

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87234

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	and
-vs-	:	
	:	OPINION
GEORGE WEST	:	
	:	
Defendant-Appellee	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION:	<u>AUGUST 17, 2006</u>
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CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-466998
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JUDGMENT:	Affirmed.
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DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellant:	WILLIAM D. MASON Cuyahoga County Prosecutor RICHARD R. NEFF Assistant County Prosecutor 8 th Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellee:	JOHN P. HILDEBRAND, SR., ESQ. Hildebrand Williams & Farrell 21430 Lorain Road Fairview Park, Ohio 44126
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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant, the State of Ohio, appeals the trial court's decision granting appellee George West's motion to suppress. The State assigns the following error for our review:

"I. The trial court erred in granting defendant's motion to suppress because the crack cocaine seized in the warrantless search fell within the well recognized plain view exception."

{¶ 2} Having reviewed the record and pertinent law, we affirm the decision of the trial court. The apposite facts follow.

{¶ 3} The Cuyahoga County Grand Jury indicted West on one count each of possession of drugs, drug trafficking with a juvenile specification, and possession of criminal tools.

{¶ 4} West filed a motion to suppress the evidence. At the hearing, the evidence revealed that on April 26, 2004, Officer Hardy responded to a domestic violence call at an apartment building located at 1247 East 89th Street. While in the hallway of the building, he noticed an extension cord coming from under the door of an apartment located adjacent to the domestic violence victim's apartment. The cord was plugged into an outlet in the common hallway.

{¶ 5} Officer Hardy testified that, based on his experience, he believed either someone was stealing electricity from the apartment complex, or unlawfully staying at the apartment. Therefore, Officer Hardy unplugged the cord. A male immediately opened the door to

determine why the electricity was turned off. Upon seeing the officers, the person looked startled. When the male first opened the door, Officer Hardy observed a man, later identified as West, run to the back of the apartment.

{¶ 6} Officer Hardy conversed with the person that opened the door regarding his right to be in the apartment and the use of the electricity in the hallway. At some point, West pushed the male away from the door and told the officer that he lived there with several others and that he had his uncle's permission to use the electricity. Apparently, West's uncle was the apartment manager. West opened the door a little wider and the officer could see several other men laying on a mattress on the floor. The only furnishings the Officer could observe in the apartment were the mattresses on the floor and a big screen television, which was next to the door's entrance.

{¶ 7} According to Officer Hardy, Officers Wheeler and Adam arrived on the scene while he was conversing with West. Officer Wheeler did not testify at the suppression hearing. However, Officer Hardy testified that while standing behind him, Officer Wheeler noticed a plastic bag of crack cocaine on the top of the large television. Officer Hardy admitted that he could not see the crack cocaine from his vantage point. The officers then proceeded into the apartment and ordered the men up against the wall.

{¶ 8} Officer Adam checked the rest of the apartment for other inhabitants. He opened a closet located in the bedroom and discovered an opened duffle bag with cocaine in plain view.

{¶ 9} The trial court granted the motion to suppress and found the "State failed to prove the necessity of the warrantless search or that it met any of the exceptions to the requirement of a warrant."¹

Motion to Suppress

{¶ 10} The State argues the trial court erred by granting West's motion to suppress because the drugs were in plain view, providing the officers with probable cause to enter the premises. We disagree.

{¶ 11} When reviewing a trial court's grant of a motion to suppress, an appellate court is to (1) give deference to the trial court's findings of fact, so long as they are supported by competent, credible evidence and then (2) determine independently whether the trial court correctly applied the law to those facts.²

The trial court in the instant case, failed to provide findings of fact. However, because the record in the instant case allows us to

¹Journal entry, November 1, 2005.

²*State v. Curry* (1994), 95 Ohio App.3d 93, 96.

review the court's judgment in spite of the lack of findings of fact, the defect is not detrimental to our review.³

{¶ 12} The only factual issue of contention is whether Officer Wheeler could have seen the drugs from his vantage point from outside the doorway. However, even if we assume for sake of argument that Officer Wheeler could have seen the drugs from outside the door, this alone would not have allowed the officers to enter the apartment without a warrant.

{¶ 13} The Fourth Amendment to the United States Constitution protects the "right of people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures." Warrantless searches are per se unreasonable under the Fourth Amendment-subject only to a few specially established and well-delineated exceptions.⁴ The State relies on the plain-view exception.

{¶ 14} The warrantless search 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

³*State v. Brown* (1992), 64 Ohio St.3d 476; *State v. Almalik* (1986), 31 Ohio App.3d 33.

