however, acknowledge the fact that *Welsh* does not completely preclude the application of the exigency exception under circumstances where the crime is a misdemeanor as opposed to a felony. *Willoughby* at ¶ 30.

{¶ 25} This court followed *Flinchum*, albeit reluctantly, in *State v. Lam*, 2013-Ohio-505, 989 N.E.2d 100 (2d Dist.). *Lam* involved the hot pursuit of an offender who committed a minor-misdemeanor traffic violation, but did not specifically discuss what constitutes a "minor offense" for purposes of applying the exigent-circumstances exception.

{¶ 26} The First District Court of Appeals' decision in *State v. Robinson*, 103 Ohio App.3d 490, 659 N.E.2d 1292 (1st Dist.1995) is more similar to the present case. In *Robinson*, the police were investigating citizens' complaints regarding activity at Robinson's residence; there was no testimony as to the precise nature of the complaints. *Id*. at 493. Two plainclothes officers went to Robinson's apartment to investigate the complaints and immediately noticed the odor of burnt marijuana emanating from an unknown source. *Id*. One of the officers knocked on Robinson's door, and when Robinson opened the door, the officers detected the odor of burnt marijuana through the opening. *Id*. When Robinson saw the officers at the door with their badges displayed, Robinson attempted to close the door, but was prevented from doing so by one of the officers inserting a flashlight between the door and the doorframe. *Id*. Robinson strained to bar their entry and shouted "Get rid of the shit. * * * Police." *Id*. The officers ultimately succeeded in forcing the door open, and when they entered the apartment they observed a packaged quantity of marijuana in Robinson's shoe which had fallen off

during the struggle. *Id*. That quantity of marijuana provided the evidentiary fundament for the officer's complaint charging Robinson with minor-misdemeanor drug abuse. *Id*.

{¶ 27} With respect to exigent circumstances, the court in *Robinson* held that the odor of burnt marijuana through the open door provided probable cause only as to the commission of the offense of drug abuse involving the possession of less than 100 grams, which is classified as a minor-misdemeanor and is subject to only a fine. In relying on *Welsh*, the court in *Robinson* concluded "that the exigent circumstance premised upon the imminent destruction of evidence of the offense of minor-misdemeanor drug abuse was insufficient to overcome the presumption of unreasonableness that attached to the officers' warrantless entry into Robinson's apartment." *Id*. at 497.

{¶ 28} The court in *Robinson* also noted that its decision did not conflict with its prior decision in *State v. Reilmann*, 1st Dist. Hamilton No. C-75553, 1976 WL 189968 (July 12, 1976), which held that exigent circumstances premised on the imminent destruction of evidence justified a warrantless entry to arrest for the crime of marijuana possession under former R.C. 3719.41. Under that statute, there was a penalty of imprisonment for up to one year for possession of less than 100 grams of marijuana, thus making it a far more serious offense than it is now under R.C. 2925.11. *Robinson* at 497. In making this distinction, *Robinson* also implies that an offense is not "a minor offense" under the *Welsh* analysis if the offense is punishable by imprisonment.

{¶ 29} In this case, Officer Combs, who had 19 years of police experience, and Officer Holbrook, who had 10 years of police experience, had probable cause to believe that marijuana was present in Striks's apartment given that they detected the odor of

burnt marijuana coming from inside the apartment. *See Moore*, 90 Ohio St.3d 47 at 49, 734 N.E.2d 804 ("if the smell of marijuana, as detected by a person who is qualified to recognize the odor, is the sole circumstance, this is sufficient to establish probable cause. There need be no additional factors to corroborate the suspicion of the presence of marijuana").

{¶ 30} While *Robinson* is very similar to the present case in that the officers based their warrantless entry on the odor of burnt marijuana emanating from Striks's apartment, unlike *Robinson*, the officers in this case had more information than just the odor. Prior to going to Striks's apartment, the officers were advised by the complainant, Stephanie Rooks, that earlier in the day, she gave Striks's live-in boyfriend, Alex Philpot, $300 to purchase a quarter pound of marijuana, which is 113 grams. Therefore, upon smelling the marijuana, the officers had reason to believe that as much as 113 grams of marijuana was inside the apartment. Possession of marijuana in an amount that exceeds 100 grams but less than 200 grams is a misdemeanor of the fourth degree and carries a maximum 30-day jail term. R.C. 2925.11(C)(3)(b); R.C. 2929.24(A)(4). The trial court overlooked this piece of information in its suppression analysis.

