**[Cite as *State v. Brandau*, 2021-Ohio-3688.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 19CA8 |
| | : | |
| v. | : | |
| | : | DECISION AND |
| JASON BRANDAU, | : | JUDGMENT ENTRY |
| | : | |
| Defendant-Appellant. | : | |

---

APPEARANCES:

Angela Miller, Jupiter, Florida, for Appellant.

Justin Lovett, Jackson County Prosecuting Attorney, and William L. Archer, Jr., Assistant Prosecuting Attorney, Jackson, Ohio, for Appellee.

---

Smith, P.J.

{¶1} This is an appeal from a Jackson County Common Pleas Court judgment convicting Appellant, Jason Brandau, of one count of having a weapon while under disability, a third-degree felony in violation of R.C. 2923.13(A)(2). On appeal, Brandau contends: 1) that the trial court erred as a matter of law when it did not require the State to stipulate to his prior conviction; 2) that the representation counsel provided him with fell below the prevailing norms for counsel and affected the outcome of his trial; 3) that the trial court erred in denying his Crim.R. 29 motion for acquittal at the conclusion of the State's case and in

allowing the State to "reopen" its case after failing to prove all the essential elements of the weapon under disability charge; and 4) that the trial court erred in denying his motion to suppress, as the evidence gathered was done so without consent and in violation of his constitutional right to be free from unreasonable searches and seizures.

{¶2} Because we find the trial court erred in denying Brandau's motion to suppress, we conclude his fourth assignment of error has merit and is therefore sustained. Further, in light of the fact that our disposition of Brandau's fourth assignment of error is dispositive of all issues on appeal, the arguments raised under his first, second and third assignments of error have been rendered moot and we need not address them. Accordingly, because the trial court erred in denying Brandau's motion to suppress, the judgment of the trial court is reversed, Brandau's conviction and sentence is vacated, and this matter is remanded to the trial court for further proceedings.

## FACTS

{¶3} On July 9, 2018, Jason Brandau was indicted for one count of improperly discharging a firearm at or into a habitation, a second-degree felony in violation of R.C. 2923.161(A)(1), one count of having a weapon while under disability, a third-degree felony in violation of R.C. 2923.13(A)(2), and one count of using a weapon while intoxicated, a first-degree misdemeanor in violation of

R.C. 2923.15(A). The indictment stemmed from an incident that occurred on June 20, 2018. The record indicates that law enforcement received a call at approximately 1:30 a.m. on June 20, 2018, reporting that bullet holes had been located in a house trailer owned by Derek Slusher, Brandau's nephew, which was located in Jackson County, Ohio. Slusher's mother, Valerie Creech, observed the holes when she had gone to check on the house and feed Slusher's rabbits. Upon law enforcement's arrival, they met with Creech, who informed them that when she arrived at the location, Jason Brandau, who lived in a house trailer located next door, walked over. She reported to law enforcement that Brandau appeared to be intoxicated, that he had a firearm, and that he told her he had been shooting earlier in the day.

{¶4} As a result, Sergeant Keith Copas, of the Jackson County Sheriff's Office, went next door to Jason Brandau's residence, where he met Brandau's brother, Steve.[1] Steve advised that he had a key to the trailer, that Brandau and his father (which is also Steve's father) lived in the trailer, and that "he was allowed to come and go." Thereafter, Steve allowed Sergeant Copas into the trailer, where Brandau was found in the living room, sleeping in a bed. When Sergeant Copas pulled back the covers and got Brandau out of bed, he observed that Brandau had a

[1] There is no explanation in the record as to why Brandau's brother showed up at approximately 2:00 a.m. with a key to Brandau's residence.

firearm on his person and also had ammunition. Brandau was arrested and taken into custody at that time.

{¶5} Brandau pled not guilty to the charges contained in the indictment that was later filed and the matter proceeded through discovery. Brandau's counsel filed a motion to suppress evidence on October 10, 2018. In his motion, he argued that the warrantless entry into his home and the search of his residence was unlawful and that any evidence and statements received as a result should be suppressed. Brandau further argued that no one had legal authority to consent to entry into the home except for his father and himself, who were living there. The State filed a memorandum in opposition on March 15, 2019, contending that Brandau's brother, who had a key, had authority to provide consent to enter. The State analogized the situation to one in which a minor child allows law enforcement to enter the residence of a parent, citing *State v. Gibson*, 164 Ohio App.3d 558, 2005-Ohio-6380, 843 N.E.2d 224 in support (court held that valid consent to enter was provided by the defendant's minor children). A hearing on the motion was held on March 5, 2019, where both Sergeant Copas and Jason Brandau testified. Brandau testified that his brother had not been provided a key his residence and that his brother had not been to the residence in over five years.

