[Cite as *State v. Perry*, 2015-Ohio-779.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case Nos. 13CA56, 14CA27, 14CA28
	:	
RONNIE PERRY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case Nos. 2012 CR 0421 and 2012 CR 832
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	March 2, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI COUCH PAGE RICHLAND CO. PROSECUTOR JOHN C. NIEFT 38 South Park St. Mansfield, OH 44902	ROBERT GOLDBERGER 10 West Newlon Place Mansfield, OH 44902

Delaney, J.

{¶1} Defendant-appellant Ronnie Perry appeals from the March 5, 2013 Amended Sentencing Entry of the Richland County Court of Common Pleas and the decision of the trial court overruling his motion to suppress. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose when the Metrich narcotics unit of the Mansfield Police Department received tips regarding shipments of marijuana from Los Angeles to Mansfield. According to informants, the marijuana was delivered to several different addresses throughout Mansfield to be received by Layton Dawes and appellant, who sometimes used other people to accept delivery.

June 18, 2012: Marijuana Delivered to Hedges Address

{¶3} Metrich intercepted a package intended for delivery to 248½ Hedges Street through U.P.S. A dog sniff indicated on the package, a search warrant was obtained, and the package was opened to reveal over 17 pounds of marijuana.

{¶4} On June 18, 2012, Metrich prepared a controlled delivery of the package to the Hedges address: an undercover officer posed as a U.P.S. delivery person and delivered the package which was accepted by an individual named Hettinger. Metrich had outfitted the package with a G.P.S. and an alarm to indicate if the package was opened. The alarm did not go off, indicating the package remained unopened.

{¶5} Approximately fifteen minutes later an orange car arrived; appellant was identified as the sole occupant. Hettinger brought the package out to the car and placed it on the passenger seat. Metrich officers followed appellant as he drove to an auto repair garage. They observed appellant standing outside a maroon S.U.V. with a

female, speaking to two white males. Based on the G.P.S. signal, officers realized the package was moving and determined it was now in the maroon S.U.V.

{¶6} The maroon S.U.V. was traffic-stopped a short distance away. The female seen earlier was driving and appellant was the passenger. The package was in the back seat behind the driver.

{¶7} Appellant was arrested and released on bond.

Marijuana Delivered to Grace Address

{¶8} Metrich was again tipped off that appellant would be receiving a package of marijuana from Los Angeles, this time via FedEx ground delivery. A FedEx driver reported he had delivered suspicious packages to 308 Grace Street and brought one such package to Metrich. The package was opened pursuant to a search warrant and found to contain marijuana.

{¶9} A controlled delivery was made to 308 Grace Street. This time the package was opened upon delivery to Brian Hensley.

Marijuana Delivery to Wayne Street Address

{¶10} Metrich became aware of yet another package of marijuana coming via the U.S. Postal Service. This package was addressed to “Advanced Saterlite (*sic*) Systems” at 354 Wayne Street. After a federal search warrant was obtained and the package was discovered to contain marijuana, a controlled delivery was made to the Wayne Street address. An anticipatory search warrant was executed at the residence when the package alarm went off, indicating it had been opened. Metrich detectives found Layton Dawes running through the back yard at the residence and apprehended him. The opened package of marijuana was found in the kitchen.

Search Warrant Obtained for 806 Greenfield Drive

{¶11} Layton Dawes lived at 806 Greenfield Drive. Metrich obtained a search warrant for this residence, which is a side-by-side duplex: Dawes lives in 806 and appellant lives in 804.

{¶12} The search warrant was executed at 806 Greenfield. Metrich found over 200 pounds of marijuana and paperwork from Los Angeles referencing "Saterlite (*sic*) Systems." The marijuana was packaged in vacuum-sealed bricks and stored in cardboard boxes and trash bags.

Search of 806 Leads to Discoveries in 804

{¶13} While executing the search warrant at 806 Greenfield, detectives located a crawlspace in the basement below the stairs which contained boxes of bricks of marijuana. Upon further investigation, Detective Tidaback noticed a hole in the wall of the crawlspace. Partially covering the hole was a piece of unattached paneling. Tidaback could see into the connected crawlspace of appellant's unit, 804 Greenfield. He observed and photographed trash bags and brown cardboard boxes in the 804 crawlspace similar to those found in 806.

