[Cite as *State v. Alihassan*, 2012-Ohio-825.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-578
v.	:	(C.P.C. No. 10CR-10-6264)
Adam A. Alihassan,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 1, 2012

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Luftman, Heck, and Associates, and *Daniel J. Sabol*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶1} Adam A. Alihassan, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a plea of guilty, of aggravated possession of drugs, in violation of R.C. 2925.11, a second-degree felony; aggravated possession of drugs, in violation of R.C. 2925.11, a third-degree felony; and possession of marijuana, in violation of R.C. 2925.11, a fifth-degree felony.

{¶2} On March 4, 2010, at 10:43 p.m., Westerville Police Officer David Leighty stopped appellant's vehicle in the parking lot of appellant's apartment complex for failure to have an illuminated license plate. Appellant was arrested after Leighty saw a large bag of marijuana near appellant's feet. At the time, appellant also had his dog in his car, and, when he found out that he was going to be taken to jail, appellant asked if he could take his dog up to his apartment first. Leighty and another officer accompanied appellant to his apartment door. Appellant opened his door to let his dog inside, and, from outside his apartment, Leighty saw on a table inside the apartment a small amount of marijuana and a marijuana grinder, the possession of which would have constituted misdemeanor infractions. Appellant attempted to close the door, but Leighty put his foot against the door to prevent it from closing. Leighty told appellant he had seen the drugs and paraphernalia inside the apartment, and the three entered the apartment.

{¶3} Once inside, the officers handcuffed appellant and performed a "protective sweep" of the apartment. During the sweep, the officers saw more drugs in the apartment. Leighty asked appellant for consent to search the apartment. Appellant asked to make a phone call first. Appellant subsequently consented to the search and signed a consent form. Officers conducted a search of the apartment and confiscated more drugs.

{¶4} Appellant was charged with two counts of aggravated possession of drugs and possession of marijuana. Appellant filed a motion to suppress evidence, claiming his Fourth Amendment rights were violated when the officers entered his apartment without a warrant and when they conducted the protective sweep of his apartment without justification. Appellant also asserted that his later consent to search his residence was tainted by the previous violations.

{¶5} On April 19, 2011, the trial court conducted a hearing on the motion to suppress. On April 29, 2011, the trial court issued an order, in which it denied appellant's motion to suppress. The trial court found (1) the police properly entered the apartment after seeing contraband within plain view from their vantage point outside the front door of the apartment; (2) the protective sweep was not justified and violated appellant's Fourth Amendment rights; (3) appellant's consent to search was valid, and the unlawful protective sweep did not taint his consent; and (4) even if appellant's consent was tainted, the inevitable discovery doctrine applied to preclude the exclusionary rule. Subsequently, appellant pled guilty to the charges in the indictment. On April 29, 2011, the trial court entered judgment in the action, finding appellant guilty of all charges and sentencing appellant to two years of imprisonment on the second-degree felony aggravated possession of drugs charge; four years of imprisonment on the third-degree felony aggravated possession of drugs charge; and six months of incarceration as to the possession of marijuana charge, with all to be served concurrent to each other. The court stayed the sentence pending appeal. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

{¶6} Appellant argues in his sole assignment of error that the trial court erred when it denied his motion to suppress evidence. The standard of review with respect to a motion to suppress is limited to determining whether the trial court's findings are supported by competent, credible evidence. *State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829, ¶5. In a hearing on a motion to suppress, the trial court assumes the

role of trier of fact, and, because the court is in the best position to resolve questions of fact and evaluate the credibility of witnesses, a reviewing court "must accept the trial court's factual findings and the trial court's assessment of witness credibility." Id. However, while "[a]ccepting those facts as true, an appellate court must independently determine, as a matter of law, without deference to the trial court's conclusion, whether the facts meet the applicable legal standard." Id. Thus, with respect to the trial court's conclusions of law, the reviewing court applies a de novo standard of review and decides whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8, citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶7} A citizen's right to be free from unreasonable search and seizure is stronger in one's own home than it is in a public place. *Payton v. New York* (1980), 445 U.S. 573, 586, 100 S.Ct. 1371, 1380. Invasion of the sanctity of the home is the chief evil against which the Fourth Amendment's warrant requirement is directed. *United States v. United States District Court* (1972), 407 U.S. 297, 92 S.Ct. 2125. A warrantless entry and search of a private residence is presumptively unreasonable. *Payton*; *Welch v. Wisconsin* (1984), 466 U.S. 740, 104 S.Ct. 2091. The government must overcome the presumption that warrantless searches of homes are per se unreasonable by demonstrating that the search falls within one of the few, well-recognized exceptions to the warrant requirement. *Welch*; *State v. Kessler* (1978), 53 Ohio St.2d 204, 373. Thus, the government bears the burden of proving an exception to the warrant requirement. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph two of the syllabus.

{¶8} The following exceptions to the search warrant requirement have been recognized by the Supreme Court of Ohio: (1) search incident to a lawful arrest; (2)

consent signifying waiver of constitutional rights; (3) the stop-and-frisk doctrine; (4) hot pursuit; (5) probable cause to search accompanied by the presence of exigent circumstances; and (6) the plain-view doctrine. *State v. Akron Airport Post No. 8975* (1985), 19 Ohio St.3d 49, 51.

{¶9} Generally, actions taken by the police are deemed reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action. *Brigham City v. Stuart* (2006), 547 U.S. 398, 404, 126 S.Ct. 1943, 1948, citing *Scott v. United States* (1978), 436 U.S. 128, 138, 98 S.Ct. 1717, 1723. Accordingly, the officer's subjective motivation is irrelevant to the analysis. See id. Evidence obtained in violation of the Fourth Amendment is barred by the Exclusionary Rule. *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684.

{¶10} Appellant's first contention is that the trial court erred when it found the officers, who were standing outside of appellant's apartment doorway, properly entered his apartment under the "plain-view" doctrine after seeing contraband inside the apartment, without a warrant, exigent circumstances or consent. The plain-view exception to the warrant requirement permits a law enforcement officer to seize clearly incriminating evidence or contraband when it is discovered in a place where the officer has a right to be. *State Dept. of Public Safety v. Marchbank* (Mar. 29, 2001), 10th Dist. No. 00AP-1026, citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 628. "The doctrine embodies the understanding that privacy must be protected by the individual, and if a police officer is lawfully on a person's property and observes objects in plain or open view, no warrant is required to look at them." *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, ¶16, citing *Horton v. California* (1990), 496 U.S. 128, 110 S.Ct. 2301. In *Buzzard* at ¶15, the

Supreme Court of Ohio held, "if [an] individual does not act to preserve * * * privacy, such as by leaving [objects] in the plain view of the public, then the state has not 'searched' within the meaning of the Constitution, because the individual has exposed those objects to others rather than keeping them to himself."

{¶11} Under the plain-view exception to the search warrant requirement, police may seize evidence in plain view during a lawful search if (1) the seizing officer is lawfully present at the place from which the evidence can be plainly viewed; (2) the seizing officer has a right of access to the object itself; and (3) the object's incriminating character is immediately apparent. *Horton* at 136-37.

{¶12} Appellant asserts that the critical issue in the present case is the second element in *Horton*; that is, whether Leighty had a right of access to the marijuana and grinder inside the apartment. We agree with appellant that Leighty did not have a right of access to the marijuana and grinder. In the trial court's decision, the second requirement in *Horton* was not directly addressed. The decision focuses mainly on the first requirement in *Horton* that Leighty was lawfully present outside the front door when he saw the marijuana and grinder. This court does not dispute the trial court's analysis in this respect. However, the analysis stops short of addressing whether Leighty could have then lawfully entered the premises without first obtaining a warrant under the plain-view doctrine.

{¶13} There exists a substantial amount of case law addressing whether a police officer standing outside of the premises may enter the premises after seeing illegal activity taking place inside the premises. Our review of these cases reveals several with aspects analogous to the circumstances in this case that support the conclusion that

Leighty entered appellant's apartment unlawfully after seeing criminal activity within the apartment. As the plain-view analysis is necessarily fact driven, a full rendering of facts from each case is necessary. In *State v. Andrews*, 177 Ohio App.3d 593, 2008-Ohio-3993, police responded to a call that there was a juvenile drinking party at a house. The house was quiet upon the officers' arrival, although about 12 cars were in the area, with indications they belonged to high school students. The police walked to the backyard, which they found abandoned and strewn with beer cans and a burning bonfire. The officers peeked through the basement windows, observed a group of juveniles with beer cans and cups on a table, and then approached the front door. They spoke with the adult homeowner, the defendant, who then shut the door. The defendant eventually reappeared at the door with her identification, and police pushed passed her and entered the home. The defendant was subsequently charged with contributing to the delinquency of a minor. Prior to trial, the trial court denied the defendant's motion to suppress. Upon appeal, the appellate court reversed. The court of appeals found that the circumstances presented did not represent any exception to the warrant requirement. The court found there was no doubt that probable cause existed for the issuance of a search warrant because clearly there was evidence of underage drinking, but there were no exigent circumstances. When police arrived, the noise had ceased. The house was quiet. Police did not observe juveniles passed out, vomiting, or intoxicated, so there was no evidence of an emergency. The scene was also secured, so police could have waited for further backup. The court also held that the destruction of the party supplies, such as metal beer cans, was not so imminent that it supported a warrantless search. The court found equally unpersuasive the argument that a warrant would cause undue delay, as it would

