[Cite as *State v. Tilman*, 2017-Ohio-2908.]

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

State of Ohio — Court of Appeals No. L-16-1153

Appellee — Trial Court No. CR0201501972

v.

Rodney Tilman — **DECISION AND JUDGMENT**

Appellant — Decided: May 19, 2017

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

Sheldon S. Wittenberg, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Rodney Tilman, appeals from the June 20, 2016 judgment of the Lucas County Court of Common Pleas convicting him of trafficking in cocaine, a violation of R.C. 2925.03(A)(2) and (C)(4)(e), following the acceptance of appellant's no

contest plea. For the reasons which follow, we affirm. He asserts the following assignments of error on appeal:

Assignment of Error no. 1:

The trial court erred as a matter of law in concluding that Mr. Tilman was an "occupant" of the premises described in the search warrant.

Assignment of Error no. 2:

The trial court erred as a matter of law in concluding that the officers had a lawful right to trespass on the vehicle of Mr. Tilman. As such, the vantage point from which the officer peered into Mr. Tilman's vehicle was constitutionally impermissible.

Assignment of Error no. 3:

The trial court erred in concluding that the incriminating nature of the contraband was immediately apparent to the officer who trespassed on Mr. Tilman's vehicle.

{¶ 2} Appellant filed a motion to suppress all of the physical evidence obtained from a search of the truck he parked in front of a house which was being searched pursuant to a warrant. He asserts that the evidence obtained from the vehicle was the result of a warrantless search. Appellee opposed the motion in the trial court arguing the evidence was found in plain view and the officers had probable cause to search the vehicle.

{¶ 3} At the motion to suppress hearing, the following evidence was submitted. An experienced SWAT team officer and the three experienced detectives of the vice unit of the Toledo police department were in the process of executing a search warrant, based on a prior controlled buy, at a residence determined to be part of drug trafficking operation. The warrant named a known resident of the house and also indicated other unknown individuals could be occupying the premises as well. The warrant permitted a search of all occupants of the residence and their vehicles on the property and it was expected, among other things, that crack cocaine packaged for sale would be found.

{¶ 4} Just as the SWAT team approached the house, appellant drove up in a dark-colored Dodge truck and parked it diagonally across the end of the driveway. The testimony varied as to how much of the car was located in the street versus the yard or driveway. The SWAT team officer observed appellant exit the vehicle and enter the home. The team moved quickly to enter the house through the front door, which was still open, in case appellant was warning the other occupants and evidence was being destroyed.

{¶ 5} Because the truck was parked close to the front door and the truck's motor was left running, two vice detectives went immediately to appellant's vehicle to ensure, for the safety of the SWAT team, that no one had remained inside the vehicle. Because the side windows were darkly tinted, one detective got on top of the hood to look inside the front windshield. He could not see anyone inside, but he observed, in plain view, a plastic bag filled with a white chunk of material in a cup holder next to the driver's seat.

Based on his experience, the detective believed the material was crack cocaine for sale and informed the other detective. Both detectives opened the truck doors. The second detective opened the passenger side door to check the front and back seat to also ensure no one was hiding in the vehicle. At that time, he also saw the same package in plain view and believed it was crack cocaine packaged for sale. Both officers also saw in plain view several IDs and cell phones in a cup holder. No further search was conducted.

{¶ 6} The baggie was field tested and found to be positive for crack cocaine. The baggie was later confirmed to contain 20.45 grams of crack cocaine packaged in smaller bags in a manner typical for sale. It was also later determined that appellant did not own the truck. No evidence was submitted as to appellant's right to use the truck. When appellant was patted down for weapons, one of the detectives found $3,060 in cash in appellant's pocket.

{¶ 7} The trial court denied appellant's motion to suppress on the basis that appellant became an occupant of the house when he entered the premises and his vehicle was included within the terms of the warrant. Nonetheless, the officers also had the right to look into the truck for safety purposes and seize contraband in plain view.

{¶ 8} On appeal, all of appellant's assignments of error related to the trial court's denial of appellant's motion to suppress. Appellee argues for the first time on appeal that appellant lacked standing to assert a Fourth Amendment violation. In response, appellant argued appellee had waived this issue on appeal.

{¶ 9} Pursuant to Ohio Constitution, Article IV, Section 3(B)(2), the court of appeals shall "review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." App.R. 12(A)(1)(b) further provides an appellate court is required to consider the issues assigned as error in the brief, in the record, or during oral argument.

{¶ 10} Appellate review is further restricted by the doctrine of waiver, which compels an appellate court to avoid consideration of error in the trial court's judgment that was not raised in the trial court where it could have been avoided or corrected by the trial court. *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 58, 236 N.E.2d 545 (1968), paragraph three of the syllabus. This general rule of waiver, however, is discretionary and the appellate court may consider an issue for the first time on appeal if the interests of justice warrant consideration of the issue. *Hill v. City of Urbana*, 79 Ohio St.3d 130, 133-134, 679 N.E.2d 1109 (1997); *C. Miller Chevrolet, Inc. v. Willoughby Hills*, 38 Ohio St.2d 298, 301, 313 N.E.2d 400 (1974), *modified in part by Hungler v. Cincinnati*, 25 Ohio St.3d 338, 341-342, 496 N.E.2d 912 (1986). When an alleged error is considered for the first time on appeal, the appellate court is limited by the factual record on appeal and any determination of the error must be made based on the evidence in the record. *State v. Peagler*, 76 Ohio St.3d 496, 668 N.E.2d 489 (1996), paragraph one of the syllabus; *Hungler*.

{¶ 11} The determination of whether appellant could assert a Fourth Amendment violation is an issue which can be determined for the first time on appeal when all of the facts necessary to make that determination are on the record. *Compare Am. Assn. of Univ. Professors v. Cent. State Univ.*, 2d Dist. Greene No. 96-CA-21, 1997 Ohio App. LEXIS 554, *41-42 (Jan. 31, 1997), *rev'd on other grounds at* 87 Ohio St.3d 55, 717 N.E.2d 286 (1999) ("constitutional issues are unique, and determinations of them establish precedent in future cases").

{¶ 12} In the interest of fairness, an appellate court will generally not review unassigned error without giving the parties an opportunity to brief the issues. *Hungler; Willoughby Hills*; *State v. White*, 2013-Ohio-51, 988 N.E.2d 595, ¶ 144 (6th Dist.). In the case before us, however, the issue is not an alleged error but an additional basis for supporting the denial of the motion to suppress the evidence that was not asserted below. Both parties addressed the issue in their briefs.

{¶ 13} Even where the parties have had an opportunity to brief an issue, however, the doctrine of waiver may be enforced because it also protects "the role of the courts and the dignity of the proceedings * * * by imposing upon counsel the duty to exercise diligence * * * rather than silently misleading [the trial court] into the commission of error." *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997). In this case, the state's failure to assert a lack of "standing" to assert a Fourth Amendment violation may have prevented the trial court from denying the motion to suppress on that ground, but it did not cause the trial court to commit reversible error.

{¶ 14} Although warrantless searches are per se unreasonable under the Fourth Amendment, the defendant has the burden of going forward with a motion to suppress to assert evidence was illegally obtained and the basis upon which the evidence should be suppressed. Crim.R. 47; *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 10; *Xenia v. Wallace*, 37 Ohio St.3d 216, 218, 524 N.E.2d 889 (1988), paragraph one of the syllabus. However, the burden of proof remains on the prosecution to establish the search or seizure was lawful. *Id.* at paragraph two of the syllabus; *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 98.

{¶ 15} The concept of "standing" to assert a Fourth Amendment violation is viewed as part of the extent of the right to be free from unreasonable searches and seizures. *Rakas v. Illinois*, 439 U.S. 128, 138-139, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978). Therefore, to invoke a Fourth Amendment right, the defendant must establish he had a legitimate expectation of privacy in the area that was searched. *United States v. Pena*, 961 F.2d 333, 336 (2d Cir.1992). An individual who does not own a vehicle or have the owner's permission to use the vehicle (a possessory interest) and does not claim an interest in the property seized, does not have a legitimate expectation of privacy in connection to the vehicle and, therefore, cannot claim a Fourth Amendment right to challenge the search of the vehicle. *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir.1995); *United States v. Garcia*, 897 F.2d 1413, 1418-1419 (7th Cir.1990) (once the defendant claims a possessory interest in a vehicle, the burden shifts to the state to prove the vehicle was stolen); *United States v. Miller*, 821 F.2d 546, 548 (11th Cir.1987); *State*

v. Carter, 69 Ohio St.3d 57, 63, 630 N.E.2d 355 (1994); *State v. Jones*, 1st Dist. Hamilton No. C-130359, 2014-Ohio-3110, ¶ 12.

{¶ 16} In the case before us, appellant did not assert a possessory interest in the truck he was driving. He never claimed nor produced evidence to establish he had permission from the owner to drive the truck. In his motion to suppress, he asserted only that he was "associated" with the truck. We find an "association" with the vehicle gives no greater rights than a mere passenger. Therefore, we agree with the state that appellant could not assert his Fourth Amendment rights were violated by the search of the truck. Therefore, the trial court's denial of the motion to suppress can be affirmed without a need to consider the trial court's grounds for denying the motion.

{¶ 17} Accordingly, we find all three of appellant's assignments of error not well-taken.

{¶ 18} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, J. _____
CONCUR.
JUDGE