[Cite as *State v. Rivera*, 2006-Ohio-2460.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86691

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
LUIS RIVERA	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION:	May 18, 2006
CHARACTER OF PROCEEDING:	Criminal appeal from Court of Common Pleas Case No. CR-458290
JUDGMENT:	AFFIRMED
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor ISADORA ALMARO, Assistant 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	PAUL B. DAIKER Zukerman, Daiker & Lear Co. 2000 East Ninth Street, #700 Cleveland, Ohio 44115

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Luis Rivera ("Rivera"), appeals the trial court's denial of his motion to suppress. Finding no merit to the appeal, we affirm.

{¶ 2} In 2004, Rivera was charged with one count of possession of drugs, two counts of drug trafficking, and one count of possession of criminal tools. Rivera filed a motion to suppress and, after a hearing, the court denied his motion. Rivera pled no contest to all charges and was found guilty by the court. He was sentenced to two years in prison.

{¶ 3} The following evidence was presented at the motion to suppress hearing. In September 2004, Detective Norman of the Cleveland Police Department was conducting surveillance at 3448 West 59th Street due to numerous complaints of heroin sales. He observed a Nissan pull into the driveway. An unidentified female was driving and Fidel Pena, Rivera's co-defendant, was the front seat passenger.[1] Rivera exited the house and had a brief conversation with Pena. Rivera re-entered the house, then returned to the car and made a hand-to-hand transaction with Pena. The female and Pena left the area and Det. Norman radioed the waiting detectives. The car was stopped, and heroin was found under the front passenger seat. Pena told police that the heroin was purchased from Rivera.

[1] Fidel Pena is not a party to this appeal.

{¶ 4} Shortly thereafter, numerous officers responded to the residence, and Sgt. Shoulders led them to Rivera's location in the backyard. Shoulders spoke with Rivera, read him his *Miranda* rights, and placed him under arrest. Shoulders explained to Rivera that he intended to obtain a warrant to search his house unless he consented to the search. Shoulders explained the standard consent form to Rivera. Rivera verbally consented to the search and also agreed to sign the consent form. Shoulders led him inside, where Rivera signed the form. Shoulders testified that Rivera was very cooperative and remorseful and led officers into a bedroom where he handed them his daughter's purse, which contained heroin and $1,900 in cash.

{¶ 5} Both Det. Norman and Sgt. Shoulders testified that Rivera gave his consent prior to any officers entering the house. Rivera's 11-year-old daughter testified on his behalf. She testified that she was outside with her father when the police arrived but ran inside because she was scared. She testified that she tried to close the door but an officer pushed it open, knocking her down. She stated that she ran to wake up her mother and the police came into the bedroom. She said the police ordered her and her mother outside, where her father was talking to police. She alleged that an officer told her father if he refused to sign the consent form, he and his wife would go to jail and the children would be placed in foster care.

{¶ 6} Rivera now appeals, asserting the following assignment of error for our review:

{¶ 7} "The trial court erred when it denied the defendant's motion to suppress evidence because of an illegal entry and search of the defendant's home."[2]

{¶ 8} At a hearing on a motion to suppress, the trial court functions as the trier of fact, inasmuch as the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of the witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 582 N.E.2d 972. On review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. After accepting such factual findings, the reviewing court must independently determine as a matter of law whether the applicable legal standard has been satisfied. *State v. Lloyd* (1998), 126 Ohio App.3d 95, 709 N.E.2d 913.

{¶ 9} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, require police to obtain a warrant based upon probable cause before conducting a search. Warrantless searches are per se unreasonable, subject only

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[2]Rivera's notice of appeal specified that he was appealing the final judgment entered on July 7, 2005, not the denial of the motion to suppress rendered on May 13, 2005. App.R. 3(D) requires an appellant to specify the order being appealed. However, we will review the sole assignment of error because App.R. 3(F) allows for the amendment of the notice of appeal.

to a few well recognized exceptions. *Katz v. United States* (1967), 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576. One of the established exceptions to the warrant requirement is a search that is conducted pursuant to voluntary consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854. The voluntariness of consent is a question of fact to be determined from the totality of the circumstances, with the government having the burden of showing by "clear and positive" evidence that the consent was "freely and voluntarily" given. *State v. Posey* (1988), 40 Ohio St.3d 420, 427, 534 N.E.2d 61; *State v. Danby* (1983), 11 Ohio App.3d 38, 463 N.E.2d 47; *State v. Davis* (1992), 80 Ohio App.3d 277, 609 N.E.2d 174.

{¶ 10} An unlawful entry into a defendant's home may taint an otherwise voluntary consent to search obtained thereafter. *State v. Cooper*, Montgomery App. No. 20845, 2005-Ohio-5781. When a consent to search is obtained after an illegal entry, the consent is invalid unless the taint of the initial entry dissipated before the consent was given. Id., citing *United States v. Buchanan* (6th Cir. 1990), 904 F.2d 349, 355-356.

{¶ 11} First, Rivera argues that the initial warrantless entry into his home by the police was unlawful because it occurred before the consent to search form was signed. Rivera points to his daughter's testimony, which suggested that the police entered before he signed the consent form. The trial court, however, did not find that the police entered prior to obtaining consent.

Instead, the trial court stated the following: "[v]iewing the totality of the circumstances in this case, this Court finds that the Defendant's consent to search his home was freely and voluntarily given." This is a factual determination left to the trial court and will not be disturbed on appeal if supported by competent, credible evidence. See *City of Dayton v. Lowe* (Dec. 31, 1997), Montgomery App. No. 16358.

{¶ 12} After reviewing the transcript, we accept the trial court's finding because it is supported by competent, credible evidence. Rivera's daughter testified that she went into the house to wake up her mother and at some point the police entered her mother's bedroom. Missing from the testimony, however, is evidence of the time lapse between the daughter's entry into her mother's bedroom and the police entry. As the trial court pointed out, "you don't know if the police followed her immediately to her mother's room or came in when they got the consent. There could be a gap there."

{¶ 13} Although Rivera claims that the police entered the house before he gave his oral or written consent, and although the burden is on the State to show that consent was freely given, the burden is on Rivera to show that the police entered before he gave that consent. After reviewing the totality of the circumstances, the court determined that consent was freely and voluntarily given before the police entered the house. The trial court, as the trier of fact, was in the best position to judge the credibility of the

witnesses and evidence. We cannot say that the court abused its discretion in determining that consent was given before the police entered the house.

{¶ 14} Next, Rivera argues that his consent was not freely and voluntarily given because he does not understand English and the officers spoke to him in English. Sgt. Shoulders testified that he read Rivera his *Miranda* rights twice to make sure that he understood his rights. Rivera stated that he understood his rights. He never asked for an interpreter or gave the police any indication he did not understand English. Rivera's daughter also testified that her father spoke to the police in English and speaks to others in English. Moreover, as noted by the State and reflected in the record, Rivera did not request a Spanish interpreter at the motion to suppress hearing; therefore, his contention that he does not understand English is without merit.

{¶ 15} Finally, Rivera argues that the police threatened to jail him and his wife and place his children in foster care if he refused to sign the consent form. As explained by the trial court, Rivera's argument involving coercion is not supported by case law. In *Davis*, supra at 289, the court found that it was not coercive to explain to the defendant that, without her consent, the police would have to place her under arrest, remove her child, place the child with a county agency, and obtain a warrant. Consequently, Rivera's argument relating to coercion fails. Therefore, we find

that the trial court correctly denied Rivera's motion to suppress. Accordingly, the sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, J. CONCURS;

SEAN C. GALLAGHER, J. CONCURS
IN JUDGMENT ONLY

PRESIDING JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this

court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).