{¶ 31} In following *Flinchum's* holding that an offense punishable by jail or imprisonment is not a "minor offense" for purposes of the *Welsh* analysis, we conclude that the limitation *Welsh* places on the exigent-circumstances exception to the warrant requirement does not apply here. This is because the officers had enough information to give them probable cause to believe that Striks was committing an offense that carried a maximum 30-day jail term.

{¶ 32} Having concluded that *Welsh* does not bar the application of the

exigent-circumstances exception, we must now determine whether the record establishes that exigent circumstances were present. "Whether exigent circumstances are present is determined through an objective test that looks at the totality of the circumstances confronting the police officers at the time of the entry." *State v. Enyart*, 10th Dist. Franklin Nos. 08AP-184, 08AP-318, 2010-Ohio-5623, ¶ 21, citing *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir.1990). The United States Supreme Court has recognized only a few emergency conditions that qualify as exigent circumstances, one of which is "imminent destruction of evidence." *Cheadle*, 2d Dist. Miami No. 00CA03, 2000 WL 966167 at *2. "[A] warrantless entry to prevent the destruction of evidence is justified if the government demonstrates: '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.' " *United States v. Lewis*, 231 F.3d 238, 241 (6th Cir.2000), quoting *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1512 (6th Cir.1988). *Accord State v. Goode*, 2d Dist. Montgomery No. 25175, 2013-Ohio-958, ¶ 18.

{¶ 33} In addition, "[s]ecuring a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Segura v. United States*, 468 U.S. 796, 810, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). *Accord Burns*, 2d Dist. Montgomery No. 22674, 2010-Ohio-2831 at ¶ 22 ("When officers secure a residence pending a search warrant, they may enter that residence").

{¶ 34} Here, Officer Combs and Officer Holbrook were aware that Striks was in the apartment and that she had immediately slammed and locked the door once she realized

the officers were outside her doorway. The officers were also aware that Philpot lived in the apartment with Striks. Before Combs gained access to the apartment, he informed Striks that he had detected the odor of burnt marijuana coming from inside her apartment and requested consent to search the premises, which she refused. Therefore, Striks knew the object of the requested search. Based on the totality of these circumstances, it was reasonable for the officers to believe that the marijuana inside Striks's apartment was in danger of being destroyed or removed if they left the residence to obtain a search warrant. Accordingly, exigent circumstances were present in this case.

{¶ 35} Given that the officers had probable cause to believe that 113 grams of marijuana was in Striks's apartment and exigent circumstances existed on the basis of imminent destruction or removal of evidence, the officers were permitted to enter the apartment without a warrant to secure the residence pending the issuance of a search warrant. As a result, the officers' warrantless entry into the apartment did not violate Striks's Fourth Amendment right against unreasonable searches and seizures.

{¶ 36} Because the officers were lawfully inside the residence when Striks made the unsolicited statement: "If I just give you the marijuana will you guys just leave?"—that statement should not have been suppressed and it was not unlawful to include it in the affidavit supporting the search warrant. Also, the fact that there was conflicting testimony as to whether the search of Striks's apartment began before or after Detective Stose arrived with the warrant is of no consequence because the record indicates that Striks voluntarily handed over the marijuana after the officers advised her that a search warrant had been obtained. Accordingly, the marijuana was not obtained pursuant to an actual search authorized by the warrant, although the officers did subsequently conduct a

search that yielded no other contraband.

{¶ 37} Even if the marijuana had been found during a search prior to the warrant's arrival, "[t]here is no formal requirement that the actual warrant arrive at the location to be searched before the search begins." *State v. Ealom*, 8th Dist. Cuyahoga No. 91140, 2009-Ohio-1073, ¶ 13, citing *State v. Swartz*, 9th Dist. Summit No. 14514, 1990 WL 131733, *3 (Sept. 12, 1990). (Other citation omitted.) Again, it was not the officers' search that yielded the marijuana. Rather Striks handed the marijuana over and this act was not in response to any unlawful conduct by the officers. Accordingly, the marijuana was lawfully obtained and should not have been suppressed.

{¶ 38} The State's sole assignment of error is sustained.

Conclusion

{¶ 39} Having sustained the sole assignment of error raised by the State, the judgment of the trial court is reversed and the matter is remanded for further proceedings.

