

[Cite as *State v. Prieto*, 2017-Ohio-4156.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

|                     |   |                     |
|---------------------|---|---------------------|
| STATE OF OHIO       | ) | CASE NO. 15 MA 0213 |
|                     | ) |                     |
| PLAINTIFF-APPELLEE  | ) |                     |
|                     | ) |                     |
| VS.                 | ) | OPINION             |
|                     | ) |                     |
| JEVON PRIETO        | ) |                     |
|                     | ) |                     |
| DEFENDANT-APPELLANT | ) |                     |

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of  
Common Pleas of Mahoning County,  
Ohio  
Case No. 2012 CR 1264

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains  
Mahoning County Prosecutor  
Atty. Ralph M. Rivera  
Assistant Prosecuting Attorney  
21 West Boardman Street, 6<sup>th</sup> Floor  
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. David J. Betras  
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Betras, Kopp & Harshman LLC  
6630 Seville Drive  
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JUDGES:

Hon. Cheryl L. Waite  
Hon. Mary DeGenaro  
Hon. Carol Ann Robb

Dated: June 1, 2017

[Cite as *State v. Prieto*, 2017-Ohio-4156.]  
WAITE, J.

{¶1} Appellant Jevon Prieto appeals an April 6, 2015 Mahoning County Common Pleas Court decision denying a motion to suppress evidence seized from his truck. Appellant argues that the trial court erroneously denied the motion as the officers did not have a warrant to search his truck and none of the warrant exceptions applied. Additionally, Appellant argues that the officers lacked probable cause to detain him. For the reasons that follow, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

#### Factual and Procedural History

{¶2} On December 1, 2012, the Youngstown Police Department received a missing person report and officers went to speak with the woman who filed the report. The woman told the officers that she believed that Appellant had abducted the victim. The woman described Appellant's vehicle as a bright yellow Ford pickup truck. The officers were familiar with Appellant and his vehicle. The officers drove to Appellant's house to speak with him and saw the truck parked in the driveway. The officers directed their spotlight at the truck and saw Appellant sitting in the driver's seat. A female companion was sitting in the passenger's seat.

{¶3} As the officers walked towards the truck, Appellant and his companion left the truck and began walking towards the house. The officers approached Appellant before he reached the house and questioned him about the victim's disappearance. Appellant denied involvement in the matter. During this discussion, Officer George Anderson noticed that Appellant was smoking a marijuana cigarette. At about the same time, another officer saw loose marijuana lying on the front seat of

Appellant's truck. Officer Anderson asked Appellant for the key to the truck, but Appellant refused. As Appellant was becoming increasingly agitated, Officer Anderson handcuffed him, stating that its purpose was officer safety. Officer Anderson then called his supervisor, who told him to retrieve the key from Appellant's person. Officer Anderson found the key in Appellant's pocket and used it to open the door of the truck. Once the door was opened, a gun was immediately visible on the driver's seat floor. Appellant was arrested and charged with one count of improperly handling a firearm in a motor vehicle, a felony of the fourth degree in violation of R.C. 2923.16(B), (I)(2), and one count of having a weapon while under a disability, a felony of the third degree in violation of R.C. 2923.13(A)(2), (B).

{¶4} On February 10, 2014, Appellant filed a motion to suppress the evidence. The trial court held a suppression hearing on April 1, 2015. Officer Anderson and Officer Josh Kelly testified at this hearing. On April 6, 2015, the trial court denied Appellant's motion. On November 23, 2015, Appellant pleaded guilty to having a weapon while under disability. Pursuant to a Crim.R. 11 plea agreement, the state dismissed the remaining charge. The trial court accepted the parties' sentence recommendation and sentenced Appellant to two years of incarceration. This timely appeal followed.

#### ASSIGNMENT OF ERROR

THE TRIAL COURT DENIED THE DEFENDANT HIS  
CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT OF  
THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION

14, OF THE OHIO CONSTITUTION, BY OVERRULING HIS MOTION TO SUPPRESS THE EVIDENCE OBTAINED BY THE POLICE WHERE THE BASIS OF PROBABLE CAUSE WAS INSUFFICIENT.

{¶15} A motion to suppress presents mixed issues of law and fact. *State v. Lake*, 151 Ohio App.3d 378, 2003-Ohio-332, 784 N.E.2d 162, ¶ 12, (7th Dist.), citing *State v. Jedd*, 146 Ohio App.3d 167, 171, 765 N.E.2d 880 (4th Dist.2001). If a trial court's findings of fact are supported by competent, credible evidence, an appellate court must accept them. *Id.* The appellate court must then determine whether the trial court's decision met the applicable legal standard. *Id.*

{¶16} Appellant argues that the officers did not have a warrant to search his truck and none of the exceptions to the warrant requirement applied. Appellant contends that the plain view doctrine does not apply here, as the officers were not lawfully on his property. Appellant also argues that the automobile exception does not apply since the truck was not mobile at the time of the search. Finally, Appellant argues that the officers unlawfully detained him prior to the discovery of the marijuana and gun.

{¶17} In response, the state argues that Appellant waived his right to appeal the trial court's suppression decision once he entered his guilty plea. Even so, the state argues that police are permitted to visit a suspect's home for purposes of questioning. The state also argues that the officers had probable cause to search the truck because Appellant was observed smoking marijuana after exiting the vehicle. The state alternatively argues that the automobile exception of the warrant

requirement applies. The state also argues that the officers had reasonable suspicion to detain Appellant because he was a suspect in a missing person case.

{¶8} Appellant challenges the trial court's denial of his motion to suppress. However, Appellant entered a guilty plea in the trial court. At oral argument, Appellant argued that the prosecutor had agreed to allow Appellant to appeal the trial court's denial of his motion to suppress as part of his guilty plea. The plea hearing transcripts were not originally made part of the appellate record.

{¶9} It is axiomatic that an appellant has the duty to provide transcripts. *State v. Dumas*, 7th Dist. No. 06 MA 36, 2008-Ohio-872, ¶ 14, citing *Natl. City Bank v. Beyer*, 89 Ohio St.3d 152, 160, 729 N.E.2d 711 (2000); *State v. Johnson*, 9th Dist. No. 02CA008193, 2003-Ohio-6814, ¶ 8; App.R. 9(B). At oral argument, Appellant orally requested permission to supplement the record with a transcript of the plea hearing. While this motion was pending, Appellant and the state entered into a stipulation to supplement the record with the transcript. We accepted the parties' stipulation. A review of the transcript shows that the parties entered into an apparent agreement to allow Appellant to appeal the trial court's denial of his motion to suppress despite his guilty plea, and that the trial court was aware of this agreement.

{¶10} While Crim.R. 12(I) allows a defendant to preserve his right to appeal a pretrial motion if he pleads no contest, there is no such right available to a defendant who pleads guilty. The law in Ohio is clear, "a guilty plea waives any right to appeal a ruling on a motion to suppress or any other trial court error, except for errors in the plea itself." *State v. Truax*, 7th Dist. No. 06 BE 66, 2007-Ohio-4993, ¶ 8, citing *State*

*v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658, paragraph two of the syllabus. As such, and despite the fact that Appellant attempted to make the appeal of his motion to suppress part of his plea agreement, Appellant has waived his right to appeal the trial court's decision.

{¶11} After argument in this matter, Appellant attempted to file a supplemental brief addressing the issue of whether his plea was entered into knowingly, voluntarily, and intelligently because it was based on his belief that he could appeal the trial court's decision not to suppress the evidence against him. Appellant concedes that the voluntariness of his plea was not raised within his initial briefing. He further concedes that he failed to file a reply brief in response to the state's brief, even though the state argued that Appellant waived his right to appeal the trial court's decision as a result of his plea. Instead, Appellant waited until after the briefing schedule closed and oral argument was concluded to raise the issue for the first time. For these reasons, we denied Appellant's supplemental brief. As the parties have not been granted permission for supplemental briefing, Appellant's filing is substantially out of rule.

{¶12} Despite the fact that Appellant did not preserve his right to appeal the trial court's decision regarding suppression, we recognize that even the trial court in this matter appeared to believe, erroneously, that an appeal of this issue was available. In the interests of fairness then, we have reviewed the matter and conclude that the seizure of the gun found in Appellant's truck did not violate his Fourth Amendment rights and the trial court did not err in denying the motion to

suppress. In order to be valid, a search must be supported by a warrant or be based on a recognized exception to the warrant requirement. *State v. Ambrosini*, 7th Dist. Nos. 14 MA 155, 14 MA 156, 2015-Ohio-4150, ¶ 8, citing *Katz v. U.S.*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In Ohio, there are seven recognized exceptions to the warrant requirement: (1) a search incident to a lawful arrest, (2) consent, (3) the stop-and-frisk doctrine, (4) hot pursuit, (5) probable cause plus the presence of exigent circumstances, (6) the plain view doctrine, and (7) administrative searches. *State v. McGee*, 7th Dist. No. 12 MA 123, 2013-Ohio-4165, ¶ 17, citing *State v. Akron Airport Post No. 8975*, 19 Ohio St.3d 49, 51, 482 N.E.2d 606 (1985).

{¶13} Pursuant to the plain view doctrine, “if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.” *State v. Abu-Enjeela*, 7th Dist. No. 11 MA 102, 2012-Ohio-6275, ¶ 7, citing *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). While Appellant argues that the officers did not have the right to be on his property, “homeowners \* \* \* do not have a reasonable expectation of privacy as to what can be routinely viewed from their driveway.” *State v. Golubov*, 9th Dist. No. 05CA0019, 2005-Ohio-4938, ¶ 11. See also *State v. Alexander*, 2d Dist. No. 2000-CA-6, 2000 WL 1475578, \*3 (Oct. 2, 2000). The officers went to the address as part of the investigation of an alleged crime. Appellant’s truck was parked in his driveway and any person passing by could readily observe much of its contents. As such, the officers who were validly on Appellant’s property conducting an investigation lawfully

looked into the truck and viewed what they believed to be loose marijuana, which was lying in plain view on the seat of Appellant's truck. They reasonably believed it to be marijuana, in part, because Appellant was smoking a marijuana cigarette when he was approached by the officers. When the officers opened the truck's door to retrieve the loose marijuana, they immediately saw the gun. According to Officer Anderson's testimony, the gun was located on the floor of the driver's seat and was readily observable once the officers opened the door to retrieve the marijuana. Because the officers were able to view the gun without moving or manipulating its surroundings, it was in plain view. There is no question that the incriminating nature of the gun was apparent. Accordingly, the trial court properly denied Appellant's motion to suppress the gun pursuant to the plain view doctrine.

{¶14} Appellant additionally argues that he was improperly handcuffed before the officers located the gun, thus was improperly detained. “[P]olice are entitled to take reasonable measures to ensure their own safety, including handcuffing should the situation warrant it.” *State v. Moore*, 8th Dist. No. 100401, 2014-Ohio-2979, ¶ 14, citing *State v. Hubbard*, 8th Dist. No. 83385, 2004-Ohio-4498. Here, the officers testified at the suppression hearing that Appellant was handcuffed for purposes of officer safety because he became increasingly agitated while speaking with the officers. As the officers' testimony provides competent, credible evidence that the use of handcuffs was reasonable under these facts, we must accept the trial court's finding in that regard.



{¶15} Appellant also contends that the officers obtained the key from his person without permission. However, an officer has the right to obtain a key from a defendant's person, with or without permission, to open a locked glovebox. *State v. Greene*, 2d Dist. No. 25566, 2013-Ohio-4516, ¶ 34. And in a case factually similar to the one at bar, the Tenth District held that an officer is permitted to use a key confiscated from a defendant to open a locked car door to retrieve evidence in plain sight. *State v. Bazrawi*, 10th Dist. No. 12AP-1043, 2013-Ohio-3015, ¶ 27 (internal citations omitted). As the officers had the right to obtain a key from Appellant without permission to open the locked car door to retrieve evidence in plain view, the officers' actions were justified.

{¶16} Accordingly, Appellant's arguments are without merit and are overruled.

#### Conclusion

{¶17} Appellant argues that the trial court erroneously denied his motion to suppress. However, Appellant pleaded guilty and waived any argument pertaining to the suppression hearing. Regardless, the evidence sought to be suppressed was in the officers' plain view once the door to the vehicle was opened. The officers had a right to open this door based on the fact that loose marijuana was on the seats and readily observable as they looked into the vehicle. They also were within the law in handcuffing Appellant for their protection. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.