

[Cite as *State v. Shaffer*, 2010-Ohio-1744.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93948

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL SHAFFER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521308

BEFORE: Gallagher, A.J., Stewart, J., and Dyke, J.

RELEASED: April 22, 2010

**JOURNALIZED:
ATTORNEY FOR APPELLANT**

Paul Mancino, Jr.
75 Public Square
Suite 1016
Cleveland, Ohio 44113-2098

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Ma'rion D. Horhn
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with

supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

{¶ 2} Appellant Michael Shaffer appeals the trial court's denial of his motion to suppress. Finding no merit to the arguments set forth, we affirm.

{¶ 3} On February 25, 2009, a Cuyahoga County grand jury indicted Shaffer on three counts. Count 1 charged drug trafficking in violation of R.C. 2925.03(A)(2), with a firearm specification; Count 2 charged possession of criminal tools in violation of R.C. 2923.24(A), with a firearm specification; and Count 3 charged having a weapon under disability in violation of R.C. 2923.13(A)(3). The indictment also contained a forfeiture of guns and money.

{¶ 4} Shaffer entered a plea of not guilty, and subsequently filed a motion to suppress. Prior to the start of the August 31, 2009, suppression hearing, the state dismissed Count 3. At the hearing, the state presented two witnesses, Detective Edwin Morley and Sergeant Andrew Ezzo, both of whom had been assigned to the Marshall Violent Fugitive Task Force ("Task Force").

{¶ 5} The witnesses testified that on February 4, 2009, there were four other officers assigned to the Task Force, along with Det. Morley and Sgt. Ezzo. The Task Force was attempting to locate Jason Frederick, pursuant to a valid arrest warrant. Det. Morley testified that in preparation for this assignment, he conducted a public records check to determine the most current address for Frederick. Det. Morley's research indicated that the last address on file for Frederick, as listed on Auto-Trac, was 2095 West 83rd Street (Up). Det. Morley also reviewed an OHLEG printout of seven photos of Frederick, taken over the course of several years. Additional information showed Frederick to be approximately six feet tall, weighing 200 pounds.

{¶ 6} When the Task Force arrived at 2095 West 83rd Street at approximately 8:30 a.m. on February 4, 2009, the officers secured the perimeter of the house, and Det. Morley approached the side door. He testified that he knocked loudly on the door and announced his presence. Det. Morley could see a male come down an inside set of stairs and look out through a small window in the side door. Det. Morley testified that he believed that male, later identified as Shaffer, was actually Frederick, the suspect they sought. Sgt. Ezzo joined Det. Morley at his position at the side door.

{¶ 7} Both Det. Morley and Sgt. Ezzo testified they could see only Shaffer's face through the window, and they could not see how tall or big he was. Det. Morley repeatedly advised that he was there to execute a warrant and that Shaffer should open the door. Sgt. Ezzo corroborated Det. Morley's testimony that they

both advised Shaffer they were there on a warrant, and that he should open the door, or it would be “taken down.” Sgt. Ezzo testified that Shaffer shouted words to the effect of, “I don’t live here; I can’t open the door.” Both officers testified they believed the man they saw inside the house was Frederick.

{¶ 8} The officers testified Shaffer refused to open the door, and instead ran up the stairs and entered the second floor unit. Sgt. Ezzo breached the side door, and several officers followed Shaffer upstairs, where they found the second floor door locked. They pounded on that door and demanded the occupants open the door, or it would be “taken down.” Det. Morley and Sgt. Ezzo heard a female voice (later identified as co-defendant Stacy Lyons), as well as running footsteps within the unit. When the occupants refused to open the door, Sgt. Ezzo breached the inner door, and the officers entered the premises.

{¶ 9} While they were attempting to secure Shaffer and Lyons, U.S. Marshall Fitzgibbon, another Task Force officer, yelled “gun,” and the officers conducted a sweep of the premises to ensure their safety and to determine whether other persons or weapons were present. Sgt. Ezzo also attempted to taser, then pepper spray, a pit bull that charged him; Lyons eventually secured the dog and removed it from the room. When asked to identify himself, Shaffer gave the officers a false name. The officers did not know immediately that Shaffer was not Frederick, the person they were searching for, even though Shaffer is under six feet tall and weighed approximately 140 pounds.

{¶ 10} While the officers conducted a protective sweep of the premises, they discovered marijuana and scales in plain view. Once both Shaffer and Lyons were secured, a search warrant was obtained, and the house was searched. Pursuant to the search warrant, marijuana, other drug paraphernalia, another gun, and approximately \$1,950 in cash were discovered.

{¶ 11} The trial court denied Shaffer's motion to suppress, finding that the officers had a valid arrest warrant for Frederick; 2095 West 83rd Street was Frederick's last known address; the officers could reasonably conclude Shaffer was Frederick because of his resemblance to the photos they had; and mail for an individual named "Frederick" was found at the residence. The court also determined the officers viewed the gun and drugs in plain sight.

{¶ 12} In his sole assignment of error, Shaffer asserts that he was denied due process of law when the trial court overruled his motion to suppress drugs and weapons found while they were executing an arrest warrant for another person. He argues that the Task Force unlawfully entered his dwelling without a search warrant and without exigent circumstances. We disagree.

{¶ 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} Generally, the Fourth Amendment prohibits the police from making a warrantless nonconsensual entry into a suspect’s home in order to make a felony arrest. *Payton v. New York* (1980), 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639. The *Payton* court held, however, that “an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” *Id.* at 603, 100 S.Ct. at 1388, 63 L.Ed.2d at 661. The court in *United States v. Underwood* (C.A.9, 1983), 717 F.2d 482, held that the right to privacy is personal to the homeowner and that the Fourth Amendment merely requires an arrest warrant plus “reason to believe” that the suspect is in another’s house.

{¶ 15} The Task Force acted upon the reasonable belief that Frederick lived at 2095 West 83rd Street, in the second-floor unit. The information was gained through a public records search. Therefore, when the Task Force arrived at the house early in the morning, it was reasonable for the officers to believe that the man who appeared at the door was the suspect they sought. The last known address they had for Frederick and the photos they had of him, coupled with the arrest warrant, gave Det. Morley and Sgt. Ezzo the authority to enter the house, once they had announced their intention to make the arrest and were denied entry. See R.C. 2935.12; *State v. Clark* (1974), 40 Ohio App.2d 365, 319 N.E.2d 605.

{¶ 16} Shaffer relies almost exclusively on *Steagald v. U.S.* (1981), 451 U.S. 204, 212, 101 S.Ct. 1642, 68 L.Ed.2d 38. The facts in *Steagald*, however, are distinguishable from the facts before us. In *Steagald*, the arresting officers relied on the warrant as legal authority to enter the home of a third person based on their belief that the defendant might be a guest there, not on their belief that the defendant actually lived there.

{¶ 17} In *State v. Tolbert* (1996), 116 Ohio App.3d 86, 686 N.E.2d 1375, the police entered the apartment of the defendant's girlfriend because they had reason to believe the suspect they sought was inside. As the girlfriend opened the door, the police could clearly see Tolbert in the apartment. This court upheld the trial court's decision to deny the motion to suppress. *Id.*

{¶ 18} The facts in our case are even more persuasive than those in *Tolbert*. Here the Task Force had the West 83rd Street address listed as Frederick's most current address. When the officers announced their presence and the fact that they had an arrest warrant, they could see Shaffer's face through the window and reasonably believed he was Frederick. The officers had the legal authority to be where they were and then to enter the house in order to execute an arrest.¹

{¶ 19} Having decided the Task Force lawfully entered Shaffer's home, we next consider whether the trial court should have suppressed evidence of guns

¹ Had Shaffer opened the door and demonstrated to the officers that he was not the suspect, and had the officers, nonetheless, forcibly entered the second-floor unit, we would have a separate issue to address. But these are not our facts.

and drugs seized as a result of their entry. We find that because the protective sweep was necessary and contraband items were in plain view, the trial court's decision to deny the motion to suppress was proper.

{¶ 20} A police officer who discovers a weapon in plain view may at least temporarily seize that weapon if a reasonable officer would believe, based on specific and articulable facts, that the weapon poses an immediate threat to officer or public safety. *United States v. Bishop* (C.A.6, 2003), 338 F.3d 623, 628. "A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271.

{¶ 21} Furthermore, the officers were then permitted to make a protective sweep to ensure their safety. "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie* (1990), 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276. The Fourth Amendment permits an officer to perform a protective sweep "if the searching officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." (Internal quotations, alterations, and citations omitted.) *Id.*

{¶ 22} Both Det. Morley and Sgt. Ezzo testified that almost immediately after the Task Force entered the upstairs unit, U.S. Marshall Fitzgibbon yelled "gun,"

and thereby alerted the other officers of a potential danger. It was at this time that the officers were charged by a pit bull. It is important to note that it was still not clear to the officers whether Frederick was in the house. The officers testified that because of the gun and the dog, as well as their continued uncertainty as to Frederick's whereabouts, they made a protective sweep of the premises. During the protective sweep, officers of the Task Force discovered marijuana and scales in plain view. The trial court heard testimony that because of their discovery, the officers obtained a search warrant in order to conduct a full search of the premises.

{¶ 23} We find that the trial court properly applied the law to the facts presented to it at the suppression hearing. The officers' actions did not violate Shaffer's constitutional rights, and the trial court correctly denied his motion to suppress. Shaffer's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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. 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

**MELODY J. STEWART, J., and
ANN DYKE, J., CONCUR**