[Cite as *State v. Kinsell*, 2010-Ohio-3854.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 25074
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DOUGLAS K. KINSELL	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 11 3674

DECISION AND JOURNAL ENTRY

Dated: August 18, 2010

MOORE, Judge.

{¶1} Appellant, Douglas Kinsell, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} At 5:23 p.m. on November 5, 2008, the Akron Police Department received a phone call from an individual whose daughter reported having observed intravenous drug use in the downstairs apartment of 697 Allyn Street in Akron, Ohio. Officers had previously reported drug complaints regarding 697 Allyn. The Street Narcotics Unit received the call, which indicated that two white males and a white female were "shooting up drugs openly with the door open" and "[h]ad needles in their arms." Approximately one hour later, several detectives from the Street Narcotics Unit visited 697 Allyn in order to investigate via what they described as a "knock and talk."

{¶3} The layout of the downstairs apartment at 697 Allyn is such that an outside door opens to the kitchen. At the back of the kitchen is a bathroom. To the right of the kitchen is a living room. The doorway between the kitchen and living room is also located at the back of the kitchen.

{¶4} The first uniformed detective, Brian Boss, knocked on the door to the kitchen. When an occupant, Judith Spicer, answered, he identified himself as an officer with the Akron Police Department and requested to enter the apartment. Spicer consented to the entry but later indicated that she was not a tenant. Before Spicer indicated that she was merely a guest, the officers observed drug paraphernalia in plain view. A second uniformed detective, David Haverstick, heard other people in the adjacent living room and conducted a protective sweep. He observed Kinsell and another man conversing on the couch. At Kinsell's feet was what appeared to be drug paraphernalia. Detective Haverstick conducted a pat down on Kinsell and eventually discovered a single Dilaudid pill. Detective Haverstick placed Kinsell under arrest.

{¶5} On November 18, 2008, the Summit County Grand Jury indicted Kinsell on one count of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1), a felony of the fifth degree.

{¶6} On January 9, 2009, Kinsell filed a motion to suppress. On February 19, 2009, and March 26, 2009, the trial court conducted a hearing on the motion to suppress. On September 17, 2009, the trial court entered an order denying Kinsell's motion to suppress. Kinsell pled no contest to the charge.

{¶7} Kinsell timely filed a notice of appeal, raising four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE ANONYMOUS UNCORROBORATED TIP RECEIVED BY THE AKRON POLICE DEPARTMENT ESTABLISHED SUFFICIENT INDICIA OF RELIABILITY TO PROVIDE THE REQUIRED REASONABLE SUSPICION NECESSARY FOR LAW ENFORCEMENT OFFICIALS TO MAKE AN INVESTIGATORY STOP AND/OR INQUIRY IN THE INSTANT CASE."

{¶8} In his first assignment of error, Kinsell contends that the uncorroborated anonymous tip regarding drug use did not provide reasonable suspicion for the police to make an investigatory stop or inquiry at the apartment in which Kinsell was found. We do not agree.

{¶9} An appellate court's review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. The trial court acts as the trier of fact during a suppression hearing, and is therefore best equipped to evaluate the credibility of witnesses and resolve questions of fact. *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548. Accordingly, this Court accepts the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8.

{¶10} "'The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution secure an individual's right to be free from unreasonable searches and seizures.'" *State v. McCoy*, 9th Dist. No. 08CA009329, 2008-Ohio-4947, at ¶5, quoting *State v. Moore*, 2d Dist. No. 20198, 2004-Ohio-3783, at ¶10.

{¶11} Police-citizen contact usually falls into one of three categories. *Florida v. Royer* (1982), 460 U.S. 491, 501-507. The first category, and the only category relevant to this

assignment of error, is a consensual encounter. "Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away." *State v. Taylor* (1995), 106 Ohio App.3d 741, 747, citing *United States v. Mendenhall* (1980), 446 U.S. 544, 553.

{¶12} Kinsell argues that the "knock and talk" conducted by the officers constituted an investigatory stop. Merely knocking on the door of an apartment and speaking with an occupant, however, is a consensual encounter independent of an anonymous tip. *State v. Harris*, 2d Dist. No. 19479, 2003-Ohio-2519, at ¶9. "Such an encounter does not require that police have a reasonable suspicion that the [apartment's] occupants were engaged in criminal activities." Id. The record does not indicate that any of the officers used physical force or a show of authority when knocking on the door to the apartment or speaking with Spicer, a non-resident, when she answered the door. Nor does the record contain any evidence to suggest that Spicer was not free to close the door and end the encounter. It is, therefore, irrelevant whether the tip was actually anonymous and uncorroborated.

{¶13} Accordingly, Kinsell's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN FINDING THAT THE INITIAL WAR[R]ANTLESS ENTRY INTO THE SUBJECT RESIDENCE WAS CONSENSUAL."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN FINDING THAT THE ALLEGED DRUG PARAPHERNA[]LIA FOUND IN THE SUBJECT RESIDENCE WAS FOUND IN PLAIN VIEW."

{¶14} Because Kinsell's second and third assignments of error are related, we consider them together. In his second and third assignments of error, Kinsell contends that the police

officers' warrantless entry into the apartment was non-consensual and that the drug paraphernalia was not found in plain view. We do not agree.

{¶15} In order to qualify under the plain view exception, "it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *State v. Williams* (1978), 55 Ohio St.2d 82, paragraph one of the syllabus. In *State v. Halczyszak* (1986), 25 Ohio St.3d 301, the Supreme Court of Ohio modified *Williams* in part, specifying, among other things, that "[i]n ascertaining the required probable cause to satisfy the 'immediately apparent' requirement, police may rely on their specialized knowledge, training and experience[.]" Id. at paragraph four of the syllabus.

Legal Intrusion

{¶16} In this case, when the officers conducted the "knock and talk" Spicer answered the door. Detective Boss identified the group of officers as members of the Akron Police Department and asked her if they could enter the apartment. Spicer consented. She walked to the middle of the kitchen then turned and met the officers as they entered the kitchen. Detective Boss then inquired as to how long Spicer had lived at the apartment. Spicer informed him that she did not live there, but a tenant was in the bathroom.

> "The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape." *Illinois v. Rodriguez* (1990), 497 U.S. 177, 186.
>
> "As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment [***] warrant a man of reasonable caution in the belief that the consenting party had authority over the

> premises?" (Internal quotations omitted.) Id. at 188, citing *Terry v. Ohio* (1968), 392 U.S. 1, 21-22.

{¶17} In this instance, although the facts are somewhat sparse, it is clear that the officers, at least two of whom were in uniform, knocked on the door of the apartment and when Spicer answered, identified themselves as police officers. They asked if they could enter the apartment and she consented without seeking permission from any other occupants. While it turns out that Spicer was not a resident, the officers were reasonable in believing she had authority to admit them into the apartment. Moreover, this Court has previously held that a lesser showing of authority to grant consent is necessary when the intent of the officers is to question an individual rather than search the premises. *State v. Pamer* (1990), 70 Ohio App.3d 540, 542-43.

Inadvertent Discovery of Evidence

{¶18} In the short time between entering the apartment and learning that Spicer was a guest, the officers had already observed used needles and four or five burnt spoons with pieces of cotton sitting on top of them. The items were "sitting openly in the kitchen." Although the officers intended merely to have a conversation, they immediately stumbled upon evidence of illegal drug use. "[T]he 'inadvertent discovery' requirement can be satisfied if the police 'lack antecedent probable cause, i.e., an advance particularized knowledge of, or intent to seize, those objects ultimately seized.'" *State v. Worthy* (Mar. 8, 2000), 9th Dist. No. CA 19459, at *3, quoting *Halczyszak*, 25 Ohio St.3d at paragraph two of the syllabus. In this case, the officers only had a tip that a witness had observed intravenous drug use. They did not have probable cause to conduct a search, and, in fact, the officers did not visit the apartment intent upon conducting a search.

Immediately Apparent Incriminating Nature of the Evidence

{¶19} Detective Boss testified that he has been employed with the Akron Police Department for more than nine years. He further testified to his training and experience in numerous cases involving illegal substances. Detective Haverstick testified that he has been employed with the Akron Police Department for approximately thirteen and one-half years. Detective Haverstick also testified to his training and experience. Detective Boss explained that the cotton found with burnt spoons is used to filter drugs before they are put in syringes. Detective Haverstick testified that the syringes, burnt spoons and cotton are indicative of heroin use. As noted above, police may rely on their knowledge, training and experience in satisfying the immediately apparent requirement. *Halczyszak*, 25 Ohio St.3d at paragraph three of the syllabus.

{¶20} Accordingly, Kinsell's second and third assignments of error are overruled.

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED IN FINDING THAT OFFICER HAVERSTICK'S SEARCH OF MR. KINSELL'S PERSON WAS JUSTIFIED AND NOT CONDUCTED IN VIOLATION OF MR. KINSELL'S CONSTITUTIONAL RIGHTS."

{¶21} In his fourth assignment of error, Kinsell contends that the trial court erred in finding that Detective Haverstick's search of Kinsell's person did not violate Kinsell's constitutional rights. We do not agree.

{¶22} Shortly after Spicer informed the officers that the tenant was in the bathroom behind her, Robin Saerls emerged from the bathroom. When Detective Boss asked her to explain all of the drug paraphernalia in the kitchen, she informed him that she had a prescription for painkillers to treat symptoms of her pancreatic cancer. She further explained that her boyfriend and Kinsell crushed the painkillers and injected them intravenously. At no time did

Saerls request that the police vacate the apartment. The exact timeline is unclear but at some point while Detective Boss spoke with Spicer and Saerls in the kitchen, Detective Haverstick heard voices in the adjacent living room and conducted a protective sweep to ensure officer safety. In the living room, he discovered Kinsell seated on a couch, conversing with an unidentified male. At Kinsell's feet, the detective saw a cotton ball sitting next to a spoon. After picking up the spoon, the detective noticed that the bottom was burnt. The detective then searched Kinsell's person and found a Dilaudid pill in the watch pocket of Kinsell's pants. The detective admitted that he could not immediately identify the object as a pill when he patted down Kinsell. The detective then placed Kinsell under arrest.

{¶23} The trial court determined that the spoon and cotton ball found at Kinsell's feet constituted drug paraphernalia in plain view of the detective. Kinsell suggests that a mere spoon and cotton ball cannot provide the reasonable suspicion or probable cause necessary to search his person. He notes that the detective had to pick up the spoon to ascertain whether it was burnt on the bottom. Kinsell has further seized upon the detective's admission that he did not immediately identify the pill as contraband during the pat down as evidence that Kinsell was subjected to an unconstitutional search and seizure in violation of the rule set forth in *Terry v. Ohio* (1968), 392 U.S. 1, and *Minnesota v. Dickerson* (1993), 508 U.S. 366.

{¶24} Even if we were to assume that Kinsell's argument is correct, we would not sustain this assignment of error. "Under the inevitable discovery doctrine, evidence obtained unconstitutionally is admissible if it 'would have been ultimately or inevitably discovered during the course of a lawful investigation.'" *State v. Ewing*, 10th Dist. No. 09AP-776, 2010-Ohio-1385, at ¶26, quoting *State v. Perkins* (1985), 18 Ohio St.3d 193, 196. Kinsell ignores the fact that officers had previously reported drug complaints about the apartment in which Kinsell was

found, that multiple items of drug paraphernalia were located in plain view in the kitchen and that Saerls identified him as one of the men who injected her prescription painkillers intravenously when explaining the presence of the drug paraphernalia. This evidence, taken together, provided the officers with probable cause to arrest Kinsell. See *State v. Hunter*, 2d Dist. No. 20917, 2006-Ohio-2678, at ¶18. In this case, as in *Ewing*, the pill would have been discovered during a search incident to arrest in which the detective could conduct a search of Kinsell's person and the area within his immediate control. *Ewing* at ¶27, citing *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶11, citing *Chimel v. California* (1969), 395 U.S. 752, 762-63. Moreover, Officer Haverstick affirmed on direct-examination that he was either placing Kinsell under arrest or preparing to do so when he discovered the pill. It is irrelevant that Kinsell was not ultimately charged with possession of drug paraphernalia. *Hunter* at ¶19.

{¶25} Accordingly, Kinsell's fourth assignment of error is overruled.

III.

{¶26} Kinsell's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

JAMES K. REED, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.