[Cite as *State v. Stacey*, 2013-Ohio-4422.]

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

State of Ohio — Court of Appeals No. OT-13-002

Appellant — Trial Court No. 11CR164

v.

Scott Stacey — **DECISION AND JUDGMENT**

Appellee — Decided: September 27, 2013

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellant.

Stephanie N. Lape, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} This is a state's appeal from an order suppressing evidence issued by the Ottawa County Court of Common Pleas. Because we conclude that the trial court properly reopened the suppression hearing to consider newly discovered evidence and properly applied the law in granting the motion to suppress, we affirm.

{¶ 2} On October 26, 2011, two members of the Ottawa County Drug Task Force and a uniformed sheriff's deputy went to the Harrison Township home of appellee, Scott Stacey, to execute a "knock and talk" with appellee. Task force officers had received information that appellee had in his home a "grow room" in which marijuana was being grown. The officers admittedly did not have enough information to obtain a search warrant for the property, but chose to go to appellee's home, knock on the door and talk about the allegations.

{¶ 3} According to subsequent suppression hearing testimony, when the officers arrived they saw a woman toward the back of the driveway. All three officers testified that when the woman saw the marked patrol car she ran and/or walked quickly inside a fence at the back of the house. The officers followed the woman through two gates they maintain were open, up two stairs and onto wooden deck-type porch. All three testified that on the porch they smelled a strong odor of raw marijuana. One of the drug task force officers testified that while on the porch he bent over and through a basement window could see multiple marijuana plants hung to dry in the basement.

{¶ 4} The first task force officer pointed out the drying marijuana to the other task force officer who decided to call the prosecutor's office to obtain a search warrant. While the second officer was on the phone, the other reported that he returned to the porch to discover that the plants he had previously viewed had been moved. The officers conferred and decided that someone in the house might be attempting to destroy

evidence. In the face of potential evidence destruction, the officers decided to proceed without a warrant and kicked in the back door.

{¶ 5} Inside the officers found appellee, his wife and another person. In the basement, they found a large quantity of growing marijuana plants and more than a dozen drying plants. Appellant and the others in the house were arrested and the marijuana seized. A subsequent search conducted after a warrant was obtained revealed multiple firearms, a large amount of cash and a video security system.

{¶ 6} On November 23, 2011, the Ottawa County Grand Jury handed down a six count indictment, charging appellee with cultivation and possession of marijuana, possession of hashish, tampering with evidence, child endangering and possession of criminal tools. Appellee pled not guilty and moved to suppress the results of the warrantless search which he asserted violated his Fourth Amendment right to be free of unreasonable searches.

{¶ 7} On January 20, 2012, the trial court held a hearing on appellee's motion to suppress. Following the hearing, the court found that, although within the curtilage of appellee's home, the officers saw no indication that they were not permitted to go to the back door and while at the back porch they were in a position to smell and see the marijuana in the basement. Moreover, once the drying plants they observed disappeared, the officers had a reasonable belief that evidence might be destroyed which provided an exigent circumstance to enter the home without a warrant, the court concluded. The court denied the motion to suppress.

{¶ 8} Subsequent to the court's decision on the motion, the state provided additional discovery to appellee. Prior to the original motion hearing, neither the state nor appellee had been able to produce a viewable copy of the surveillance camera data that had been recorded by appellee's system and seized from the home. When an expert finally decoded the video, the result made appellee move to reopen the suppression hearing.

{¶ 9} On appellee's presentment that the video surveillance would directly contradict the testimony of the officers who testified at the original suppression hearing, the court reopened the proceeding for the sole purpose of viewing the surveillance footage. After viewing the video and entertaining written argument, the court reversed itself and granted the motion to suppress.

{¶ 10} The court accepted the officers' testimony that once on the porch they smelled raw marijuana. The court noted, however, that the video showed that after that one of the officers stepped off the deck and kneeled on the ground to look in a basement window. Another of the officers retrieved a large flashlight which the first officer used to look through a window while lying on the ground. The officers then used the flashlight to look though a second window. One of the officers moved a trashcan to gain a better view. At the first suppression hearing, the officers denied ever leaving the porch, denied using a flashlight and denied moving anything. The court characterized what was on the video as in "direct contradiction" to the testimony the officers originally offered.

{¶ 11} The court concluded that the officers had entered an area beyond which the public was impliedly welcome in violation of the Fourth Amendment. Because of this, the exigent circumstances by which the officers justified entering the house was of their own manufacture and consequently unlawful. On these conclusions, the court suppressed the evidence seized from appellee's house. From this judgment, the state now appeals.

{¶ 12} The state sets forth three assignments of error:

1. The trial court erred by re-opening the suppression hearing after denying appellant's motion to suppress.

2. The trial court's factual findings are not supported by competent, credible evidence.

3. The trial court erroneously applied the law.

I. Reopening Suppression Hearing

{¶ 13} In its first assignment of error, the state suggests that the trial court abused its discretion when it granted appellee's motion to reopen the suppression hearing.

{¶ 14} The decision of whether to reopen a suppression hearing rests within the sound discretion of the court and will not be disturbed absent an abuse of discretion. *State v. Lashuay*, 6th Dist. Wood No. WD-06-088, 2007-Ohio-6365, ¶ 19. An abuse of discretion is more than a mistake of judgment or an error of law, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 15} In *Lashuay* a defendant sought to reopen a suppression hearing when, two months after the initial hearing, the state produced a police videotape of the traffic stop which led to his subsequent arrest. The defendant asserted that the tape directly contradicted the testimony of the arresting officers at the original hearing. The court denied the defendant's motion to reopen. On appeal, we held that a trial court that denies a motion to reopen a suppression hearing, when confronted with new evidence bearing directly on the propriety of a search or seizure, abuses its discretion in doing so. *Lashuay* at ¶ 20.

{¶ 16} The trial court in this matter expressly relied on *Lashuay* in arriving at its decision to reopen the suppression hearing. The state, however, attempts to distinguish the case, asserting that the video at issue here was not newly discovered, but that both parties knew of its existence at the time of the first hearing.

{¶ 17} This argument is unpersuasive. Although both parties were aware of the existence of the surveillance video prior to the first hearing, neither party knew the contents. It was not until two months after the first hearing that an expert decoded the video. This was the first time that either the state or appellee became aware of the contents of the video. In that respect, the video was new evidence bearing directly on the propriety of the entry into and search of appellee's house. Accordingly, the trial court did not abuse its discretion in reopening the suppression hearing. Appellant's first assignment of error is not well-taken.

II. Evidence Sufficiency

{¶ 18} A review of a ruling on a motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When considering such a motion, the trial court becomes the trier of fact and is in the best position to evaluate witnesses and resolve factual questions. As a result, the trial court's factual findings must be accepted if supported by competent, credible evidence. *Id., State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accepting these findings as true, the reviewing court must then determine independently, as a matter of law, whether the facts satisfy the applicable legal standard. *State v. Woljevach*, 160 Ohio App.3d. 757, 2005-Ohio-2085, 828 N.E.2d 1015 (6th Dist.).

{¶ 19} In its second assignment of error, the state asserts that the trial court's factual findings are unsupported by the record. Specifically, the state maintains that the video that was the subject of the second suppression hearing was never introduced or admitted into evidence.

{¶ 20} The sole purpose of the reopened suppression hearing was to view the surveillance video of the officer's entry into appellee's home. At the hearing, apparently after some off the record discussions, the court went on the record and stated:

> I think we have reached the conclusion that the testimony that was given at the first suppression hearing will stand and that this video is meant to supplement or be almost a rebuttal of the initial suppression hearing, and

that we don't anticipate any witness testimony in the hearing at all, is that correct counsel?

{¶ 21} Both counsel agreed and went on to agree that the video viewed was a fair and accurate copy of the original. The parties also stipulated that the video had not been altered and that the time and date stamp on the screen is accurate. The court then viewed the video and requested written argument from counsel.

{¶ 22} In its judgment entry, the court relies extensively on the contents of the video. The court states that "[a]t the subsequent suppression hearing, the parties stipulated to the officers' prior testimony and the surveillance video was admitted and displayed."

{¶ 23} The source of the state's second assignment of error is that a review of the brief transcript of the second suppression hearing fails to reveal any point in the proceeding where the video was offered into or accepted as evidence. Citing this court's decisions in *City of Oregon v. Lajti*, 6th Dist. Lucas No. L-12-1110, 2013-Ohio-204, and *State v. Bates*, 6th Dist. Wood No. WD-90-29, 1991 WL 21524 (Feb. 22, 1991), for the proposition that a trial court is not permitted to consider evidence that was never offered or received into evidence, the state insists that consideration of the video was improper.

{¶ 24} The state raises this argument for the first time on appeal. It did not object to the court's purported improper consideration of the video in its written argument after the second suppression hearing. It did not call the court's attention to this error when the

court expressly stated in its judgment entry that the video had been admitted into evidence.

{¶ 25} Generally, appellate courts will not consider errors that counsel could have called to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. Peagler*, 76 Ohio St.3d 496, 499, 668 N.E.2d 489 (1996); *State v. Glaros*, 170 Ohio St. 471, 166 N.E.2d 379 (1960), paragraph one of the syllabus. Moreover, it is patently clear from the record that the parties understood that the video would be viewed and considered by the court in making its determination of the suppression motion. As a result, the state suffered no undue prejudice by the court's consideration of this evidence. *See State v. Hilton*, 9th Dist. Wayne No. 09CA0036, 2010-Ohio-1923, ¶ 9; *Reber v. Reber*, 6th Dist. Huron No. H-91-045, 1992 WL 213088 (Sept. 4, 1992). Absent prejudice, error is not cognizable. App.R. 12(D).

{¶ 26} Accordingly, the state's second assignment of error is not well-taken.

III. Application of the Law

{¶ 27} In its remaining assignment of error, the state asserts that the trial court misapplied the law when it determined that the officers' warrantless entry into the house based on observations through a basement window violated the Fourth Amendment. The state maintains that officers may lie on the ground and use flashlights and follow walkways without warrants. If, through that lawful activity, police view what they have probable cause to believe is unlawful activity, they may use this information to obtain a warrant. If it appears that evidence will be destroyed by delay, this is an exigent

circumstance under which they may enter a dwelling. This, the state insists, is what happened in this instance and the evidence obtained from this entry should not be suppressed.

{¶ 28} The right of people to be secure from unreasonable searches in their persons, houses and effects is guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution. A reasonable search or seizure is one based upon probable cause and executed pursuant to a warrant. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶ 29} Warrantless searches or seizures are per se unreasonable, subject to only a few well-defined exceptions. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *State v. Kessler*, 53 Ohio St.2d 204, 207, 373 N.E.2d 1252 (1978). Absent an exception to the warrant requirement, the state must have both probable cause and a warrant before proceeding. Evidence obtained from a search conducted without a warrant or an exception to the warrant requirement must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 654-655, 81 S.Ct. 1684, 6 L.Ed. 1081 (1961).

{¶ 30} The area of privacy an individual can claim as protected by the Fourth Amendment includes his or her home and the curtilage, an area surrounding the home in which a person can reasonably expect to be protected. *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984).

Because the curtilage of a property is considered to be part of an individual's home, the right of officers to come into the curtilage is highly

circumscribed. Absent a warrant, police have no greater rights on another's property that any other visitor. Thus, it has been held that the only areas of the curtilage where officers may go are those impliedly open to the public. This would include walkways, driveways, or access routes leading to the residence. The guiding principal is that a police officer on legitimate business may go where any "reasonably respectful citizen" may go. (Citations omitted.) *State v. Woljevach*, 160 Ohio App.3d 757, 2005-Ohio-2085, 828 N.E.3d 1015 (6th Dist.)

{¶ 31} The trial court in this matter reasoned that the walkway to appellee's back porch and the back porch were areas within the curtilage where an ordinary citizen may reasonably expect to go. Thus, the "plain smell" of curing marijuana encountered when the officers were on the back porch would provide probable cause for a search warrant.

{¶ 32} Appellee's motion to suppress, however, was not premised on a challenge to probable cause for a warrant. Appellee challenged the warrantless entry into the house.

{¶ 33} Exigent circumstances are an exception to requirement that police obtain a warrant prior to conducting a search. The prevention of the imminent destruction of evidence has long been recognized as one such exigent circumstance. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)

> [W]arrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with

> the warrant requirement. Therefore, * * * the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where * * * the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed. *Kentucky v. King*, 131 S.Ct. 1849, 1858, 179 L.Ed.2d 865 (2011).

{¶ 34} Alternatively, when police create their own exigency by engaging in conduct that violates the Fourth Amendment, the search should not be allowed.

{¶ 35} The rationale for the warrantless entry into the house was provided by the exigent circumstance that at one glance curing marijuana was observed through a basement window while at a second look it was gone. These observations led officers, according to their testimony, to believe evidence was being destroyed. At the initial suppression hearing, the officers testified that all of these observations were made from appellee's back porch, a place a reasonably respectful citizen might go. The trial court denied the motion to suppress.

{¶ 36} What the security video viewed at the second suppression hearing revealed was that the officers did not confine themselves to the walkway and the porch. In the video they are seen stepping onto the yard, moving objects in the yard and lying on the ground, using a large flashlight to look into the basement windows. Once the officers left the implied invitation of the walkway and the porch, they entered the protected curtilage

of the backyard. Since the observations that led the officers to believe that evidence was being destroyed were viewed in the protected curtilage rather than from a place they had a lawful right to be, such observations may not be used to support exigent circumstances to justify warrantless entry into the house and the subsequent search. The trial court consequently did not misapply the law in granting appellee's motion to suppress. Appellant's remaining assignment of error is not well-taken.

{¶ 37} On consideration, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE