[Cite as *State v. Rice*, 2010-Ohio-531.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-CA-0063
VICKEY L. RICE	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 08-CR-474
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 16, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH WAYNE OSWALT By: EARL FROST Licking County Prosecutor 20 S. 2nd St., 4th Fl. Newark, OH 43055	ROBERT C. BANNERMAN Box 77466 Columbus, OH 43207-0098

Gwin, P.J.

{¶1} Appellant Vickey L. Rice appeals her conviction in the Licking County Court of Common Pleas for one count of possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(c), a felony of the third degree and one count of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree. The appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On June 28, 2008, James Eckard called the Newark Police Department to request that an officer accompany him to the home of the appellant. Mr. Eckard requested the officer's presence while he removed his personal property from the residence. Mr. Eckard had also telephoned appellant and informed her of his plan.

{¶3} Mr. Eckard had been in jail for one hundred days prior to entering a halfway house on May 30, 2008. For approximately two months prior to going to jail, Mr. Eckard had been living at his mother's house. Mr. Eckard had only stayed at the appellant's residence for one month prior to going to live with his mother. He left the appellant's residence and moved in with his mother because he and appellant ended their relationship. Mr. Eckard did not sign any rental agreements for the residence. He did not have any keys to the appellant's home.

{¶4} The police officers arrived at the appellant's residence before Mr. Eckard. The officers knocked on appellant's door and informed appellant of the reason for their presence. A short time later, appellant, his daughter and the daughter's boyfriend arrived at appellant's home. Appellant and Mr. Eckard began to argue and everyone proceeded to enter the residence. The police alleged that appellant appeared to be

animated, fidgety, and displayed other signs of narcotics use. Police inquired of appellant as to whether she was using drugs. Appellant responded that she was not.

{¶5} While inside the residence, the officers notice what appeared to be a bag of crack cocaine in the living room next to the television. Appellant denied the drugs were hers and gave the officers permission to search her home. In addition to the drugs that were found in plain view, the officers also recovered a bag of crack cocaine from inside a purse, digital scales and another bag of white powder, a metal rod, metal screens and a chore boy. These items were not in plain view.

{¶6} Upon testing, the contraband was found to be Schedule II Controlled substances: 6.2 grams of Crack Cocaine and .17 grams of Methamphetamine.

{¶7} Appellant was indicted on two felony counts: Count 1, Possession of Crack Cocaine, in violation of R.C. 2925.11(A)(C)(4)(c), a felony of the 3rd degree, punishable by a maximum term of 5 years in prison, and a maximum fine of $10,000; Count 2, Aggravated Possession of Drugs, in violation of R.C. 2925.11(A) (C) (1) (a), a felony of the 5th degree, punishable by a maximum term of 1 year in prison, and a maximum fine of $2,500. Each Count carried a mandatory driver's license suspension of between 6 months and 5 years.

{¶8} Appellant filed a motion to suppress; the State filed a response, and on October 21, 2008, the trial court conducted an evidentiary hearing on the motion. By Judgment Entry filed January 5, 2009, the trial court overruled appellant's motion to suppress.

{¶9} Appellant then changed her not guilty plea to one of no-contest. The trial court found appellant guilty and sentenced her to 2 years on Count 1 and 9 months on

Count 2, with each count running consecutively to each other, and consecutively with Licking County Common Pleas Court case No. 08-CR-0524. Appellant was also placed on 3 years of post-release control.

{¶10} Appellant timely appealed and raises the following three assignments of error for our consideration:

{¶11} "I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE.

{¶12} "II. WITH RESPECT TO JOINT PROPERTY APPELLANT'S CONVICTION FOR POSSESSION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND/OR INSUFFICIENT AS A MATTER OF LAW.

{¶13} "III. APPELLANT'S FOURTH AMENDMENT AND OHIO ARTICLE 1 SECTION 14 RIGHTS WERE VIOLATED."

I & III.

{¶14} In her first assignment of error, appellant argues that the trial court erred in denying her motion to suppress. In her third assignment of error appellant contends that her fourth amendment rights were violated. Because we find the issues raised in appellant's first and third assignments of error are closely related, for ease of discussion we shall address the assignments of error together.

{¶15} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v.*

Guysinger (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 620 N.E.2d 906; *Guysinger.* As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶16} The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. *Illinois v. Rodriguez* (1990), 497 U.S. 177, 181, 110 S.Ct. 2793, (citing *Payton v. New York* (1980), 445 U.S. 573, 100 S.Ct. 1371, and *Johnson v. United States* (1948), 333 U.S. 10, 68 S.Ct. 367). The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, Id. (citing *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041), or "from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected," *United States v. Matlock*

(1974), 415 U.S. 164, 171, 94 S.Ct. 988. See also *United States v. Ayoub* (6th Cir 2007), 498 F.3d 532, 537.

{¶17} In *United States v. Matlock* (1974), 415 U.S. 164, 94 S.Ct. 988, the United States Supreme Court held that a third party with common authority over the premises can consent to a search. In fn. 7, the *Matlock* court explained "common authority" as follows:

{¶18} "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, see *Chapman v. United States,* 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord could not validly consent to the search of a house he had rented to another), *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (night hotel clerk could not validly consent to search of customer's room) 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."

{¶19} This rule was extended in *Illinois v. Rodriguez* (1990), 497 U.S. 177, 110 S.Ct. 2793, wherein the United States Supreme Court held at paragraph two of the syllabus, "A warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not."

{¶20} As noted in *Rodriquez* at 186, the standard is one of reasonableness:

{¶21} "As we put it in *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949):

{¶22} "'Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.'

{¶23} "We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape."

{¶24} The *Rodriguez* court further held at 188-189:

{¶25} "As with other factual determinations bearing upon search and seizure, determination of consent to enter must 'be judged against an objective standard: would the facts available to the officer at the moment ... "warrant a man of reasonable caution in the belief" ' that the consenting party had authority over the premises? *Terry v. Ohio,* 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the

search is valid." See, *State v. Shaffer*, Licking App. No. 07CA79, 2008-Ohio-3116 at ¶ 18-23.

{¶26} In the case at bar, the events took place on June 28, 2008. Mr. Eckard had been in jail for one hundred days prior to being released to a halfway house on May 30, 2008. (T. at 11). For approximately two months prior to going to jail, Mr. Eckard had been living at his mother's house. (T. at 16). Mr. Eckard only stayed at the appellant's residence for one month prior to going to live with his mother. (T. at 8; 11). He left the residence and moved in with his mother because he and appellant ended their relationship. (T. at 16). Mr. Eckard did not sign any rental agreements for the residence. (T. at 12). He did not have any keys to the home. (T. at 10).

{¶27} Turning first to the consent to enter, we find it clear from the record that Mr. Eckard had no authority over the premises. The evidence established that Mr. Eckard and appellant did not share joint access or control of appellant's home.

{¶28} However, we agree with the court in *Akron v. Harris* (1994), 93 Ohio App.3d 378, 638 N.E.2d 633, that where the intent of the officers was not to conduct a search, but only to question a resident, the consent of a third party to enter the house should not be held to the same standard as the consent of a third party to a warrantless search of the house. *State v. Chapman* (1994), 97 Ohio App.3d 687, 690, 647 N.E.2d 504, 505-506.

{¶29} Using a standard of reasonableness, we find nothing inappropriate about the police's entering an apartment at the request of a person who has gone there to retrieve his personal belongings. Central to our holding, we note that the officers had arrived at appellant's home prior to the arrival of Mr. Eckard. Appellant did not ask the

officers to leave, nor did she suggest to them that their presence was unauthorized or unwanted. Appellant did not inform the officers that Mr. Eckard's visit to the residence was unauthorized or unwanted. She took no action that would convey to the officers that Mr. Eckard was not permitted to enter the residence to obtain his personal property. (T. at 20; 25-26). In fact, Mr. Eckard had telephoned appellant to tell her that he was coming to retrieve his belongings. (T. at 35). Appellant and her friend were in the process of packing Mr. Eckard's possessions when the police arrived. (T. at 28; 36). Upon review, we find the facts to be sufficient to have created a reasonable belief that Mr. Eckard had the right to give consent to the officers to enter the home.

{¶30} We note, however, that giving consent to enter does not thereby bestow consent to search the premises. *Lakewood v. Smith* (1965), 1 Ohio St.2d 128, 30 O.O.2d 482, 205 N.E.2d 388; *Columbus v. Copp* (1990), 64 Ohio App.3d 493, 581 N.E.2d 1177; *State v. Chapman*, supra.

{¶31} In *State v. Akron Airport Post 8975* (1985), 19 Ohio St.3d 49, 482 N.E.2d 606, the Ohio Supreme Court set forth the following judicially recognized exceptions to the search warrant requirement: (1) a search incident to a lawful arrest; (2) consent thereby signifying a waiver of their constitutional rights; (3) the stop and frisk doctrine; (4) hot pursuit; (5) probable cause to search and the presence of exigent circumstances; and (6) the plain view doctrine. Id. at 51, 482 N.E.2d 606.

{¶32} [I]n order to qualify under the plain view exception, it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the

evidence was immediately apparent." *State v. Williams* (1978), 55 Ohio St.2d 82, 85, 377 N.E.2d 1013.

{¶33} In the case at bar, we have already found the officers' entry into the residence was lawful. Second, the discovery of the crack cocaine was inadvertent. (T. at 30 – 31). Finally, the incriminating nature of this evidence was immediately apparent. (Id.).

{¶34} We note that in the case at bar, the police did not conduct a search or seize any property that was not in plain view before obtaining the appellant's consent to search. (T. at 31). There was no evidence presented that appellant was coerced or believed that she could not refuse either the officers entry to her residence or their request to search the residence. Rather, Pamela Gill, appellant's friend, testified that at no time did appellant give the officer's consent to search the residence. (T. at 37 - 38). Further, she testified that there was no crack cocaine in the living room before the officers entered the residence. (T. at 37 – 38; 39). Mr. Eckard's daughter likewise testified that appellant did not consent to a search of the residence; rather the officers just conducted a search of the house on their own. (T. at 43 - 44).