. . . . . .

HALL, J., concurs.

FROELICH, P.J., dissenting:

{¶ 40} I dissent from the majority's conclusions that the police officers reasonably suspected something more than a minor misdemeanor offense and that exigent circum-stances existed which justified the officers' warrantless entry into Striks's home.

{¶ 41} Appellate review of a decision on a motion to suppress presents a mixed question of law and fact. A court of appeals reviews de novo a trial court's legal conclusions with respect to a motion to suppress, but defers to its factual findings so long

as the findings are supported by competent, credible evidence. *State v. Rhines*, 2d Dist. Montgomery No. 24203, 2011-Ohio-3615, ¶ 16; *Columbus v. Montgomery*, 10th Dist. Franklin No. 09AP-537, 2011-Ohio-1332, ¶ 33.

{¶ 42} The majority concludes that the police officers had probable cause to believe that marijuana in excess of 100 grams was in Striks's apartment. This conclusion by the majority assumes facts which were not in evidence and overrides the trial court's factual finding, to which we must defer, that "[t]here were no facts known to the Officers at the time they entered the property that indicated [Striks] possessed more than 100 grams" of marijuana. The trial court did not base its decision on a legal conclusion that the facts did not support a finding of probable cause, but on the factual finding that no facts existed supporting the inference that more than 100 grams of marijuana were present.

{¶ 43} According to Officer Combs, Rooks stated that she had given $300 to Philpot – not Striks – "earlier that day * * * or maybe even before that," to buy a quarter-pound of marijuana. For the sake of argument, I will assume that Rooks gave Philpot enough money to purchase 100 grams of marijuana or more, although no evidence was presented at the hearing about the typical cost of this amount of marijuana or the officers' knowledge of the same.

{¶ 44} When the officers forced their way into Striks's apartment, they did not know whether Philpot was present, when Rooks had given him the money, or whether he had, in fact, at some point in time purchased the marijuana for which the money had allegedly been given to him. Rooks had told the officers that Philpot lived at Striks's apartment and that Striks was his girlfriend. There had been no previous complaints to the police

about suspected drug activity at the apartment, and the officers did not testify that the police had had any prior interaction with Striks or any other individuals they had cause to believe were present there. Significantly, the officers did not claim to have believed that any particular amount of marijuana was present in the apartment.

{¶ 45} The trial court observed that no evidence was presented about whether Rooks, who was the source of the information that Philpot had planned to buy marijuana, had provided accurate and reliable information to the police in the past (although the smell of marijuana coming from the residence was consistent with her assertion). It is not at all clear from the record that Rooks was a credible and disinterested informant, and such a factual determination was not supported by the evidence. By the officers' accounts, Rooks had loaned Philpot $300 to purchase one-quarter pound of marijuana, of which $140 or $150 had already been repaid. Rooks stated that the marijuana was not for her. Rooks had regular interaction with Philpot; he watched their child while Rooks worked, and she had seen him to give him the money and to obtain partial repayment. However, Rooks and Philpot apparently had a somewhat contentious relationship: they had a child together, but Rooks disapproved of some of the activities in which Philpot and Striks engaged in the child's presence (she mentioned cocaine use to the officers), had to involve the police to retrieve property, and readily made statements implicating Philpot in criminal activity.

{¶ 46} In other contexts, we have discussed the need for police to corroborate information from informants of unknown reliability before acting upon it. *See, e.g., State v. Mitchell*, 2d Dist. Montgomery No. 25402, 2013-Ohio-622, ¶ 19-20; *State v. Victoria*, 2d Dist. Clark No. 2009 CA 95, 2010-Ohio-4536, ¶ 23-26. In my view, the police should

have reasonably questioned Rooks's motives and reliability, especially in light of her self-serving decision to involve the police in an attempt to recover money that she said was loaned to her child's caregiver and father for the purpose of buying drugs.