{¶6} The trial court ultimately denied the motion to suppress on March 29, 2019. In its decision, the court relied on *Gibson*, *supra*, and found that because

Brandau's brother had a key to the residence, he had mutual use of the residence, as well as joint access and control of the property. The trial court reasoned that "[i]ndividuals generally are not given keys to a property and allowed to come and go as they please unless there is an intention for mutual use and joint access." The trial court further found that "Sergeant Copas had an objectively reasonable belief that Steve Brandau possessed apparent authority to provide consent."

{¶7} Thereafter, the matter proceeded to a jury trial. Brandau was ultimately acquitted of improperly discharging a firearm into a habitation and using a weapon while intoxicated, but he was found guilty of having a weapon while under disability. The trial court entered a judgment of conviction on April 9, 2019, and imposed a 24-month prison term upon Brandau on May 13, 2019, granting him credit for 205 days served. The trial court also informed Brandau that he may be subject to a three-year term of post-release control, that he was prohibited from owning or carrying a firearm or dangerous ordinance, and the court ordered the forfeiture of a Ruger .22 caliber pistol. It is from this judgment that Brandau now brings his timely appeal, setting forth four assignments of error for our review.

ASSIGNMENTS OF ERROR

I. "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DID NOT REQUIRE THE STATE TO STIPULATE TO BRANDAU'S PRIOR CONVICTION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

CONSTITUTION AND ARTICLE I, §§10 AND 16 OF THE OHIO CONSTITUTION."

II. "THE REPRESENTATION PROVIDED TO BRANDAU FELL BELOW THE PREVAILING NORMS FOR COUNSEL AND AFFECTED THE OUTCOME OF THIS TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 10 AND 16 OF THE OHIO CONSTITUTION."

III. "THE TRIAL COURT ERRED IN DENYING APPELLANT BRANDAU'S R. 29 MOTION AT THE CONCLUSION OF THE STATE'S CASE AND ALLOWING THE STATE TO 'REOPEN' ITS CASE AFTER FAILING TO PROVE ALL THE ELEMENTS OF THE WEAPON UNDER DISABILITY CHARGE. APPELLANT BRANDAU WAS DENIED DUE PROCESS. U.S. CONST. AMENDS. V, VI, XIV, OHIO CONST., ART. I, § 10."

IV. "THE TRIAL COURT ERRED IN DENYING APPELLANT BRANDAU'S MOTION TO SUPPRESS AS THE EVIDENCE GATHERED WAS DONE SO WITHOUT CONSENT AND IN VIOLATION OF BRANDAU'S CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURES. U.S. CONST., AMENDS. IV AND XIV, OHIO CONST., ART. I, §10."

ASSIGNMENT OF ERROR IV

{¶8} Because our disposition of Brandau's fourth assignment of error renders all of his other assignments of error moot, we address it first and out of order. In his fourth assignment of error, Brandau contends the trial court erred by denying his motion to suppress. More specifically, Brandau argues that his brother

did not have authority to consent to law enforcement's entry into his residence, and that even if the initial entry was lawful, his brother did not have any authority to allow law enforcement into the area where he was sleeping, which is where the weapon was located. The State responds by arguing that the consent exception to the warrant requirement was satisfied when Brandau's brother gave law enforcement consent to enter the residence. The State further argues that even if Brandau's brother did not have actual authority to consent to the entry, the officers present "had a reasonably objective belief that his brother had apparent authority to provide consent." We begin by considering the standard of review to be applied when analyzing the denial of a motion to suppress.

Standard of Review

{¶9} In general, "appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The Supreme Court of Ohio has explained as follows:

> 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. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. 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. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

*Burnside* at ¶ 8.