take over four hours to secure. The court also stated whether the defendant's crime was a felony or a misdemeanor offense was of no relevance because no exigent circumstances existed to justify the warrantless intrusion of the home. Id. at ¶21.

{¶14} In *State v. Davis* (1999), 133 Ohio App.3d 114, officers responded to a complaint of loud music inside an apartment. When officers arrived, they saw several people inside the apartment through a sliding glass door, and they appeared to be underage and holding beer cans. After arresting the two underage tenants outside the apartment, officers entered the apartment and arrested others, including the defendants, for underage consumption. Prior to trial, the court denied the defendants' motion to suppress. On appeal, the court of appeals reversed. The appellate court held that the police unlawfully entered the premises without a warrant, and no exigent circumstances were present. The court noted that no violence was involved and none of the individuals were armed. Additionally, there was no likelihood that anyone would escape, as the police could have secured the only exit door. The court also rejected the state's argument that the time required to obtain a search warrant would have allowed destruction or dissipation of evidence, as beer cans and bottles are hard to destroy beyond the point of recognition, and there was no evidence of beer bottles being broken or beer cans being crushed.

{¶15} In *State v. Kesler* (1996), 111 Ohio App.3d 98, two police officers approached the defendant's apartment to investigate a disturbance call. Through a screen door, the officers saw the defendant sitting on a couch with a dish on his lap, which he put into a drawer after noticing the police. The officers believed there was marijuana on the dish and immediately entered the apartment to arrest the defendant.

Once inside, the officers saw two guns with shells on a chair near the defendant. An officer moved the guns, and the defendant was forcibly made to stand for a weapons pat down. During the arrest, additional police officers arrived and searched the remaining bedrooms in the apartment, finding drugs, guns, and cultivation tools. Prior to trial, the trial court granted the defendant's motion to suppress evidence gathered from the bedrooms but denied the motion as to the marijuana and guns found in plain view near the defendant. On appeal by the defendant, the court of appeals reversed. The appellate court found there was testimony that none of the substance identified as marijuana was in the process of being destroyed and there was no reason why the officers could not have secured the premises and obtained a search warrant to search at a later time. One deputy testified that they did not knock and make further inquiry because they believed there was a plain-view exception. In other words, the court stated, the officers, believing what they saw to be marijuana, without giving any further thought to the requirements of the Fourth Amendment, and without knocking or announcing, grabbed the door and walked inside appellant's apartment, despite there being no pending danger of injury to anyone, no immediate danger of destruction of contraband, and no evidence of flight. The court concluded the facts were insufficient to justify the warrantless intrusion into the defendant's home.

{¶16} In *State v. West*, 8th Dist. No. 87234, 2006-Ohio-4267, a police officer responded to a domestic violence call at an apartment. In the hallway, the officer saw an extension cord coming from under the door of an apartment that was plugged into a hallway outlet. The officer unplugged the plug, and a male opened the door. The male appeared startled, and the officer saw the defendant run to the back of the apartment.

The male at the door began talking to the officer, until the defendant came to the door and said the apartment manager had given him permission to use the plug. The officer also saw several other men lying on a mattress on the floor. Other officers arrived outside the apartment door, and one noticed a bag of crack cocaine on a television. The officers entered the apartment, ordered the men against a wall, and, while checking the apartment for other inhabitants, discovered an opened duffle bag with cocaine in it in a closet. Prior to trial, the court granted the defendant's motion to suppress. Upon appeal by the state, the appellate court affirmed. In addressing whether the officers had a lawful right of access to the object, under *Horton*, the court found that, although the officer's 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 court found no exigent circumstances. 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.

{¶17} In *State v. Robinson* (1995), 103 Ohio App.3d 490, after receiving a citizen's complaint, two plainclothes officers went to a hallway leading to the defendant's apartment. The officers smelled marijuana. An officer knocked on the defendant's door. The defendant opened the door, and the odor of the marijuana came out of the opened door. When the defendant saw the officers standing at the door with their badges displayed, he attempted to close the door, but was prevented from doing so when an officer inserted her flashlight between the door and the doorframe. The officers identified themselves as police officers and ordered the defendant to open the door. As the officers struggled to force the door inward, and the defendant tried to bar their entry, the officers

heard him shout repeatedly for someone inside the apartment to get rid of the "shit" and say the word "police." The officers saw a second person in the apartment run from room to room. After the officers forced open the door and entered the apartment, they saw a packaged quantity of marijuana in the defendant's shoe, which had fallen off during the struggle. Prior to trial, the court sustained the defendant's motion to suppress, and the state appealed. The appellate court affirmed. The court of appeals found the officers' progress into the apartment was not made in conformity with the Fourth Amendment consent doctrine. The court held that the defendant communicated to the officers the limited scope of his consent to the initial intrusion when he attempted to bar the officers' entry into the apartment by closing the door, and the officers exceeded the scope of the defendant's voluntary consent when they forced their way over the threshold and into the apartment. The court also found no exigent circumstances existed. Any imminent destruction of evidence of the offense of minor misdemeanor drug abuse was insufficient to overcome the presumption of unreasonableness that attached to the officers' warrantless entry into the apartment.

{¶18} In *State v. Mims*, 6th Dist. No. OT-05-030, 2006-Ohio-862, officers received a tip that the defendant was growing marijuana in his backyard, and six days later, officers went to defendant's home, which was enclosed by a six-foot tall privacy fence. One officer stood upon a telephone pole lying on the ground and looked over the top of the fence. He saw defendant as well as several marijuana plants growing. The officer asked the defendant permission to enter the backyard through a garage in the back of the yard, but the defendant refused. The officer then told the defendant to meet him at the gate in the front of the yard. The two talked outside the gate, and the defendant admitted

that the plants belonged to him. The officer then said, "take me to the plants," which the defendant did. The defendant was subsequently charged with several drug offenses. The trial court granted defendant's motion to suppress the evidence on the grounds that no exigent circumstances existed and the state failed to establish that the defendant had consented to the search. On appeal, the appellate court affirmed. The appellate court found that, although the viewing of marijuana plants in the defendant's backyard gave the police probable cause to obtain a search warrant, they could not lawfully access the premises without such. The court also found there existed no exigent circumstances when there was no evidence that the officers saw the defendant make any moves indicating he intended to destroy the plants, there was no immediate danger to anyone, there was no indication that the defendant would flee, and there was no indication that he would destroy evidence before a warrant could be obtained.

{¶19} In *State v. Jenkins* (1995), 104 Ohio App.3d 265, a police officer learned from sources that the defendant was using and selling drugs out of his apartment. The officer went to the defendant's apartment and knocked on the door. Although the defendant opened a window shade in response to the knock, he refused to allow the officer, who was dressed in civilian clothes, to enter. Just as the defendant let go of the window shade, the officer saw him run away. Believing the defendant was going to destroy the drugs, the officer kicked in the defendant's door and entered the home to find the defendant flushing drugs down the toilet. The defendant was charged with drug offenses, and his later motion to suppress was denied by the trial court. On appeal, the court of appeals reversed. The court found the officer's entry into the home was unlawful, and no exigent circumstances existed. The court concluded that exigent circumstances, if

any, arose only after the officer was refused entry. The court held that a warrantless entry of a home by law enforcement authorities, even based upon probable cause, cannot be justified by exigent circumstances of their own making.

{¶20} In the present case, there can be no dispute that Leighty had a right to be present at the threshold of the door when he saw the marijuana and grinder inside appellant's apartment. Appellant was under arrest at the time he opened his door to let his dog inside, and Leighty was entitled to be immediately beside appellant. However, Leighty had no lawful right to cross the threshold of the doorway and access the interior of appellant's apartment. The above cases illustrate clearly that Leighty's seeing the drugs gave him probable cause to obtain a search warrant, but he could not lawfully access the interior premises without such and based upon the plain-view doctrine alone. The plain-view exception permits a law enforcement officer to seize clearly incriminating contraband only when it is discovered in a place where the officer has a right to be. See *Marchbank*. Leighty was only lawfully in the common public area outside appellant's apartment. He had no right to be inside the apartment, where appellant had a clear expectation of privacy. Thus, in order for Leighty to have had a lawful right to access the interior of appellant's apartment, some exigent circumstance must have existed.

{¶21} We find there were no exigent circumstances to provide an exception to the warrant requirement. The trial court found that the officers were justified to enter the residence and secure the marijuana and grinder in order to prevent its destruction or removal. The state supports the trial court's conclusion by arguing that police had a reasonable belief that there existed third parties that may have been present inside the residence, and they would have been tipped off to the officers' presence when appellant

released the dog inside. The state also argues that Leighty was concerned there might be someone else in the apartment because he knew there had been prior police calls to the apartment for disturbances between appellant and his girlfriend, he heard "noises" inside the apartment, and the apartment lights were on.

{¶22} We disagree with the state's contentions. There was no evidence presented that the marijuana and grinder were in danger of destruction or removal. Although Leighty testified he knew there had been prior disturbance calls to the apartment regarding appellant and his girlfriend, he never said that he believed appellant's girlfriend lived at the apartment, and he admitted that people can have domestic disturbances when they do not live together. Leighty also admitted he heard no voices coming from inside the apartment, the television was not on, and there were no indications that a person was in the apartment. Although Leighty first testified that he heard no noises coming from inside the apartment, he later said he heard "noises" inside, and the noises were from an aquarium. Importantly, Leighty never testified that he believed the noises were made by people inside the apartment.

{¶23} With no evidence of any third parties present in the apartment, there was no risk of destruction of the evidence. Although, conceivably, the dog could have ingested the small amount of marijuana on the table, the grinder would not have been easily destroyed. See *Andrews* (an aluminum beer can is not in imminent danger of destruction); *Davis* (beer cans and bottles are not easily destroyed). Also, even if third parties would have been present inside the apartment, we fail to see how the appearance of the dog inside the apartment would have, in and of itself, "tipped off" any occupant as to appellant's arrest. Under the circumstances, as pointed out in all of the cases cited

above, the proper course of conduct would have been to have an officer stand at the doorway and guard the premises while a warrant was obtained based upon what Leighty saw inside the apartment. We also note that there is no evidence that appellant was even aware that Leighty had seen the marijuana and grinder on the coffee table inside the apartment, or that any occupant would have known that Leighty had seen the contraband; thus, there would have been no reason for occupants to destroy the contraband while officers were obtaining a search warrant. See, e.g., *West* (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). For these reasons, we find no exigent circumstances existed.

{¶24} Having found the intrusion was contrary to the Fourth Amendment, and having found no exigent circumstances existed, we must now look at whether appellant consented to the search, an exception to the warrant requirement. The trial court found that appellant consented to the search when he signed the consent form. We disagree. Initially, the trial court was working under the assumption that the police officer's initial entry into the apartment was lawful. Given our finding that the initial entry was a violation of the Fourth Amendment, and the trial court's additional finding that the subsequent protective sweep was a violation of the Fourth Amendment, the circumstances as to the voluntariness of the consent must be viewed from the perspective that the consent was obtained on the heels of two prior Fourth Amendment violations. This is particularly relevant because the trial court specifically relied upon the fact that appellant's use of the phone prior to consent vitiated the "relatively minor police misconduct" in performing the protective sweep. In fact, there were two instances of unlawful intrusion, with Leighty's

initial intrusion into the apartment constituting a significant Fourth Amendment infringement. In terming the protective sweep "innocuous," the court also expressed it was "understandabl[e]" that the officer would be concerned about waiting in appellant's living room late at night; however, the reason the officer was in the living room was because of his prior unlawful entry.

{¶25} We also note that appellant defined his scope of consent prior to the initial intrusion. Appellant apparently consented to have Leighty view the inside of his apartment while he opened the door "halfway," but then appellant attempted to shut the door. It was at the moment he tried to bar the officer's further entry that appellant implicitly ceased any consent. See, e.g., *Robinson* (the defendant communicated to the officers the limited scope of his consent to the initial intrusion when he attempted to bar the officers' entry into the apartment by closing the door). Thus, the police were alerted to the fact that appellant was not consenting to his entry and search of the apartment when appellant tried to shut the door to keep them out.

{¶26} Regardless, we find appellant's consent was not voluntary. When, as here, a defendant's consent is obtained after illegal police activity, "[t]he consent will be held voluntary only if there is proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal action." *State v. Retherford* (1994), 93 Ohio App.3d 586, 602, citing *Florida v. Royer*, 460 U.S. 491, 501, 103 S.Ct. 1319, 1323. Factors to consider in determining whether the consent is sufficiently removed from the taint of the illegal police activity include the length of time between the illegal activity and the subsequent search, the presence of intervening circumstances, and the purpose and flagrancy of the misconduct. See *United States v. Richardson* (C.A.6, 1991), 949 F.2d

851, 858; see also *Brown v. Illinois* (1975), 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2262. Voluntariness is a question of fact and depends on the totality of the circumstances. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041. The government bears the burden of proving that the defendant's consent was "freely and voluntarily" given. *Royer* at 497.

{¶27} In the present case, the two Fourth Amendment violations occurred about 15-20 minutes before appellant signed the consent. This is a "short" period, which the trial court also admitted in its decision. A short temporal gap between unlawful police activity and a defendant's consent to search weighs heavily against a finding that the consent was an act of free will sufficient to purge the taint of the earlier police conduct. See *State v. Torres*, 6th Dist. No. L-07-1306, 2008-Ohio-2090, ¶21 (consent obtained within 15 minutes of the illegal seizure of appellant's keys is not a significant time lapse), citing *United States v. Washington* (C.A.9, 2004), 387 F.3d 1060, 1073 (holding that 15 minutes was insufficient), and *United States v. Maez* (C.A.10, 1989), 872 F.2d 1444, 1456 (holding that 45 minutes was insufficient).

{¶28} However, the trial court here found that, despite this short period between the illegal activity and the consent, there was an intervening circumstance sufficient to break the chain of illegality and dissipate the taint of the prior illegal action, in that appellant asked to use his telephone prior to signing the consent form. Again, we disagree with the trial court that appellant's use of his phone broke the chain of illegality and dissipated the taint of the two recent Fourth Amendment violations. There was a lack of evidence regarding the nature, subject-matter, and duration of the phone call. Leighty had no memory with regard to the circumstances surrounding the phone call, and he did

not even know if appellant spoke to anyone. Furthermore, there are a multitude of topics about which appellant could have wanted to speak with someone under these circumstances that did not necessarily relate to his consent to search. The record is simply devoid of any evidence regarding the phone call from which to draw the conclusion that it broke the chain of illegality. Although the trial court viewed the phone call as a show that appellant gave thoughtful consent, it is more likely the phone call shows appellant's continued reluctance to permit a search. Under these circumstances, where appellant had attempted to stop police from entering his home by closing his door but was forcefully prevented from doing so by the officer's foot, had suffered two Fourth Amendment violations, and had been handcuffed inside his residence during an unlawful protective sweep, we cannot find that the phone call, which was made by appellant while still under the continuing illegality of the unlawful entry, and which may or may not have been successful and may or may not have related to the issue of consent, broke the chain of illegality. Although the circumstances do not suggest the officer's conduct was flagrant, the circumstances do suggest appellant more submitted to authority after the two constitutional violations than made a voluntary choice to consent to a search. For these reasons, we find appellant's consent was not voluntary.

{¶29} However, the trial court then concluded that, even assuming that the consent was tainted and invalid, the evidence seized by the police would have been admissible under the inevitable discovery doctrine. Pursuant to the inevitable discovery doctrine, illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation. *State v. Perkins* (1985), 18 Ohio St.3d 193,

196; *Nix v. Williams* (1984), 467 U.S. 431, 104 S.Ct. 2501. The inevitable discovery doctrine is applied only in limited circumstances where the state can show by a preponderance of the evidence that, despite the constitutional violation, discovery of the evidence was, in fact, inevitable. The state must prove not simply that the government could have found the evidence without the constitutional violation, but affirmatively would have found it. *Perkins*, syllabus.

{¶30} Here, the trial court based its application of the inevitable discovery doctrine on the premise that the police were lawfully present in appellant's residence pursuant to the "plain-view" doctrine, and once they saw the grinder and marijuana, they would have had sufficient probable cause to obtain a warrant and, consequently, seize the evidence anyway. We find the application of the inevitable discovery doctrine under the current circumstances is inappropriate. "[T]he inevitable discovery doctrine exception does not apply in situations where the government's only argument is that it had probable cause for the search." *United States v. Souza* (C.A.10, 2000), 223 F.3d 1197, 1203. "To apply the inevitable discovery doctrine whenever police *could* have obtained a warrant, yet chose *not* to, would essentially eliminate the warrant requirement and encourage police to proceed without a neutral and detached magistrate's probable cause determination." (Emphasis sic.) *State v. Coyle* (Mar. 15, 2000), 4th Dist. No. 99 CA 2480; see also *State v. Pearson* (1996), 114 Ohio App.3d 153, 163 ("the state's argument [that the inevitable discovery doctrine applies because the police possessed probable cause and could have obtained a search warrant] would obviate any Fourth Amendment warrant requirement as long as it could be shown later that a warrant would in all probability have been obtained"); *United States v. Echegoyen* (C.A.9, 1986), 799 F.2d 1271, 1280 fn.7 ("to

excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment"); *United States v. Johnson* (C.A.6, 1994), 22 F.3d 674, 683 ("to hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean that there is inevitable discovery and no warrant requirement whenever there is probable cause"). Thus, the inevitable discovery doctrine should not be applied in such a way as to encourage unconstitutional shortcuts. *Coyle*.

{¶31} This line of reasoning applies to the present case. If we were to apply the inevitable discovery doctrine to the present circumstances, the Fourth Amendment would be rendered impotent in all similar cases in which a court later determines that the police, in fact, had probable cause to perform the warrantless search. It would also encourage police to engage in their own Fourth Amendment speculation without a prior probable cause determination by a court and foster a "search-first" mentality that disregards constitutional safeguards. In essence, the foundation of the Fourth Amendment would be completely undercut by applying the inevitable discovery doctrine to every case where there is a post-warrantless search determination of probable cause. Therefore, we find the inevitable discovery doctrine does not apply to the present circumstances, pursuant to *Souza*, *Coyle*, *Pearson*, *Echegoyen*, and *Johnson*. For these reasons, the trial court erred when it denied appellant's motion to suppress. Appellant's assignment of error is sustained.

{¶32} Accordingly, appellant's assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings in accordance with law, consistent with this decision.

Judgment reversed and cause remanded.

CONNOR, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶33} I would affirm the trial court's decision denying appellant's motion to suppress because (1) appellant validly consented to the search of his apartment, and (2) Officer Leighty's testimony proves the contraband would have been inevitably discovered based on information obtained during an independent investigation. Therefore, I respectfully dissent.

{¶34} Even if I were to assume that the entry and protective sweep in this case were unlawful,[1] I disagree with the majority's conclusion that the officers' conduct "tainted" appellant's decision to consent to the search of his apartment. For consent to be tainted as "fruit of the poisonous tree," it must result from an "exploitation" of the prior illegality. *State v. LaPrairie*, 2d Dist. No. 2010CA-0009, 2011-Ohio-2184, ¶51, citing *Wong Sun v. United States* (1963), 371 U.S. 471, 488, 83 S.Ct. 407, 417. Factors to consider in determining whether consent was causally connected to the illegality include (1) the temporal proximity between the illegal activity and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

[1] I would note that this case differs significantly from those relied on by the majority because appellant requested access to his apartment during a lawful arrest. Plain-view seizures conducted in such situations are measured under *Washington v. Chrisman* (1982), 455 U.S. 1, 7, 102 S.Ct. 812, 817, the case relied upon by the trial court.

State v. Wildman, 185 Ohio App.3d 346, 2009-Ohio-6986, ¶21, citing, inter alia, *Brown v. Illinois* (1975), 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2262.

{¶35} Significantly, the majority agrees that no purposeful or flagrant police misconduct occurred. This factor is often considered "the most important because it is tied directly to the rationale underlying the exclusionary rule, deterrence of police misconduct." *United States v. Shaw* (C.A.6, 2006), 464 F.3d 615, 630 (internal quotations omitted). The United States Supreme Court, describing the factor as "particularly" significant, found purposeful and flagrant misconduct where the officers were aware of the "impropriety" of their misconduct, embarked on an "expedition for evidence in the hope that something might turn up," and acted in a manner that "calculated to cause surprise, fright, and confusion." *Brown*, 422 U.S. at 605, 95 S.Ct. at 2262.

{¶36} I believe the absence of purposeful and flagrant misconduct in this case weighs strongly against suppression. The officers did not arrive at appellant's doorstep unannounced for the purpose of conducting a suspicionless search for contraband. Appellant had been lawfully arrested for felony drug possession, and he (not the officers) voluntarily requested access to his apartment before being taken to the station. When appellant freely opened his door and revealed more drugs in plain view, Officer Leighty believed that the entry was justified by the plain-view doctrine and that the limited protective sweep was authorized to discover the existence of third parties in the premises. (Tr. 23-24.) In fact, Officer Leighty failed to discover contraband during the limited sweep because, according to his testimony, his only concern at that time was finding third parties, not evidence. (Tr. 31.) The trial court accepted this testimony as credible when it

found that the limited protective sweep was not a "ruse" designed to search for evidence of contraband.

{¶37} In finding that appellant's consent was tainted, the majority relies heavily on the temporal-proximity factor. In my view, however, this factor alone cannot invalidate consent. As the Sixth Circuit has stated, "no case (to our knowledge) holds that temporal proximity alone, without any other indicia of causation, justifies suppression." *United States v. Clariot* (C.A.6, 2011), 655 F.3d 550, 555. Although 15 to 20 minutes elapsed before appellant consented in this case, other courts have found consent to be valid after similar periods of time based on the existence of intervening circumstances and the lack of purposeful or flagrant misconduct. See, e.g., *United States v. Snype* (C.A.2, 2006), 441 F.3d 119, 135 (consent valid even though only 20 minutes had elapsed between illegal entry and consent to search); *United States v. Delancy* (C.A.11, 2007), 502 F.3d 1297, 1310-11 (10 to 20 minutes); *United States v. Oguns* (C.A.2, 1990), 921 F.2d 442, 447-48 ("only * * * a few minutes"). "The exclusionary rule forbids the government from using evidence *caused* by an illegal seizure, not evidence found around the time of a seizure." *Clariot*, 655 F.3d at 555 (emphasis sic).

{¶38} I also disagree with the majority's finding that no intervening circumstances occurred. While the majority addresses one event (the phone call), I believe that several intervening circumstances existed to sever any "taint" from the officers' conduct. Immediately after the sweep, police removed appellant's handcuffs, allowed him to use his phone, advised him in writing of his Fourth Amendment right to refuse consent, and informed him of his *Miranda* rights. The majority finds the phone call to be insignificant because Officer Leighty could not testify as to the nature of the call; however, I believe it

is unreasonable to assume the call was somehow unrelated to appellant's subsequent decision to consent. If anything, the fact Officer Leighty was not intently listening to appellant's phone call shows that appellant had an opportunity to reflect on his decision independently and without police influence. Moreover, appellant's subsequent signing of the consent form constitutes "an important intervening circumstance," *Delancy*, 502 F.3d at 1311, and the *Miranda* advisements, while alone may be insufficient, are relevant when determining whether the "taint" has been purged. Id.; see also *Oguns*, 921 F.2d at 447 (signing a consent form and receiving *Miranda* warnings are relevant to the validity of consent).

{¶39} Under these circumstances, I believe appellant validly consented to the search of his apartment. Even if the entry and sweep were unlawful, the multiple intervening events and, most importantly, the complete lack of purposeful or flagrant police misconduct removed any "taint" from the officers' conduct.

{¶40} Regardless, even if appellant's consent was invalid, I believe the evidence discovered in the apartment "would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins* (1985), 18 Ohio St.3d 193, 196, following *Nix v. Williams* (1984), 467 U.S. 431, 444, 104 S.Ct. 2501, 2509. Under the inevitable discovery doctrine, the evidence must show, within a reasonable probability, that law enforcement would have discovered the evidence in question apart from the unlawful conduct. *State v. Ewing*, 10th Dist. No. 09AP-776, 2010-Ohio-1385, ¶26. The rationale behind the inevitable-discovery doctrine is that "the prosecution should not be placed in a worse position at trial because of some earlier police misconduct when the

evidence gained would have ultimately been found in the absence of such misconduct." *Perkins* at 196, citing *Nix*.

{¶41} Here, Officer Leighty specifically testified that he "would have" applied for a warrant after discovering the pound of marijuana during appellant's arrest and seeing more marijuana in plain view on appellant's table. (Tr. 29, 37.) This conclusion was based on Officer Leighty's years of experience with narcotics warrants and familiarity with the warrant-application procedure of the detective bureau. (Tr. 37.) Because the officers discovered contraband during a "separate" investigation, the trial court correctly found that the evidence would have been inevitably discovered.

{¶42} The majority states that the inevitable-discovery doctrine cannot apply where the government's only argument is that a warrant "could have" been obtained based on probable cause. While the majority warns that application of the inevitable-discovery doctrine would foster a "search-first" mentality that disregards constitutional safeguards, the United States Supreme Court has rejected the same criticism of the independent-source doctrine where, as here, the evidence shows that police honestly, but mistakenly, believed the entry was justified by exigent circumstances. *Murray v. United States* (1988), 487 U.S. 533, 108 S.Ct. 2529, fn.2. Nevertheless, the trial court in this case did not base its inevitable-discovery finding on mere after-the-fact speculation that police *could have* applied for a warrant to search the residence. As explained above, Officer Leighty specifically testified that he "would have" applied for a warrant based on the information obtained during his investigation. Therefore, I believe the trial court correctly applied the inevitable-discovery doctrine.

{¶43} Accordingly, I would affirm the denial of appellant's motion to suppress. Because the majority does not, I respectfully dissent.

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