{¶ 47} Moreover, the officers did not claim to have relied on Rooks's statements about the purported purchase of marijuana by Philpot when deciding to enter Striks's apartment; rather, they relied on the smell of marijuana coming from the apartment. Even assuming that Philpot had purchased the marijuana for which Rooks allegedly loaned him money (a conclusion for which no evidence was offered), the officers had no basis to conclude that Philpot had brought any amount of marijuana, let alone more than 100 grams, to Striks's apartment. Although the smell of burnt marijuana supported the conclusion that there was some amount of marijuana on the premises, it did not support the conclusion that Philpot or any specific amount of marijuana was on the premises; it also demonstrated that some marijuana had already been smoked. I agree that the smell of marijuana, as identified by someone qualified to recognize the odor, is in most cases sufficient to establish probable cause. But establishing probable cause of the commission of a minor misdemeanor is not the same as establishing exigent circumstances. I also agree with the majority's premise that the exigent circumstances exception to the Fourth Amendment's warrant requirement can apply when the delay associated with obtaining a warrant is likely to result in concealment or destruction of evidence of certain offenses. *See State v. Johnson*, 187 Ohio App.3d 322, 2010-Ohio-1790, 931 N.E.2d 1162 (2d Dist.); *Cheadle*, 2d Dist. Miami No. 00CA03, 2000 WL 966167. "An urgent need to prevent evidence from being lost or destroyed may constitute an exigent circumstance, particularly where drugs are involved." *Johnson* at ¶

14, citing *State v*. *Motley,* 9th Dist. Summit No. 24182, 2008-Ohio-6937, ¶ 24.

{¶ 48} But even with probable cause, officers may not enter a private residence without a warrant unless an exception – in our case, exigent circumstances – exists. *Payton v. New York*, 445 U.S. 573, 587-588, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The officers here did not testify to any indicia of the imminent destruction of evidence, such as sounds of movement inside the apartment or the flushing of toilets. Coupled with the lack of any knowledge of prior drug activity on the premises, the evidence does not support the conclusion that the destruction of evidence was imminent, creating exigent circumstances. *See State v. Lam*, 2013-Ohio-505, 989 N.E.2d 100 (2d Dist.).

{¶ 49} Further, the police cannot by their own conduct create an exigency and then use that exigency to justify a warrantless entry. *See State v. Sims*, 127 Ohio App.3d 603, 713 N.E.2d 513 (2d Dist.1998); *State v. Jenkins*, 104 Ohio App.3d 265, 661 N.E.2d 806 (1st Dist.1995); Katz, Ohio Arrest, Search & Seizure, Section 9:5 (2008). In Striks's case, the police officers arguably created the need (if any existed) to prevent the destruction of evidence by confronting the residents about their suspicion of the presence of drugs. If the officers had simply asked about the return of Rooks's property, as was their original purpose, without mentioning the odor of marijuana, they might immediately thereafter have obtained a warrant based on probable cause, without risk, or at a much lower risk, of the destruction of evidence. Viewed differently, if Striks or any other occupant were going to destroy evidence, they would presumably have done so between the time when Striks opened the door, slammed it closed, and later voluntarily returned to the hallway.

{¶ 50} *Middletown v. Flinchum,* 12th Dist. Butler No. CA99-11-193, 2000 WL

1843199 (Dec. 18. 2000), suggests that the demarcation between a serious and minor offense, for purposes of whether the exigent circumstances exception to the warrant requirement applies, is brightly drawn on the basis of whether the suspected offense is one for which jail time can be imposed, rather than whether the offense is a felony or a misdemeanor. The Supreme Court's review of the appellate opinion did not address the distinction between misdemeanor and felony offenses or between jailable and non-jailable offenses. *Middletown v. Flinchum*, 95 Ohio St.3d 43, 765 N.E.2d 330 (2002). Rather, the court held that "when officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor." *Id*. at 45. The Court endorsed the reasoning that, "[w]hen a citizen has knowingly placed himself in a public place, and valid police action is commenced in that public place, the citizen cannot thwart police action by fleeing into a private place." *Id*., citing *Nebraska v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978), paragraph two of the syllabus. This allows hot pursuit of ***any*** offense.

{¶ 51} However, even accepting the line drawn by the 12th District in *Flinchum* and by the majority in this case, the officers did not reasonably suspect any offense for which jail time could be imposed, and the exigent circumstances exception did not apply, regardless of which definition of a "minor offense" is used.

{¶ 52} I would find that the officers did not have reasonable grounds to believe that there was marijuana on the premises the possession of which amounted to more than a minor misdemeanor offense and that exigent circumstances did not exist to justify entry into Striks's apartment. I would affirm the trial court's decision suppressing the evidence

procured as a result of the unlawful entry.

. . . . . .

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