{¶14} Upon viewing the boxes and bags through the hole in the crawlspace, Metrich obtained a search warrant for 804 Greenfield and upon execution found a large amount of marijuana and cash. Medication in appellant's name was found in a bedroom along with mail and utility bills. Investigators also found paperwork relating to "Advanced Saterlite (*sic*) Systems" and 354 Wayne Avenue.

Indictment, Trial, and Conviction

{¶15} In Richland County Court of Common Pleas Case Number 2012 CR 421, appellant was charged by indictment with one count of marijuana possession in an amount greater than 5000 grams but less than 20,000 grams [R.C. 2925.11(A) and (C)(3)(e)] and one count of trafficking in marijuana [R.C. 2925.03(A)(2) and (C)(3)(e)], both felonies of the third degree. In Case Number 2012 CR 832, appellant was charged by indictment with possession of marijuana in an amount greater than 40,000 grams [R.C. 2925.11(A) and (C)(3)(g)], a felony of the second degree. Appellant entered pleas of not guilty in both cases.

{¶16} Appellee moved to consolidate appellant's two cases and to join them with those of codefendant Layton Dawes, which appellant opposed. The trial court consolidated appellant's two cases but declined to join the cases with those of Dawes.

{¶17} Appellant moved to suppress the evidence discovered pursuant to Metrich's observations through the hole in the crawlspace. A hearing was held before the trial court and the motion to suppress was overruled.

{¶18} The case proceeded to trial by jury and appellant was found guilty as charged. In Case Number 2012 CR 421, Count I merged into Count II and appellant was sentenced to a prison term of 15 months (later amended to 12 months). In Case Number 2012 CR 832, appellant was sentenced to a prison term of eight years to be served consecutively to the sentence in 2012 CR 421.

Note on Appellate History

{¶19} A timely notice of appeal was filed from 2012 CR 421 but not from 2012 CR 832. This appeal was filed as 2013 CA 56 and was later dismissed for want of prosecution. We subsequently allowed appellant to reopen the appeal.

{¶20} Appointed appellate counsel then filed two appeals: 2014 CA 27 from trial court Case Number 2012 CR 832 and 2014 CA 28 from trial court Case Number 2012 CR 421. Appellee notes the appeal from 2012 CR 832 is untimely but in light of the intertwined procedural history concedes we should consider "the merits of all issues for cases 2012 CR 421 and 2012 CR 832."

{¶21} Appellant now appeals from the trial court's decision overruling his motion to suppress and raises one assignment of error:

ASSIGNMENT OF ERROR

{¶22} "THE COURT ERRED IN NOT SUPPRESSING THE EVIDENCE FOUND PURSUANT TO THE WARRANT ISSUED ON NOVEMBER 19, 2012 FOR THE SEARCH OF 804 GREENFIELD DRIVE."

ANALYSIS

{¶23} Appellant argues the search of 804 Greenfield was illegal because officers were not permitted to look into 804 from their position in the adjoining unit. We disagree.

{¶24} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030

(1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶25} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). 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. See*, Williams*, supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a 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*, 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

{¶26} Appellant asserts he had a reasonable expectation of privacy in the crawlspace and argues Metrich investigators effectively "searched" 804 before obtaining a search warrant because they looked through the hole into the crawlspace. We

disagree with appellant's premise and find that the officer's "look" into the crawlspace was not a search.

{¶27} Our Fourth Amendment analysis is triggered by the officer's "look" into appellant's crawlspace. The state is prohibited from making unreasonable intrusions into areas where people have legitimate expectations of privacy without a search warrant, including a person's home and the curtilage surrounding it. *State v. Morgan*, 5th Dist. Fairfield No. 13-CA-30, 2014-Ohio-1900, ¶ 33, citing *State v. Vondenhuevel*, 3rd Dist. Logan 8–04–15, 2004–Ohio–5348, ¶ 10. The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶28} The Ohio Supreme Court has recognized seven exceptions to the search warrant requirement: (a) [a] search incident to a lawful arrest; (b) consent signifying waiver of constitutional rights; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search, and the presence of exigent circumstances; (f) the plain-view doctrine; or (g) an administrative search. *State v. Akron Airport Post No. 8975*, 19 Ohio St.3d 49, 51, 482 N.E.2d 606 (1985), certiorari denied 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 777 (1986); *Stone v. Stow*, 64 Ohio St.3d 156, 164, 593 N.E.2d 294, fn. 4 (1992).

