[Cite as *State v. Harris*, 2010-Ohio-6019.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 94324, 94325, and 94326

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERNEST HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-526284, CR-522094, and CR-523355

BEFORE: Gallagher, A.J., Jones, J., and Vukovich, J.*

RELEASED AND JOURNALIZED: December 9, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Ernest Harris challenges the denial of his motion to suppress by the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we reverse.

{¶ 2} This appeal addresses three underlying cases, Cuyahoga County C.P. Nos. CR-522094, CR-523355, and CR-526284, in which Harris was charged and convicted of one count of drug possession in each. On March 5, 2009, Harris was arrested at his house at 12826 Marston Avenue (the

"house"), Cleveland, Ohio. He was arrested at his house again on March 21, 2009, and on June 30, 2009. After each arrest, Harris was indicted on a one-count indictment for a violation of R.C. 2925.11(A)(5), a fifth-degree felony. On August 18, 2009, Harris filed a motion to suppress the evidence Cleveland police officers recovered from the house. He argued that the police's warrantless entry into his house violated his Fourth Amendment rights.

{¶ 3} The following facts were adduced at the suppression hearing held on October 13, 2009. The house had belonged to Willie and Leuvenia Ross, Harris's uncle and aunt, both deceased as of 2007. The trial court took judicial notice that Harris was the legal owner of the house at the time of his arrests. The court also noted that on May 7, 2007, in Case No. CV-622729, the Cuyahoga County Court of Common Pleas found that the house was dangerous and harmful to the health and safety of the community, that a nuisance existed, and that the nuisance had not been abated. That court ordered the house closed, locked, and boarded up for a period of one year, as permitted under R.C. 3767.06.

{¶ 4} The state presented two witnesses at the suppression hearing, Sergeant Ron Ross and Detective Luther Roddy. Both officers testified they were aware of neighbors' complaints of drug activity and prostitution occurring at the house. Both acknowledged they believed the house was still

under a court-ordered injunction to remain closed and padlocked, and they could readily observe that the windows were still boarded up. On none of the three occasions that Harris was arrested did any officer observe evidence of drug activity or prostitution at the house before entering it. On none of the three occasions did the officers have a warrant, nor did they have Harris's consent to search the house.

{¶ 5} On March 5, 2009, the officers approached the house because they observed a woman attempting to gain entry via the side door. A patdown search of the woman revealed she possessed a rock of crack cocaine. Officers entered the house because they heard noise coming from inside, they thought the house was abandoned, and they believed no one was lawfully permitted to be inside. When the officers entered, they conducted a protective sweep of the rooms and found two crack pipes in plain view. Harris, who was inside the house, did not give consent for the officers to enter. Harris was arrested and charged with drug possession.

{¶ 6} On March 21, 2009, officers returned to the house because of neighbors' complaints of people coming and going from the house; the officers did not observe evidence of this themselves. The officers heard noise coming from inside the house, and someone answered the door and allowed the officers to enter. Several people inside were arrested for criminal trespass.

Harris was arrested and charged with drug possession after officers observed a crack pipe in his bedroom.

{¶ 7} On June 30, 2009, officers returned to the house, still under the impression the injunction was in place; they entered the house without a warrant, arrested Harris, and charged him with drug possession.

{¶ 8} Det. Roddy and Sgt. Ross testified they believed the injunction was in place, and that if it had not been, they agreed that officers would have needed a warrant to enter the house. At oral argument, the state conceded that the injunction had expired one year from May 7, 2007, the date it was issued.

{¶ 9} The trial court denied Harris's motion to suppress on the basis that the injunction was permanent as to all illegal activity, stating "[Harris] does not have a right to be in that property in order to carry out the enjoined [drug] activities which, even after the expiration of the initial one-year period, are still permanently enjoined." The court acknowledged that the officers "entered in order to investigate a violation of the Court's prior order * * *."

{¶ 10} On October 14, 2009, Harris pleaded no contest to the charges in all three indictments. On November 16, 2009, the court sentenced him to 12 months community-controlled sanctions on each case, to run concurrent.

{¶ 11} Harris now appeals the trial court's denial of his motion to suppress.

{¶ 12} In his sole assignment of error, Harris argues that "[t]he trial court erred in denying appellant's motion to suppress when the state failed to establish that its warrantless entry was justified by an exception to the warrant requirement."

{¶ 13} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." (Citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

{¶ 14} "The Fourth Amendment to the United States Constitution provides in part: 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.' The Fourth Amendment to the United States Constitution and Section 14, Article One, of the Ohio Constitution require the police to obtain a warrant based upon probable cause before they conduct a search." *State v. Rankin*, Cuyahoga App. No. 88866, 2007-Ohio-4844, at ¶ 20, citing

Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564.

{¶ 15} The Constitution prohibits the state from making unreasonable, warrantless intrusions into areas where people have legitimate expectations of privacy. *United States v. Chadwick* (1977), 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538. Unless the state specifically proves an exception to the warrant requirement, a warrantless search is unconstitutional, even if the facts unquestionably demonstrate probable cause to obtain a warrant. *State v. Sharpe*, 174 Ohio App.3d 498, 2008-Ohio-267, 882 N.E.2d 960, ¶ 29, citing *Agnello v. United States* (1925), 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145.

{¶ 16} Here Harris argues that he had a legitimate expectation of privacy while in his house. We agree. We do not find that the testimony of the officers at the suppression hearing demonstrates that their unauthorized entry into the house was lawful.

{¶ 17} First we note that any injunction on the house was no longer in place after May 7, 2008, ten months prior to Harris's first arrest. R.C. 3767.06 allows the proper governmental agency to close and lock a property to prohibit any use for a period of one year upon a showing of an unabated nuisance. That time period had long since expired at the time Harris was first arrested at the house. The state conceded as much at oral argument.

{¶ 18} Furthermore, even if the officers were under the impression that the house was still subject to the injunction on March 5, 2009, they offered no explanation for not having confirmed this before returning to the house on March 21 and June 30. The fact that an injunction had at one time been placed on the house does not provide law enforcement officers access to a property without any time limitation.[1]

{¶ 19} The trial court also found that the officers' testimony demonstrated they had a public safety concern based on neighbors' calls that the house was being used for drug activity and prostitution. The information gained from these calls indicated that people were coming and going from the house at all hours of the day and night.

{¶ 20} Under certain emergency or exigent circumstances, law enforcement officers are not required to obtain a warrant before entering a private residence. The Fourth Amendment does not prohibit police officers from making warrantless entries into a house when the officers reasonably believe a person in the house is in immediate need of aid; likewise, the need

[1] Both the trial court and the state rely on the dissent in *State ex rel. Cleveland v. Cornell*, Cuyahoga App. No. 84679, 2005-Ohio-1977, but we do not see how it applies here. In her dissent Judge Blackmon stated: "After it has been established, the nuisance is permanently enjoined and the owner is perpetually enjoined from a nuisance at the offending house and any other house so owned or maintained." Id. We read this to mean that illegal activities such as drug sales and prostitution are nuisances, and therefore always prohibited. We do not read this to mean that an injunction ordered on property pursuant to R.C. 3767.06 is permanent without a showing that the nuisance continues unabated.

to protect or preserve life or to avoid serious injury is justification for an officer to enter a house for what would otherwise be illegal absent the exigency. *Mincey v. Arizona* (1978), 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290.

{¶ 21} A determination of exigency sufficient to justify warrantless entry must be made on a case-by-case basis. Id. at 392. The appropriate inquiry is whether, based on the totality of the circumstances, it was reasonable for the officer to believe that an exigent or emergency situation existed. *State v. Applegate* (1994), 68 Ohio St.3d 348, 1994-Ohio-356, 626 N.E.2d 942. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. * * * The Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Whren v. United States* (1996), 517 U.S. 806, 813-814, 116 S.Ct. 1769, 135 L.Ed.2d 89. Therefore, this court must determine whether exigent circumstances existed in this case, and whether the officers' actions in entering the house were reasonable.

{¶ 22} Det. Roddy and Sgt. Ross testified they did not observe anyone coming and going from the house, with the sole exception of seeing one woman knocking at the side door on March 5. They also testified that they

did not spend any time attempting to corroborate the neighbors' complaints prior to gaining entry on the three dates in question.

{¶ 23} We find that this evidence does not support a finding that exigent circumstances existed here, and the officers' warrantless entrance into the house was not reasonable. The officers did not articulate any immediate threat to any persons or the community that would prevent them from taking time to get a warrant. This finding is bolstered by the fact that the officers entered Harris's house not once, but three times over the course of four months, each time without obtaining a warrant. Furthermore, unlike cases in which neighbors complain about loud noise coming from a property, where officers may be required to address the nuisance immediately and without a warrant, the facts here are sufficiently different.

{¶ 24} Because of the facts adduced at the suppression hearing and the Fourth Amendment prohibition against warrantless entries into a person's house, we find merit to Harris's argument. Harris's sole assignment of error is sustained.

Judgment reversed.

It is ordered that appellant recover from appellee 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 common pleas court to carry this judgment into execution.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

LARRY A. JONES, J., and
JOSEPH J. VUKOVICH, J.,* CONCUR

*(Sitting by assignment: Judge Joseph J. Vukovich of the Seventh District Court of Appeals.)