[Cite as *State v. Miller*, 2011-Ohio-1545.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-10-027

Appellee — Trial Court No. 09-CRB-03376
09-CRB-03379

v.

Aaron Miller
Douglas Reining — **DECISION AND JUDGMENT**

Appellants — Decided: March 31, 2011

* * * * *

Matthew L. Reger, Prosecutor for City of Bowling Green,
for appellee.

Carrie A. Connelly, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶1} Aaron Miller and Douglas Reining appeal their convictions in Bowling Green Municipal Court to underage consumption of alcohol, violations of Bowling Green

Code of Ordinances 96.02(D). Their convictions are based upon no contest pleas. Appellants entered the pleas after the trial court overruled their joint motion to suppress evidence.

{¶2} Under the motion, appellants sought first, to suppress all evidence gained through the search of the Delta Tau Delta fraternity house at Bowling Green State University ("BGSU"), without a warrant, by a campus police officer based upon claimed illegality of the search. Second, appellants sought to suppress statements made by them to the campus police officer based upon the claim that the statements were made while in custody and without prior *Miranda* warnings. See *Miranda v. Arizona* (1966), 384 U.S. 436.

{¶3} On the night of the search, the campus police officer issued citations charging both appellants with underage consumption of alcohol, a violation of R.C. 4301.69(E)(1) and a first degree misdemeanor, possession of marijuana, a violation of R.C. 2925.11(C)(3)(a) and a minor misdemeanor, and possession with the intent to use drug paraphernalia (grinder for marijuana), a violation of R.C. 2925.14(C)(1) and a fourth degree misdemeanor. After appellants pled no contest to the underage consumption charge, the trial court dismissed the other two charges.

{¶4} Appellants assert one assignment of error on appeal:

{¶5} "Assignment of Error

{¶6} "The trial court erred by denying Appellants' respective motions to suppress, as the evidence against them was obtained in violation of their rights afforded by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 14 and 10 of the Constitution of the State of Ohio."

{¶7} Crim.R. 12(I) provides:

{¶8} "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

{¶9} "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. An appellate court reviews a trial court's application of the law de novo. Id.; *State v. McNamara* (1997), 124 Ohio App.3d 706, 710.

{¶10} Search

{¶11} Christopher Pearcy, a campus police officer at BGSU, testified at the hearing on the motion to suppress. He stated that on December 8, 2009, he was on patrol when he saw two males standing on the second floor balcony of the Delta Tau Delta

fraternity house. He also saw smoke coming from their direction. Entry to the balcony is only available from the second floor of the building. Officer Pearcy admitted that he did not observe any criminal conduct by either of the individuals at any time before he entered the building.

{¶12} The balcony is located above a side entrance on the second floor and east end of the building. Officer Pearcy did not approach the area from the ground and made no attempt to speak to the individuals from the ground before entering the building.

{¶13} Pearcy unlocked the front door to the fraternity house by using an electronic key (personal entry device or "PED") and entered at approximately 12:06 a.m. He walked directly to the second floor and gained entry onto the balcony through a computer lab. Pearcy testified that he immediately smelled burnt marijuana upon walking onto the balcony and that he saw one of the appellants holding a pipe. Pearcy took possession of the pipe. The two individuals on the balcony were appellants.

{¶14} While in the fraternity house, Pearcy also observed an open container of beer and a grinder, drug paraphernalia, in a common room located on the first floor of the fraternity house. During the course of his investigation at the fraternity house, Pearcy questioned appellants concerning marijuana, drug paraphernalia, and underage drinking of beer that night. Appellants made incriminating statements to Pearcy during questioning.

{¶15} In *Athens v. Wolf* (1974), 38 Ohio St.2d 237, the Ohio Supreme Court recognized that with respect to intrusions by law enforcement officials, the Fourth Amendment's protections against unreasonable searches and seizures extends to university dormitory rooms. Id. at paragraph one of the syllabus. Here, appellants object to Officer Pearcy's warrantless entry into the fraternity house itself, claiming a reasonable expectation of privacy even in common areas of the residence. Although the Ohio Supreme Court considered the legality of a search of a fraternity house in *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141, the case did not address the issue of the scope of Fourth Amendment protections afforded individual residents of a fraternity house in common areas.

{¶16} In determining whether the Fourth Amendment protects against a search, "the rule that has emerged * * * is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States* (1967), 389 U.S. 347, 361 (Harlan, J., concurring). See *Rakas v. Illinois* (1978), 439 U.S. 128, 143-144; *State v. Williams* (1995), 73 Ohio St.3d 153, 166-167.

{¶17} At the time of the search, only six or seven individuals lived at the Delta Tau Delta fraternity house. Access to the building by the general public was restricted. The building has two entrances and they remained locked. Entry to the fraternity house required use of a PED. Doors locked automatically after use. The only non-resident

issued a PED was the fraternity president. Others, including non-resident fraternity members, gained entry to the building only by knocking at the door or by accompanying someone with a PED. Guests were required to be accompanied at all times, particularly after midnight.

{¶18} Appellants testified that residents to the fraternity house did not live in self-contained living units. They shared traditional living areas linked by common hallways and corridors.

{¶19} Appellants argue that the fraternity house should not be treated as a private home because the fraternity house is owned by the university and subject to the student conduct code and university health and safety regulations. The state contends that Fourth Amendment protections should extend solely to a resident's room. A state university cannot require students to waive their Fourth Amendment protections against unreasonable intrusions by law enforcement officials in order to live in university housing. *State v. Ellis*, 2d Dist. No. 05CA78, 2006-Ohio-1588, ¶13; *Piazzola v. Watkins* (5th C.A. 1971), 442 F.2d 284, 289-290. See *Wolf*, 38 Ohio St.2d at 240.

{¶20} Appellants request the court to follow the decision of the U.S. Court of Appeals for the Seventh Circuit in *Reardon v. Wroan* (7th C.A. 1987), 811 F.2d 1025, and rule that a fraternity house is to be treated the same as a home for purposes of Fourth Amendment rights:

{¶21} "[I]t is necessary to address briefly whether the fraternity residence is afforded the same Fourth Amendment status as a home under the protections of *Payton.* More specifically, there is some question as to whether the hallway to the fraternity house where the plaintiffs were arrested is comparable, under a Fourth Amendment analysis, to the common areas of apartment buildings where the cases have held that privacy interests are not protected under Payton. * * * Although there are certain similarities to the apartment building cases, fraternity residents clearly have a greater expectation of privacy in the common areas of their residence than do tenants of an apartment building. As the district court noted, fraternity members could best be characterized as 'roommates in the same house,' not simply co-tenants sharing certain common areas. Moreover, a fraternity, by definition, is intended to be something of an exclusive living arrangement with the goal of maximizing the privacy of its affairs." Id. at 1028, fn. 2 (Citations omitted.)

{¶22} At the time of the search, Delta Tau Delta fraternity house provided residence for six or seven students with access to the building by the public restricted at all times. We agree with the *Reardon* court that the shared living arrangement at a fraternity house supports treating residents as "roommates in the same house." We conclude that appellants met their burden of showing a reasonable expectation of privacy throughout the house and that the fraternity house should be treated as a home for

purposes of Fourth Amendment protections against unreasonable searches and seizures by law enforcement officials.

{¶23} "The 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' *United States v. United States Dist. Court for E. Dist. Of Michigan, S. Div.* (1972), 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752. Warrantless entries of residences are presumptively unreasonable, subject to only a few established, well-delineated exceptions. *Payton v. New York* (1980), 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639." *State v. Tallent*, 6th Dist. No. L-10-1112, 2011-Ohio-1142, ¶ 12.

{¶24} The state argues that appellants had no reasonable expectation of privacy while on the balcony to the fraternity house because their activities were observable from a public street, citing *State v. Ritchie* (Aug. 25, 2000), 2d Dist. No. 2000-CA-20 and *California v. Ciraolo* (1986), 476 U.S. 207. In *California v. Ciraolo,* the United States Supreme Court held that a home owner held no reasonable expectation of privacy that society would be expected to honor that would preclude aerial observation by the naked eye of a defendant's backyard through use of an aircraft overhead. *Ciraolo*, 476 U.S. at 213-214. In *State v. Ritchie,* the Second District Court of Appeals concluded that there is no reasonable expectation of privacy to observation of criminal activities within a house, as to activities that could be observed by persons present at routes normally used to enter or leave the residence. The defendant was observed from outside a house while sitting

within at a table with drug paraphernalia, a pipe, and a baggie containing what appeared to be marijuana. Based upon the observation, the police secured a warrant to search the residence.

{¶25} This case does not present circumstances of the type considered in either *Ciraolo* or *Ritchie.* Officer Pearcy testified that he did not observe any unlawful activity from outside the fraternity house. His observations of criminal activity, including the smell of burnt marijuana, were made from the second floor of the building as he entered onto the balcony.

{¶26} Such observations come within restrictions against unreasonable searches and seizures under the Fourth Amendment unless Officer Pearcy was lawfully present on the second floor at the time:

{¶27} "As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search' within the meaning of the Fourth Amendment." LaFave, *Search and Seizure* (4th Ed. 2004) 445, Section 2.2.

{¶28} For Officer Pearcy's observations from the second floor to come within an exception to the Fourth Amendment protections against unreasonable searches and seizures, the intrusion that permitted the view must itself be lawful. See *State v. Williams* (1978), 55 Ohio St.2d 82 at paragraph one of the syllabus.

{¶29} Even if Officer Pearcy's observations from outside the building presented probable cause to believe that appellants were smoking marijuana, the exigent circumstances exception would not apply to support a warrantless search. Possession of marijuana, a violation of R.C. 2925.11(C)(3)(a), is a minor misdemeanor. Section 14, Article I of the Ohio Constitution prohibits warrantless arrests for minor misdemeanors absent special circumstances and also prohibits searches incident to such arrests. *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, ¶25. This court has held that the exigent circumstances exception to the presumption of unreasonableness of warrantless home entries is not applicable to misdemeanor offenses. *State v. Christian*, 6th Dist. No. F-04-003, 2004-Ohio-3000, ¶ 11; *State v. Scott* (1999), 135 Ohio App.3d 253, 258.

{¶30} The state argues that the fraternity house is university owned and subject to university regulations, including restricted use of balconies to fraternity houses for safety reasons. Although testimony as to the height of the balcony walls differed, with testimony providing heights ranging from two to three feet in height, waist high, or even four feet high, photographs in evidence demonstrated that the balcony created no imminent risk to the safety of the two students standing there.

{¶31} The state argues that Officer Pearcy entered the fraternity house with the purpose to remove appellants from the balcony because of university regulations on use of the balcony. However, Officer Pearcy testified that ultimate decision under university

regulations as to student use of balconies rested with the house director. The university regulations themselves were not submitted in evidence at trial.

{¶32} On appeal, the state has submitted a copy of the BGSU Student Handbook 2009-2010 as an exhibit to its appellate brief and made a series of arguments based upon The Residential Community Policies set forth in the handbook. We cannot consider the student handbook in this appeal. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. For the same reason we also do not consider appellants' arguments that campus police are not university officials that are authorized to enter university owned living areas without a warrant under the university regulations.

{¶33} We conclude that competent credible evidence in the record is lacking to establish that administrative regulations of the university authorized entry by campus police officer Pearcy into the fraternity house on administrative grounds for reasons unrelated to law enforcement.

{¶34} We also conclude that the state failed to meet its burden of demonstrating that the warrantless entry and search of the fraternity house by campus police fell within an exception to the warrant requirement under the Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution. Accordingly, the trial court erred in failing to suppress all evidence gained from Officer Pearcy's entry into

the building and search of the premises. We find appellants' assignment of error is well-taken on those grounds.

{¶35} This determination renders moot appellants' alternative basis for suppression of statements made to Officer Pearcy on *Miranda* grounds. Pursuant to App.R. 12(A)(1)(c), we do not address the moot issue.

{¶36} We conclude appellants were denied a fair trial. We reverse the judgment of the trial court as to both appellants and remand this consolidated appeal to the Bowling Green Municipal Court for further proceedings consistent with this opinion. Pursuant to App.R. 24, the state is ordered to pay the court costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE