[Cite as *State v. Smith*, 2021-Ohio-3330.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KENDALL LAMONT SMITH, JR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 CO 0022

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2019 CR 52

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Vito Abruzzino, Columbiana County Prosecutor and *Atty. Tammie M. Jones*, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Atty. Wesley Johnston, P.O. Box 6041, Youngstown, Ohio 44501, for Defendant-Appellant.

Dated: September 15, 2021

D'APOLITO, J.

{¶1} Appellant Kendall Lamont Smith Jr. appeals the judgment entry of the Columbiana County Court of Common Pleas overruling his motion to suppress. The trial court concluded that Appellant did not have standing to challenge the search of a hotel room in which he was present, because he was not a registered guest and his sole purpose for being present in the hotel room was commercial, that is, for the sale of illegal narcotics. In the alternative, the trial court opined that the search of a pair of red sweatpants, which contained the illegal narcotics, constituted a search incident to arrest. For the following reasons, the judgment entry of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶2} Brian McLaughlin, the director of the Columbiana County Drug Task Force and a detective with the East Palestine Police Department, provided the only testimony offered at the suppression hearing. Three exhibits were admitted into evidence at the hearing: A registration from the hotel on State Route 154 in Columbiana County, a receipt captioned "folio" from the Days Inn, and a consent to search form. Defense counsel used a police report to cross-examine McLaughlin, but the report was not admitted into evidence.

{¶3} On January 14, 2019, McLaughlin was contacted by the Lisbon Police Department at 9:15 a.m. to provide assistance at the Days Inn. Hotel staff reported that "a male subject was high in the parking lot." (Suppression Hrg., p. 8.)

{¶4} McLaughlin was accompanied to the Days Inn by Detective Kody Watkins, Chief Mike Abraham, who was in uniform, and "Lieutenant Daub." McLaughlin, Watkins, and Daub were in plain clothes, but their badges, which identified them as law enforcement officers, were clearly visible.

{¶5} When the four officers arrived at the Days Inn, the male suspect, identified as Ben Eastman, was seated in the backseat of a Lisbon Police Department patrol car, which was parked in the BP Fuels parking lot, adjacent to the Days Inn. McLaughlin recognized Eastman from a 2013-2014 narcotics case, where Eastman was identified as

a "runner" for Appellant as well as several other drug dealers in Columbiana County. McLaughlin knew Appellant from a prior trafficking case from 2017 or 2018, however, Appellant was not the subject of a present investigation. A search of Eastman's person yielded a hypodermic needle.

{¶6} When McLaughlin questioned Eastman, Eastman "indicated that the room that he had been staying in [Days Inn Room 101], he was the only one in the room, and that [Appellant] left about 1:00 a.m. * * * But there was nobody in the room at this point in time." (*Id.*, p. 10.) Later in his testimony, McLaughlin stated that Eastman told him that "[Appellant] had left the room and that there was another girl there earlier too, but she had also left." (*Id.*, p. 12.) As a consequence, McLaughlin presumed that Room 101 was unoccupied.

{¶7} Room 101 was registered to Kris Vervin. The Days Inn receipt reflects that she rented the hotel room for one night and she was the only guest. She checked in at 2:55 a.m.

{¶8} Staff members at the Days Inn reported a "large amount of traffic in and out of [Room 101] through the night." (*Id.*, p. 11.) Contrary to the information provided by Eastman, the staff members further reported that there was still someone present in Room 101.

{¶9} McLaughlin provided the following testimony regarding the events that followed:

> The housing [sic] said they could go down – housekeeping said they would go down and knock on the door, but they would like us to go with them. Which we did do.
>
> They knocked on the door. A male said, "Who is it?" They said, "Housekeeping." Door opened.
>
> Immediately you could smell [raw] marijuana coming from the room.

(*Id.*, p. 13-14.)

{¶10} McLaughlin testified that the "housekeeping personnel" knocked on the door then "left the immediate area of the door once the door opened." (*Id.*, p. 16.) McLaughlin further testified that Appellant opened the door "at least halfway," and that McLaughlin was standing to the left of the door, and Detective Watkins and Chief Abraham were standing to the right of the door. (*Id.*, p. 15, 30.)

{¶11} When Appellant saw a uniformed officer, he "tried to slam the door," and "Chief Abraham stopped the door from hitting him." (*Id.*, p. 14.) McLaughlin testified that Abraham "just put his foot in front of the door to keep it from hitting him – slamming shut." (*Id.*, p. 16.)

{¶12} According to McLaughlin, he believed that illegal drugs were present and likely to be destroyed by Appellant in the event that the officers did not immediately enter Room 101. On cross-examination, he testified that he entered the room based on the smell of marijuana, the "high individual coming from the room," and the needle found on Eastman's person. (*Id.*, p. 30.)

{¶13} When the officers entered Room 101, McLaughlin twice ordered Appellant to the ground. Appellant did not comply, so McLaughlin took him to the ground. At the time, Appellant was wearing a white t-shirt and undershorts, and he had the pair of red sweatpants at issue in this appeal in his hand.

{¶14} The officers placed Appellant in a chair at a table at the end of the bed. Prior to being seated in the chair, Appellant placed the red sweatpants on the bed. (*Id.*, p. 42.)

{¶15} McLaughlin asked Appellant if there were any drugs in the room, based on the odor of raw marijuana and the information from the hotel staff that there had been a considerable amount of traffic in and out of the room during the early morning hours. Appellant denied the presence of any illegal drugs, specifically marijuana.

{¶16} Appellant told McLaughlin that someone had tried to rob him in Salineville, and Appellant obtained a ride "from somebody" to the hotel in order "to hideout from whomever was trying to rob him in Salineville." (*Id.*) Appellant further explained that Vervin had left the hotel room to purchase breakfast for him at Sheetz. According to McLaughlin's testimony, a fifth member of law enforcement, "Detective Sheets," arrived

at about that time, and upon entering the hotel room inquired, "[w]ow, where's the marijuana?" (*Id.*, p. 19.)

{¶17} Roughly one-half hour after the officers entered Room 101, Vervin returned. McLaughlin interviewed her in the hallway. Vervin explained that "she will frequently drive people around." (*Id.*, p. 21.) She retrieved Appellant from Salineville the prior evening and brought him to the Days Inn. McLaughlin testified that "[h]e paid her $50.00 to do that. And put the hotel – paid cash for the hotel." (*Id.*, p. 22.) Vervin told the officers that she had left Room 101 to transport a third party to a doctor's appointment, not to purchase breakfast for Appellant.

{¶18} McLaughlin obtained consent from Vervin to search her purse. The search yielded a crack pipe and a push rod. Next, Vervin executed a written form in which she consented to a search of the hotel room. Vervin was not arrested, however, McLaughlin denied that any agreement was made that Vervin would not be arrested in exchange for her consent to search Room 101. (*Id.*, p. 37-38.)

{¶19} During the search, Appellant stated that he had "a bag of clothes" in the hotel room. The only bag of clothes found during the search was a plastic shopping bag from Dollar General, which contained some white t-shirts and "maybe" some socks. (*Id.* at 22.) However, McLaughlin testified that "[t]hat wasn't the bag [Appellant] was looking for." (*Id*.)

{¶20} At some point, McLaughlin searched the pockets of the red sweatpants and found the illegal narcotics that formed the basis for the indictment against Appellant. (*Id.*, p. 23, 39.) McLaughlin did not provide any testimony regarding the exact contents of the pockets of the red sweatpants, he testified instead that the contraband was "all in the red sweatpants. I believe it was all in the sweatpants." (*Id.*, p. 23.)

{¶21} The only drug to which McLaughlin provided any specific testimony was marijuana. McLaughlin testified that the officers found "a small amount of marijuana" when they searched the hotel room. (*Id.*, p. 30-31.) He agreed with defense counsel's characterization of the amount of marijuana as "a minor misdemeanor, a bag of it." McLaughlin conceded that no mention of the marijuana was made in the police report and that Appellant was not charged for marijuana possession.

{¶22} At the suppression hearing, McLaughlin was asked, "Were you able to ascertain whether or not those pants belonged to [Appellant]?" (*Id.*, p. 22-23.) McLaughlin responded, "He denied that they belonged to him." However, it is not clear from the hearing testimony whether McLaughlin asked Appellant about his ownership of the red sweatpants before or after the drugs were found.

{¶23} The red sweatpants were the only pants in the hotel room, and, as a consequence, Appellant donned the red sweatpants when he was taken into custody. The officers determined that the red sweatpants belonged to Appellant the following day when they viewed the hotel surveillance video, which depicted Appellant walking to and from Room 101 in the early morning hours of January 14, 2019 while wearing the red sweatpants.

{¶24} McLaughlin conceded that four law enforcement officers were present in Room 101 when they executed the consent search. He further conceded that Appellant would not have had to be left alone in Room 101 in order to obtain a search warrant.

{¶25} After the motion to suppress was overruled, Appellant pleaded "no contest" to the first three charges in the indictment: One count of possession of Fentanyl-related compound (equal to or exceeding ten grams but less than twenty grams) in violation of R.C. 2925.11(A), a felony of the second degree (count one); one count of possession of cocaine in violation of R.C. 2925.11(A), a felony of the first degree (count two) (equal to or exceeding twenty-seven grams but less than 100 grams); one count of aggravated possession of drugs (oxycodone) (less than the bulk amount) in violation of R.C. 2925.11(A), a felony of the fifth degree (count three); each with an accompanying forfeiture specification for money in a drug case pursuant to R.C. 2941.1417(A). A fourth count, obstruction of official business in violation of R.C. 2921.31(A), a misdemeanor of the second degree, was dismissed at sentencing in exchange for Appellant's plea.

{¶26} Appellant was sentenced to four years on counts one and two, respectively, and ten months on count three, to be served concurrently. Mandatory fines in the aggregate amount of $17,500.00 were imposed. The sentencing entry indicated that a forfeiture order would be issued in the amount of $1,401.00.

{¶27} This timely appeal followed.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED THE DEFENDANT HER [SIC] CONSTITUTIONAL RIGHT AGAINST ILLEGAL SEARCH AND SEIZURE BASED UPON HIS MOTION TO SUPPRESS THE EVIDENCE IN THIS CASE.

{¶28} Appellant's sole assignment of error can be divided into five sub-parts: Appellant had a legitimate expectation of privacy in the hotel room; the housekeeping ruse by the officers tainted Vervin's subsequent consent; the officers had no probable cause to enter Room 101; Vervin did not have authority to consent to the search of Appellant's pants; and there was no exigency that prevented the officers from securing Appellant and Room 101 and obtaining a search warrant.

{¶29} Appellee counters that Appellant had no standing to challenge the search of the hotel room, as he was neither an occupant nor overnight guest, but, instead, present in the room for the sole purpose of selling drugs. Next, Appellee argues that the odor of raw marijuana created probable cause to enter Room 101 to prevent the likely destruction of the contraband. Finally, Appellant contends that the search of the red sweatpants constituted a search incident to arrest.

{¶30} A trial court's decision to deny a motion to suppress involves a mixed question of law and fact: legal questions are reviewed de novo, but factual issues are rarely disturbed as the trial court is the fact-finder at the suppression hearing and occupies the best position to evaluate witness credibility. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. In other words, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence; upon accepting the facts as true, the appellate court independently determines, without deferring to the trial court's conclusion, whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

{¶31} The Fourth Amendment imposes a reasonableness standard on the exercise of discretion by government officials. *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 12, citing *Delaware v. Prouse*, 440 U.S. 648, 653-654, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1990). The permissibility of a particular law enforcement

practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *Id.* citing *Prouse* at 654, 99 S.Ct. 1391, 59 L.Ed.2d 660.

{¶32} The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Ohio Constitution, Article I, Section 14, is nearly identical to its federal counterpart. *State v. Kinney*, 83 Ohio St.3d 85, 87, 698 N.E.2d 49 (1998).

{¶33} For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant. See *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). This requires a two-step analysis: First, there must be probable cause. If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement applies. If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 657, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

{¶34} Probable cause exists when a reasonably prudent person would believe that there is a fair probability that the place to be searched contains evidence of a crime. *Illinois v. Gates*, 462 U.S. 213, 246, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). However, "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision." *Id.* at 235, 103 S.Ct. 2317. "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 370-71, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt, * * * and that the belief of guilt must be particularized with respect to the person to be searched or seized * * *." *Id.*, citing *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979).

{¶35} Searches and seizures without a warrant are per se unreasonable except in a few well-defined and carefully circumscribed instances. *State v. Hawkins*, 7th Dist.

No. 16 CO 0014, 2017–Ohio–715, ¶ 16. Accordingly, "[w]hen police conduct a warrantless search, the state bears the burden of establishing its validity." *State v. Hambleton*, 7th Dist. Columbiana No. 16 CO 0028, 2017-Ohio-7561, ¶ 15.

{¶36} Reasonableness is demonstrated when the "societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas v. Sanders* (1979), 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235. Normal inconvenience and slight delay involved in procuring a warrant, standing alone, "are not enough to bypass the constitutional requirement." *Johnson v. United States* (1948), 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436.

STANDING

{¶37} The trial court opined that Appellant did not have standing to challenge the warrantless search. Standing to invoke the protection of the Fourth Amendment depends on whether the person who claims it has a legitimate expectation of privacy in the place invaded by a police search and seizure. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). A subjective expectation of privacy is insufficient; in order to have standing to challenge the legality of a search, a person must have an expectation of privacy that society is prepared to recognize as reasonable. *State v. Williams*, 73 Ohio St.3d 153, 166, 652 N.E.2d 721 (1995).

{¶38} The United States Supreme Court has recognized that occupants of a hotel room have a reasonable expectation of privacy that the Fourth Amendment protects. *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889 (1964). Additionally, an overnight guest may have a legitimate expectation of privacy in another's home; however, an individual who is merely present with the consent of the householder may not. *Minnesota v. Carter*, 525 U.S. 83, 89, 119 S.Ct. 469 (1998); *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990).

{¶39} The Eighth District has held that a defendant does not have a reasonable expectation of privacy in a hotel room when the tenancy had expired, the defendant did not pay for the room, he was neither a registered guest nor an overnight guest, and he

repudiated any interest in the hotel room to the officers. *State v. Coleman*, 118 Ohio App.3d 522, 526, 693 N.E.2d 825 (8th Dist.1997). The Second District has likewise held that a defendant does not have standing to assert Fourth Amendment rights in the hotel room, where he did not rent the room, pay for the room, nor have access to the room with a key or a key card, and did not have any personal effects. The Second District further opined that a defendant is not an overnight guest where the occupant of the hotel room, who purportedly invited the defendant to stay, is not present in the hotel room. *State v. Moore*, 2d Dist. Montgomery No. CA20198, 2004-Ohio-3783, ¶ 12-13.

{¶40} More recently, in *State v. Graves*, 12th Dist. Clermont No. CA2015-03-022, 2015-Ohio-3936, the Twelfth District concluded that Graves had no reasonable expectation of privacy in a hotel room, where he did not pay for the room and was not a registered guest. The Twelfth District further observed that Graves was not an overnight guest, because he did not "set forth any information as to when he arrived at the hotel, when he planned to leave, or that he had any personal effects in the room." *Id.* at ¶ 12. The detectives testified that the hotel room was of average size with two queen beds. Further, numerous individuals were found in the room, including four adults and one child, and there was no indication at the hearing that the beds had been used, particularly by Graves.

{¶41} As previously stated, Appellant bears the burden of proof with respect to his standing to challenge the search of the hotel room. In order to establish his standing to challenge the search, Appellant must show that he was either a co-occupant of Room 101 or an overnight guest of Vervin.

{¶42} In this case, the typical indicia of occupancy relied upon by Ohio intermediate appellate court is not present. Appellant was not a registered guest, and there was no evidence admitted at the hearing that he had a key card, used the bed or the shower, or had any personal belongings in the room. McLaughlin testified that the Dollar General bag, which was the only bag found in the room, was not the bag of clothes which Appellant claimed. Accordingly, we find that Appellant was not an occupant of Room 101.

{¶43} As part of its overnight guest analysis, the trial court, citing *Minnesota v. Carter*, *supra,* opined that Appellant's expectation of privacy in Room 101 was diminished

because Room 101 was rented for a commercial, not residential, purpose. In *Carter*, the United States Supreme Court considered whether two men, who were observed sitting in the living room of an apartment bagging cocaine with the tenant through a gap in a window blind, were overnight guests with a legitimate expectation of privacy in the apartment to challenge the search of the apartment. *Id.* at 85. The men had driven to the Eagen, Minnesota apartment from Chicago for the sole purpose of packaging the cocaine. *Id.*

{¶44} The Supreme Court noted that the men "were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with [the lessee], or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship to suggest a degree of acceptance into the household. While the apartment was a dwelling place for [the lessee], it was for these respondents simply a place to do business." *Id.* at 90. The Supreme Court concluded that, although "an overnight guest in a home may claim the protection of the Fourth Amendment, ... one who is merely present with the consent of the householder may not." *Id.* at 90.

{¶45} We review the trial court's decision to determine whether its factual findings are supported by competent and credible evidence. Under the civil manifest weight analysis (competent and credible evidence), a reviewing court is bound to interpret evidence susceptible to more than one construction consistently with the verdict and judgment. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 21. Based on the deferential standard of review, we find that Appellant failed to demonstrate that he was an overnight guest of Vervin, based on the trial court's factual finding that Appellant's sole use of Room 101 was to sell illegal narcotics.

{¶46} Further, the search of Appellant's pants yielded fentanyl, cocaine, and oxycodone, and $1,401.00 in cash. We find that the assortment of drugs and the substantial amount of money, for which no explanation was provided at the hearing, was competent, credible evidence supporting the trial court's factual conclusion that Appellant's sole use of Room 101 was selling illegal narcotics in Room 101. Accordingly, we find that Vervin was the sole occupant of Room 101, and Appellant was not an overnight guest.

{¶47} In summary, we find that Appellant was neither a registered occupant nor an overnight guest of Vervin. As a consequence, Appellant had no legitimate expectation of privacy in Room 101 that society is prepared to recognize as reasonable, and no standing to challenge the search of the hotel room.

WARRANTLESS ENTRY

{¶48} