[Cite as *State v. Ambrosini*, 2015-Ohio-4150.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO, PLAINTIFF-APPELLEE, V. ANTHONY AMBROSINI AND JACOB PREGI, DEFENDANTS-APPELLANTS.	)))))))))	CASE NOS. 14 MA 155 14 MA 156 OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from Mahoning County Court No. 4, Mahoning County, Ohio Case No. 14CRB69, 14CRB71

JUDGMENT: Reversed and Remanded

APPEARANCES:

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: September 28, 2015

[Cite as *State v. Ambrosini*, 2015-Ohio-4150.]

DONOFRIO, P.J.

{¶1} Defendants-appellants Anthony Ambrosini and John Pregi appeal a decision of the Mahoning County Court No. 4 denying their motion to suppress evidence. They argue that the police conducted an illegal search exceeding their authority under the exigency exception to the 14th and 4th Amendments to the United States Constitution, and Article 1 Section 14 of the Ohio Constitution.

Facts and Procedural Posture

{¶2} On January 18, 2014, at approximately 5:00 am, Police Officers Christopher Collins and Ronnie Crum of the Austintown Township Police Department responded to a report of loud music and alleged drug use at 4519 New Hampshire Circle, Austintown. (Tr. 6.) The address is the apartment home of Ambrosini where Pregi was visiting at the time of the incident. (Tr. 16.)

{¶3} Upon arrival, the officers entered the apartment complex and, following the smell of burning marijuana and music, eventually arrived at Ambrosini's apartment. (Tr. 7-9.) Ambrosini's apartment is located on the bottom floor of the complex immediately adjacent to a common outdoor courtyard with a separate sliding door facing the courtyard. (Tr. 9.) Once arriving at Ambrosini's apartment, Officer Crum placed himself at the front hallway door while Officer Collins placed himself near the rear sliding door that faces the courtyard. (Tr. 9.) After detecting the smell of marijuana through the small opening in the sliding door, Officer Crum observed a glass pipe and a loose green substance which appeared to be marijuana on a kitchen table. (Tr. 12.) The officers then announced their presence, entered the apartment, seized the then alleged marijuana and glass pipe, and cited Ambrosini and Pregi for marijuana possession in violation of R.C. 2925.11 and possession of marijuana paraphernalia in violation of R.C. 2925.141(C), each minor misdemeanor offenses.

{¶4} Ambrosini and Pregi pleaded not guilty and they each filed a motion to suppress. At the suppression hearing both officers Crum and Collins testified that they felt an exigent circumstance existed, specifically the destruction of evidence,

which allowed them to enter Ambrosini's apartment without a warrant. (Tr. 15-16, 32-33.) Both officers also asserted their right to enter Ambrosini's apartment without a warrant on the grounds the alleged marijuana use occurred in plain view. (Tr. 15, 16, 32, 33.) Additionally, during cross examination Pregi admitted to the alleged marijuana use and confirmed that Ambrosini was also smoking marijuana. (Tr. 44, 45.)

{¶5} On July 7, 2014, the trial court denied the suppression motion based on the officers' testimony that the alleged marijuana possession and use occurred in plain view. Both Ambrosini and Pregi pleaded no contest. The trial court sentenced them each to a $150 fine on each of the counts and imposed a 180-day operator's license suspension. They each filed an appeal and the trial court contemporaneously granted their respective motions to stay the sentences pending the outcome of this appeal.

Standard of Review

{¶6} In reviewing a suppression decision, the general rule is that the trial court is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Mills,* 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992), citing *State v. Fanning,* 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Our standard of review requires us to determine whether the trial court's findings are supported by competent, credible evidence. *State v. Roberts,* 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. Then, we independently determine whether the trial court applied the appropriate legal standard. *Roberts,* 110 Ohio St.3d 71 at ¶ 100 (mixed question of law and fact).

Analysis

{¶7} Both Ambrosini's and Pregi's sole assignment of error states:

> "The trial court erred in denying the motion to suppress as the police violated the Fourth Amendment as applied through the Fourteenth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution by entering a home without a warrant and when exigent circumstances doctrine does not apply."

{¶8} "Unreasonable searches and seizures are constitutionally prohibited. Ohio Const. Sec. 14, Art. I; U.S. Const. Amend. IV and XIV; *Maryland v. Buie* (1990), 494 U.S. 325, 331; *State v. Robinette* (1997), 80 Ohio St.3d 234, 238-239. For a search or seizure to be reasonable, it must be supported by a warrant or based upon an exception to the warrant requirement. *Katz v. United States* (1967), 389 U.S. 347, 357." *State v. Adams*, 7th Dist. No. 08 MA 246, 2011-Ohio-5361, ¶ 34. The Ohio Supreme Court has recognized seven exceptions to the 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; or (f) the plain-view doctrine," *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); or (g) an "administrative search," *Stone v. Stow*, 64 Ohio St.3d 156, 164, fn. 4., 593 N.E.2d 294 (1992).

{¶9} Here, the trial court found that the police acted properly by entering the apartment upon witnessing Ambrosini and Pregi smoking marijuana in plain view. "The warrantless seizure by a law enforcement officer of an object in plain view does not violate the Fourth Amendment if (1) the officer did not violate the Fourth Amendment in arriving at the place from which the object could be plainly viewed, (2) the officer has a lawful right of access to the object, and (3) the incriminating character of the object is immediately apparent." *State v. Robinson*, 103 Ohio App.3d 490, 494, 659 N.E.2d 1292 (1st Dist.1995) citing *Horton v. California*, 496 U.S. 128, 136-137, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

{¶10} There has been no dispute that the police officers were lawfully in the common public area outside Ambrosini's apartment. However, Ambrosini clearly had an expectation of privacy inside the apartment and, thus, the officers had no lawful right to be *inside* the apartment. *State v. Alihassan*, 10th Dist. No. No. 11AP-578, 2012-Ohio-825, ¶ 20 (while officer's "seeing the drugs" in common area outside defendant's apartment gave him probable cause to obtain a search warrant, the plain view exception was inapplicable because officer "had no right to be inside the apartment" and no exigent circumstances existed); *see also State v. Robinson*, 103

Ohio App.3d 490, 494, 659 N.E.2d 1292 (1st Dist.1995) (reasonable expectation of privacy and Fourth Amendment implicated by officer's warrantless entry into defendant's apartment upon smelling burning marijuana emanating from the apartment). Therefore, in order for the officers to have had a lawful right to access the interior of Ambrosini's apartment, some exigent circumstance must have existed.

{¶11} The State concedes that exigent circumstances exception to the warrant requirement does not apply to the facts of this case. As the First District recognized in *Robinson*:

> [T]he United States Supreme Court has found the exigent circumstance premised upon the imminent destruction of evidence of a minor offense to be insufficient to overcome the presumption of unreasonableness that attaches to a warrantless entry. *Welsh v. Wisconsin* (1984), 466 U.S. 740, 754, 104 S.Ct. 2091, 2100, 80 L.Ed.2d 732, 745-746. The odor of burning marijuana that escaped through the open door provided probable cause only as to the commission of the offense of drug abuse involving the possession of less than one hundred grams. The Ohio General Assembly has classified the offense as a minor misdemeanor, R.C. 2925.11(C)(3), subject only to a fine, R.C. 2929.21(D), and has further provided that an arrest or conviction for the offense "does not constitute a criminal record." R.C. 2925.11(D). The General Assembly has thus classified the offense in question as the most minor offense possible. Therefore, on the authority of *Welsh, supra,* we hold that the exigent circumstance premised upon the imminent destruction of evidence of the offense of minor-misdemeanor drug abuse was insufficient to overcome the presumption of unreasonableness that attached to the officers' warrantless entry into Robinson's apartment. See *Blanchester v. Hester* (1992), 81 Ohio App.3d 815, 612 N.E.2d 412 (holding that exigent circumstances did not justify a warrantless entry to arrest for a minor traffic offense); *State v. Sbarra* (Apr. 10, 1992), Portage App. No. 91-P-2341, unreported,

> 1992 WL 190173 (holding that exigent circumstances did not justify a warrantless entry to arrest for the nonviolent misdemeanor **1297 of fleeing and eluding the police); *State v. Holderman* (Jan. 20, 1992), Ross App. No. 1787, unreported, 1992 WL 10122 (holding that exigent circumstances did not justify a warrantless entry to arrest for fourth-degree-misdemeanor menacing); *State v. Petrosky* (Mar. 27, 1991), Hamilton App. Nos. C-900264, C-900265, unreported, 1991 WL 40550 (holding that the exigent circumstance premised on the need to preserve evidence of intoxication did not justify a warrantless entry when probable cause existed only as to leaving the scene of an accident).

State v. Robinson, 103 Ohio App.3d 490, 497, 659 N.E.2d 1292 (1st Dist.1995). Other Ohio appellate districts are in accord and we find the rationale of *Robinson* equally persuasive. *State v. Johnson*, 173 Ohio App.3d 669, 2007-Ohio-6146, 880 N.E.2d 111, ¶ 16 (9th Dist.).

{¶12} Rather, the State argues that the trial court's erroneous denial of the motions to suppress was harmless pursuant to Crim.R. 52(A). The State's theory is that the trial court's error in denying the motions to suppress evidence is of no consequence to Ambrosini's and Pregi's subsequent convictions due to there being enough independent evidence as grounds for conviction. In support the State cites *State v. Kulyk*, 5th Dist. No. 01 CA 13, 2002-Ohio-1591, where the Fifth District observed:

> [I]n a criminal prosecution, the allegedly erroneous admission in evidence of items unlawfully seized is harmless beyond a reasonable doubt and does not provide grounds for reversal of the conviction where the pertinent testimony of witnesses at the trial is *not the product* of such seizure and is overwhelmingly sufficient to independently establish the elements of the offense beyond a reasonable doubt.

(Emphasis added.) *Kulyk*, supra at *5.

{¶13} We conclude that the harmless error rule in Crim.R. 52(A) is not applicable under the facts and circumstances of this case. Crim.R. 52(A) defines harmless error as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." The primary problem with analyzing the trial court's error in this case as harmless lies in the procedural posture of the case. The case law applying harmless error in the criminal context involves examining the error in light of all of the evidence presented at trial. In this instance, there was no trial.

{¶14} Ambrosini and Pregi appealed the trial court's denial of his motion to suppress after pleading no contest. An important strategic implication of a no contest plea is that it "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." Crim.R. 12(I).

{¶15} Given that this case involves a no contest plea and not a trial, we are disinclined to review the trial court's error under harmless error analysis because it is impossible to assess the impact of an erroneous denial of a motion to suppress evidence on a defendant's decision to plead no contest. Additionally, since a trial never took place, our inquiry would be entirely speculative since we cannot know exactly what evidence would be presented at trial.

{¶16} Accordingly, Ambosini's and Pregi's sole assignment has merit.

{¶17} The judgment of the trial court overruling the motion to suppress is reversed and this matter is remanded with instructions to allow Ambrosini and Pregi to withdraw their no contest pleas if they so choose and for further proceedings according to law and consistent with this

Waite, J., concurs.

Robb, J., concurs.