⁴*State v. Welch* (1985), 18 Ohio St.3d 88, 91, citing *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed. 2d 576.

officer has a lawful right of access to the object; and (3) the incriminating nature of the object is immediately apparent.⁵

{¶ 15} The pivotal controversy before us is within the second criterion of the plain view doctrine. The authorities must have lawful access to the contraband in plain view. In *Horton v. California*,⁶ the Supreme Court stressed that an officer's discovery of an object in plain view does not exempt the officer from complying with the Fourth Amendment. The officer must have a "lawful right of access" to the discovered object.⁷

{¶ 16} In the instant case, when the contraband was allegedly observed by Officer Wheeler, the officers were standing outside the apartment door. West had not consented to the officers entering the premises. Although the officer's alleged ability to see the contraband provided probable cause, it did not establish an exception to obtaining a warrant to enter the apartment in order to seize the evidence. The *Horton* Court noted that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances."⁸ The Court explained:

⁵*Horton v. California* (1990), 496 U.S. 128, 136-137, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112, 114.

⁶*Id.*

⁷*Id.* at 137.

⁸*Id.* at 137.

"Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor v. United States*, 286 U.S. 1 [, 52 S.Ct. 466, 76 L.Ed. 951 (1932)]; *Johnson v. United States*, 333 U.S. 10 [68 S.Ct. 367, 92 L.Ed. 436 (1948)]; *McDonald v. United States*, 335 U.S. 451 [, 69 S.Ct. 191, 93 L.Ed. 153 (1948)]; *Chapman v. United States*, 365 U.S. 610 [, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961)]; * * * We have since applied the same rule to the arrest of a person in his home. See *Minnesota v. Olson*, 495 U.S. 91 [, 110 S.Ct. 1684, 109 L.Ed.2d 85] (1990); *Payton v. New York*, 445 U.S. 573 [, 100 S.Ct. 1371, 63 L.Ed.2d 639] (1980)."⁹

{¶ 17} In the instant case, evidence of exigent circumstances was not presented. The officers were merely investigating the illegal use of electricity, not drug trafficking. Therefore, the occupants were not alerted to the fact the officers were aware of drugs in the apartment, which arguably would have caused the residents to attempt to dispose of the contraband while the officers were obtaining a search warrant.

{¶ 18} In *United States v. Radka*,¹⁰ the Sixth Circuit Court of Appeals set forth a two-prong test for determining the validity of a warrantless entry based upon the exigency of the imminent destruction of evidence:

"A warrantless entry to prevent the loss or destruction of evidence is justified, if the government demonstrates:

⁹Id. See, also, *California v. Ciroala* (1986), 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210.

¹⁰(C.A. 6, 1990), 904 F.2d 357, 361.

(1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that the loss or destruction of evidence is imminent. The mere possibility of loss or destruction of evidence is insufficient justification. Affirmative proof of the likelihood of the destruction of evidence, along with the necessity for warrantless entry are required.”¹¹

{¶ 19} Here, there was no evidence presented that the contraband was in danger of imminent destruction if the officers did not seize it immediately. As we stated, there was no indication the occupants were aware that the officers knew of the drugs. Therefore, there was no basis justifying the officers entering the apartment without first obtaining a warrant. We conclude the trial court did not err by granting the motion to suppress based on the State’s failure to prove an exception to the prohibition against warrantless searches. Accordingly, the State’s sole assigned error is overruled.

Judgment is affirmed.

KENETH A. ROCCO, P.J., CONCURS;

MICHAEL J. CORRIGAN, J., DISSENTS.
(SEE ATTACHED DISSENTING OPINION.)

PATRICIA ANN BLACKMON
JUDGE

MICHAEL J. CORRIGAN, J., DISSENTING: Motion to suppress, drug possession, drug trafficking.

¹¹Id. at 362.

{¶ 20} I respectfully dissent because I believe that the evidence showed that the police were justified in making a warrantless entry into the apartment on grounds that the loss or destruction of evidence was imminent. *Minnesota v. Olson* (1990), 495 U.S. 91, 100. The evidence showed that the police had 1) a reasonable belief that third parties were inside the dwelling and 2) a reasonable belief that these third parties were aware that the police were at the door. See *State v. Baker and Bakey* (Apr. 25, 1991), Cuyahoga App. Nos. 60352, 60353, unreported, citing *United States v. Sangineto-Miranda* (6th Cir. 1988), 859 F.2d 1501, 1512. The evidence not only showed that a third party opened the door to the police, but that West had been seen moving quickly into the second room of the apartment once it became clear to the occupants that the police were present. Although there was no specific testimony on exigent circumstances, the facts received at the suppression hearing admit no other conclusion but that the police showed an objectively reasonable basis for fearing the imminent destruction of evidence.