{¶29} Metrich officers were legally present in 806 Greenfield pursuant to a search warrant and observed contraband in 804 from their vantage point in the adjoining unit. The contraband was in plain view. In *Harris v. United States*, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), the United States Supreme Court held

"it has long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." In *Texas v. Brown*, 460 U.S. 730, 738, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), then-Justice Rehnquist explained the plain view doctrine does not set limitations on "open view" sightings:

> The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming there is probable cause to associate the property with criminal activity.* * * "[P]lain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. (Citations omitted.)

{¶30} In Katz, *Ohio Arrest, Search and Seizure*, Section 13.01, at 214 (1997 Ed.), a two-part test is set forth that must be met to justify a plain view search and seizure: the "intrusion affording the plain view must be lawful" and the "incriminating nature of the evidence must be immediately apparent to the seizing authority." In this case, Metrich investigators were lawfully present in 806 Greenfield pursuant to a search warrant which permitted them to look anywhere in the residence where drugs might be found. They were thus permitted to enter the crawlspace of 806 and there encountered the hole through which they observed incriminating objects inside 804 Greenfield consistent with contraband, to wit, cardboard boxes and trash bags similar to packaging materials of marijuana found in 806.

{¶31} We disagree with appellant's premise that his privacy interest in the crawlspace is paramount. The existence of a hole permitting a view from the adjoining

unit means the expectation of privacy is lessened. See, *Mallory v. City of Riverside*, 35 F.Supp.3d 910 (S.D.Ohio Aug. 4, 2014). The Fourth Amendment does not require law enforcement to disregard evidence readily visible through the hole in the crawlspace. In *United States v. Elkins*, 300 F.3d 638, 654-55 (6th Cir.2002), an officer was lawfully present on a path outside a building when he peered through a pipe protruding from the building into the interior, wherein he recognized contraband. In overruling the trial court's decision to suppress the evidence, the Sixth Circuit stated the following:

> The next issue is the permissibility of the look itself. * * * *. Officer Bell used no "unique sensory device" to "penetrate the walls" of 2896 Walnut Grove; he simply looked through an exposed gap in the wall with his unaided eye. [Appellants] do have a reasonable expectation of privacy in the interiors of their businesses, but that fact does not insulate those spaces against plain view observation. In *Dunn* the Supreme Court assumed that the barn into which the police peered was protected against warrantless physical entry, but held that it was not a search for the police to shine a flashlight through a net-covered opening above the barn's front gate and scrutinize its interior. [Citation omitted.] Any contortions Bell made to peer through the opening did not change the "plain view" character of his observation. The fact "that the policeman may have to crane his neck, or bend over, or squat, does not render the [plain view] doctrine inapplicable, so long as what he saw would have been visible to any curious passerby." *James v. United States*, 418

> F.2d 1150, 1151 n. 1 (D.C.Cir.1969). See also *Texas v. Brown*, 460 U.S. 730, 740, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion) (concluding that since "[t]he general public could peer into the interior of [an] automobile from any number of angles[,] there is no reason [an officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen"); *United States v. Pace*, 955 F.2d 270, 273, 275 (5th Cir.1992) (holding that peering through small opening in the back of locked barn was not a search); *United States v. Wright*, 449 F.2d 1355 (D.C.Cir.1971) (per curiam) (holding that shining a flashlight through a gap between defendant's closed garage doors was not a search). Since we earlier concluded that Bell also did not violate a Fourth Amendment privacy interest by standing where he stood when he made the observation, his look through the gap was not a search requiring a warrant. See *Dunn*, 480 U.S. at 304–05. * * * *.

{¶32} In the instant case, Tidaback's "look" through the hole was not a search. It did permit him to see cardboard boxes and garbage bags which he recognized as similar to the packaging of marijuana found in 806.

{¶33} We find the trial court properly overruled appellant's motion to suppress. The sole assignment of error is thus overruled.

CONCLUSION

{¶34} Appellant's sole assignment of error is overruled and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.