Fourth Amendment Principles

{¶10} "The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures." *See State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶ 15. The Supreme Court of Ohio has held that "in felony cases, Article I, Section 14 of the Ohio Constitution provides the same protections as the Fourth Amendment to the United States Constitution." *See State v. Hawkins*, 158 Ohio St.3d 94, 2019-Ohio-4210, 140 N.E.3d 577, ¶ 18, citing *State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, 37 N.E.3d 123, ¶ 12. "This constitutional guarantee is protected by the exclusionary rule, which mandates the exclusion at trial of evidence obtained from an unreasonable search and seizure." *See State v. Petty*, 4th Dist. Washington Nos. 18CA26, 18CA27, 134 N.E.3d 222, 2019-Ohio-4241, ¶ 11.

{¶11} " '[S]earches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *See State v. Conley*, 4th Dist. Adams No. 19CA1091, 2019-Ohio-4172, ¶ 17, quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct.

507, 19 L.Ed.2d 576 (1967). "Once the defendant demonstrates that he or she was subjected to a warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible." *Conley*, *supra*, at ¶ 17, citing *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, 96 N.E.3d 262, ¶ 18.

{¶12} In this case, Sergeant Copas testified that he did not enter to search Brandau's residence, but instead he entered to arrest him. The record indicates, however, that after Copas made the initial entry, he moved through the house, into the living room area where Brandau was sleeping, pulled back the covers and found Brandau asleep holding a gun. Thereafter, it was discovered Brandau had ammunition on his person. We also note that although Copas testified he was entering Brandau's residence to arrest him, he had not obtained a warrant for Brandau's arrest. Further, although his initial plan may not have been to conduct a search, we conclude the actions that ensued after the initial entry into the residence constituted a search.

Legal Analysis

{¶13} The record indicates that Brandau resides along with this father, Steve Brandau, in a house trailer which is located next door to another house trailer that is occupied by his cousin, Derek Slusher. Brandau testified that he had never given a key to his brother, also named Steve Brandau, and that his brother had not

been to his residence in over five years. Brandau further testified that the only person he had given a key to was his cousin, Derek. The trial court discounted this testimony in favor of the testimony of Sergeant Copas, who testified that Brandau's brother told him that he had a key to the residence and was permitted to come and go.

{¶14} Steve Brandau did not actually testify during the suppression hearing. However, the record indicates that Brandau's brother was an adult, did not own the residence at issue, did not reside at the residence at issue and was not an occupant or overnight guest of the residence at issue at the time he provided consent to enter. Further, the record demonstrates that Sergeant Copas knew Steve Brandau was not a resident or occupant of Brandau's house at the time consent to enter was given. Instead, the record demonstrates that Steve Brandau showed up at approximately 2:00 a.m. with a key to the residence. None of these facts were in dispute below or on appeal. We initially note that these facts are very different from the facts contained in *State v. Gibson*, *supra*, which was relied upon by the both the State and the trial court below, and which involved the question of whether minor children who were resident/occupants of their parent's residence can provide consent for law enforcement to enter.

{¶15} Not only did Sergeant Copas obtain consent to enter Brandau's residence from a non-resident, non-occupant, non-owner, adult brother of Brandau,

Copas admitted during his testimony that he did not attempt to secure consent to enter from the residents of the house, who, as it turns out, were simply sleeping inside. Sergeant Copas testified that he at no time knocked on the door or announced his presence upon arrival or before entry. In fact, Copas testified during the suppression hearing that it was his intent to get into the residence to arrest Brandau, without obtaining a warrant.[2] Nevertheless, Sergeant Copas testified that he believed Brandau's brother had authority to provide consent for entry into the residence. Further, the trial court determined, based upon the information before it, that Sergeant Copas had a reasonably objective belief that Steve Brandau had authority to provide consent to enter the residence.

{¶16} Although this Court does not have the benefit of having heard the testimony in person, based upon the written record before us, we cannot say that we would have discredited Brandau's testimony in the manner that the trial court did. However, as set forth above, when reviewing a trial court's decision denying a motion to suppress, we must accept the trial court's findings of fact if they are supported by competent, credible evidence. Here, there was testimony in the record by Sergeant Copas indicating that Steve Brandau had been given a key to Brandau's residence and that Steve Brandau claimed he was free to come and go.

[2] Although it was never mentioned during the suppression hearing, at trial Sergeant Copas testified that he entered Brandau's residence through the back door, not the front door.

Thus, despite the fact that Brandau provided contradictory testimony, the trial court was free to reject Brandau's testimony in favor of the testimony of Sergeant Copas, and this Court is not permitted to second guess the credibility determinations of the trial court.

{¶17} However, as also set forth above, this Court has a duty to independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. It is at this point that, given the information before us, we must depart from the reasoning of the trial court. Based upon the facts before us, as determined by the trial court, as well as the following case law and constitutional principles, we believe the trial court erred in denying Brandau's motion to suppress.

{¶18} As we have already explained above, warrantless searches and seizures are per se unreasonable under the Fourth Amendment, but there are certain well-established exceptions. Potentially at play in any warrantless entry-into-a-private-residence type of situation are the exigent circumstances and consent exceptions to the warrant requirement. This Court has previously observed as follows regarding the exigent-circumstances exception to the warrant requirement: "One such exception to the Fourth Amendment's warrant requirement is the community-caretaking exception, which courts sometimes refer to as the 'emergency-aid exception' or 'exigent-circumstance exception.' " *See State v.*

*Markins*, 4th Dist. Scioto No. 10CA3387, 2013-Ohio-602, ¶ 20, quoting *State v. Dunn*, 131 Ohio St.3d 325, 2012-Ohio-1008, 964 N.E.2d 1037, ¶ 15.

{¶19} In *Markins*, we explained that under the exigent-circumstances exception, " 'law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.' " *Markins* at ¶ 21, quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *see also State v. Fisher*, 5th Dist. Fairfield No. 13CA35, 2014-Ohio-3029, ¶ 28 ("The exigent-circumstances exception has been recognized in situations of hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect's escape, and risk of danger to the police and others"). The scope of this exception must be strictly circumscribed by the exigencies that justify the entry, and "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *See Welsh v. Wisconsin*, 466 U.S. 740, 749-750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *Blanchester v. Hester*, 81 Ohio App.3d 815, 818, 612 N.E.2d 412 (12th Dist.1992). Here, however, Sergeant Copas testified during the suppression hearing that there was no reason why Brandau would have needed emergency aid. Thus, the State did not argue that the emergency-aid, or exigent-circumstances, exception to the warrant requirement applied.

{¶20} Another exception to the warrant requirement is the consent search. The State argued below and now argues on appeal that the consent exception to the warrant requirement applied in this case to allow a warrantless entry into Brandau's home in order to effectuate his arrest. In *State v. Cross*, this Court previously reasoned as follows regarding the consent exception to the warrant requirement: " 'It is well settled law that, absent consent, the Fourth Amendment prohibits warrantless entry into a home to make an arrest unless there is both probable cause for the arrest and the existence of exigent circumstances.' " *See State v. Cross*, 4th Dist. Washington No. 12CA54, 2014-Ohio-1046, ¶ 19, quoting *State v. Letsche*, 4th Dist. Ross No. 02CA2693, 2003-Ohio-6942, ¶ 19, citing *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.E.2d 639 (1980); *Johnson v. United States*, 333 U.S. 10, 13-15, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *Cleveland v. Shields*, 105 Ohio App.3d 118, 121, 663 N.E.2d 726 (8th Dist.1995); *State v. Jenkins*, 104 Ohio App.3d 265, 268, 661 N.E.2d 806 (1st Dist.1995). We have already established that Sergeant Copas did not possess either a search warrant or an arrest warrant and that there were no exigent circumstances. Thus, Sergeant Copas was required to obtain consent prior to entering Brandau's residence.

{¶21} Consent given by third parties with common or apparent authority over the premises is generally an exception to the warrant requirement. *See United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), and *Illinois*

*v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (in which the Court recognized the constitutionality of searches conducted based on consent given by third parties with common or apparent authority over the premises to be searched). However, Brandau argues that his brother's consent to enter the residence was invalid as he did not have common or apparent authority over the premises. We agree.

{¶22} In *State v. Burns*,[3] this Court observed as follows regarding the consent exception:

> "[t]he Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained."

*State v. Burns*, 4th Dist. Highland No. 11CA14, 2012-Ohio-1529, ¶ 16, quoting *Georgia v. Randolph*, 547 U.S. 103, 105, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), citing *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) and *United States v. Matlock*, *supra*; *State v. Tibbetts*, 92 Ohio St.3d 146, 166, 749 N.E.2d 226 (2001); *State v. Boysel*, Hocking App. No. 08CA5, 2008-Ohio-4037.

[3] *Burns* involved the search of a probationer's residence, the search of which was governed by his conditions of supervision. However, Burns objected to the consent search of his residence, which was owned by his parents, on the basis that he did not own the premises and thus could not give valid consent.

We further noted in *Burns* that " 'Common authority' rests on 'mutual use of the property by persons having joint access or control for most purposes .' " *Burns* at ¶ 16, quoting *United States v. Matlock*, *supra*, at 172.

{¶23} In *State v. Hardy*, this Court observed as follows regarding the meaning of "common authority" for purposes of understanding third-party consent:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, *see Chapman v. United States*, 365 U.S. 610, 5 L Ed.2d 828, 81 S Ct. 776 (1961) (landlord could not validly consent to the search of a house he had rented to another), *Stoner v. California*, 376 U.S. 483, 11 L Ed.2d 856, 84 S.Ct 889 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

*State v. Hardy*, 4th Dist. Pike No. 96CA588, 1997 WL 106719, *3, quoting *United States v. Matlock, supra*, at 172, fn. 7.

{¶24} In *Hardy*, the State argued that officers had a reasonable belief that Hardy's father had common control over Hardy's house and could provide a valid consent to enter. *Id.* at *3. However, this Court rejected the State's argument because "[the] only facts linking [Hardy's] father to the house were that he owned the house and its proximity to the father's home." Thus, despite the fact that

Hardy's father owned the house at issue, lived near the house and apparently had access to it, because there was no evidence that he resided there, was a co-tenant, or was an occupant, we found he lacked common or apparent authority to provide consent to enter.

{¶25} In *State v. Boysel*, *supra*, Boysel contested the search of his residence after his live-in girlfriend gave law enforcement officers consent to enter the house. *Boysel* at ¶ 10. This Court ultimately held that trial court did not err "in finding that Pinkstock [Boysel's girlfriend] had joint possession of the house with Boysel, [and] that Pinkstock gave permission to the probation officer and the deputies to enter the house." *Id.* at ¶ 13. Thus, in that case, the person who gave permission to enter and search was a co-tenant and current occupant at the residence in question at the time the consent was given. Because the deputy understood Pinkstock to be a resident and occupant of the house in question, we held it was reasonable for him to believe that Pinkstock shared authority over the house with Boysel and, therefore, could consent to a search. *Id.* at ¶ 14.

{¶26} Here, based upon the evidence in the record presently before us, and in light of the foregoing case law which contains various different examples of a when a third-party is considered to have common or apparent authority to provide consent to enter a residence of a defendant, we cannot conclude that the State met its burden of demonstrating that Sergeant Copas possessed an objectively

reasonable belief that Brandau's brother could validly consent to law enforcement's entry into Brandau's house. As we have discussed, there is no evidence that Steve Brandau had an ownership interest in the house, and even if there was, under the theory of common authority, ownership is not enough unless one is also a resident or an occupant. Further, there is no evidence that he was a resident of the house, that he was a current tenant or co-tenant of the house, or that he was an occupant of the house. Instead, it was clear to Sergeant Copas that Steve Brandau lived elsewhere and had only just shown up at Brandau's house. His only connection to the house was that his father and adult brother lived there, that he possessed a set of keys, and claimed that he was entitled to come and go. However, we cannot conclude that his claim that he was entitled to come and go, even if accepted as true, constitutes "common authority" for purposes of providing third-party consent. Even if he was permitted to come and go, there is no testimony or other evidence in the record from which it could be reasonably inferred that he mutually used the property or had joint control over the property *for most purposes*, which is necessary to establish common authority or apparent authority.

{¶27} As such, we conclude the trial court erred in finding that Brandau's brother validly consented to law enforcement's entry into Brandau's home. As a result, we further find that the trial court erred in denying Brandau's motion to

suppress. Because we have found merit in Brandau's fourth assignment of error, it is sustained. Accordingly, the judgment of the trial court is reversed, Brandau's conviction and sentence are reversed, and this matter is remanded to the trial court for further proceedings.

ASSIGNMENTS OF ERROR I, II AND III

{¶28} Because the disposition of Brandau's fourth assignment of error has rendered the arguments raised under his first, second and third assignments of error moot, we need not address them.

**JUDGMENT REVERSED, VACATED, AND REMANDED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE REVERSED, the conviction and sentence are VACATED, and the matter shall be REMANDED back to the trial court for further proceedings. Costs shall be assessed to Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Wilkin, J., Concurs in Judgment and Opinion.
Abele, J., Dissents.

For the Court,

_____
Jason P. Smith
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**