{¶35} Matters of weight and credibility are for the trier of fact, including at suppression hearings. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583, 584. We will not disturb the trial court's decision to believe the police officers. Conflicts in the evidence are for the trier of fact to resolve. *State v. DeHass,* supra.

{¶36} Based upon the foregoing, we find the trial court did not err in overruling appellant's motion to suppress.

{¶37} Appellant's first and third assignments of error are overruled.

II.

{¶38} In her second assignment of error, appellant maintains that the trial court erred in finding her guilty because the evidence was insufficient to demonstrate that she possessed the drugs that were found inside her home. We disagree.

{¶39} The Ohio Supreme Court has held that "[w]here an indictment, information, or complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense. *State v. Bird* (1998), 81 Ohio St.3d 582, 584. (Citing *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 425, 662 N.E.2d 370, 373).

{¶40} If there had been a trial, the state would have had to prove beyond a reasonable doubt all elements of the indictment, including that appellant possessed the drugs. However, with a no contest plea, the state was relieved of these obligations. The state only had to allege sufficient facts to charge the violations contained in the indictment. See *Mascio,* 75 Ohio St.3d at 425, 662 N.E.2d at 373; *State v. Bird* 81 Ohio St.3d at 584, 692 N.E.2d at 1015.

{¶41} Further, in *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 424, 662 N.E.2d 370, the Court held that "[t]he procedure specified in Crim.R. 11(C) does not envision an affirmative-defense hearing or mini-trial." Thus, the *Mascio* court concluded, "[a]lthough the trial court retains discretion to consider a defendant's contention that the admitted facts do not constitute the charged offense, the defendant who pleads no contest waives the right to present additional affirmative factual allegations to prove that he is not guilty of the charged offense." Id. The trial court thus possesses discretion to

determine whether the facts alleged in the indictment, information, or complaint are sufficient to justify conviction of the offense charged. Id. at 423, 662 N.E.2d at 372.

{¶42} In *State v. Bird*, supra, the charge stemmed from an incident where appellant, who is infected with the human immunodeficiency virus ("HIV"), spat in a police officer's face. The appellant argued that the indictment was insufficient to charge him with the offense of felonious assault with a deadly weapon because it failed to establish the existence of essential elements of the crime, *i.e.,* that saliva is a deadly weapon, and that appellant knowingly caused or attempted to cause the officer physical harm. The appellant in *Bird,* like the appellant in the case at bar, entered a plea of no contest to the charge. The Ohio Supreme Court found that by pleading no contest to the indictment, the appellant was foreclosed from challenging the factual merits of the underlying charge. The Court noted, "[i]t is unnecessary to decide whether the human immunodeficiency virus may be communicated through saliva and whether saliva may be considered a deadly weapon. By pleading no contest, appellant admitted the truth of the allegations in the indictment." 81 Ohio St.3d 585, 692 N.E.2d at 1016.

{¶43} In the case at bar, the appellant was charged with Possession of Crack Cocaine and Aggravated Possession of Drugs (Methamphetamine). The indictment language mirrors the statutory language. Thus, it is sufficient to charge the offenses. Crim.R. 7(B). *State v. Bird*, supra 81 Ohio St.3d at 585, 692 N.E.2d at 1016.

{¶44} Additionally, at the sentencing hearing the assistant prosecutor recited facts sufficient to state the two crimes had occurred, including that the appellant "did knowingly obtain, possess or use, Crack Cocaine in an amount equal to or exceeding 5 grams, but less than 10 grams. Further, she did knowingly obtain, possess or use,

Methamphetamine, in an amount less than bulk." (Sent T. at 10). When asked by the trial court, the appellant agreed with the facts stated by the assistant prosecutor (Sent. T. at 13). The trial court advised the appellant that based on the facts, the court would find her guilty and she then asked the court to accept her plea (Sen. T. at 14-16).

{¶45} Being an admission of the truth of the facts on which the charges against her are based, a no contest plea forecloses a defendant's right to challenge the truth of those facts in a subsequent appeal from her resulting conviction and sentence. *State v. Bird* (1998), 81 Ohio St.3d 582, 584, 692 N.E.2d 1013; *State v. Evans,* Montgomery App. No. 21669, 2007-Ohio-6587 at ¶ 10. By pleading no contest and foregoing a trial appellant lost her opportunity to raise at trial that she did not possess the drugs. She, therefore, did not preserve that issue for appeal.

{¶46} Appellant's second assignment of error is dismissed.

{¶47} The judgment of the Licking County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE

WSG:clw 0121

[Cite as *State v. Rice*, 2010-Ohio-531.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
VICKEY L. RICE	:	
Defendant-Appellant	:	CASE NO. 09-CA-0063

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE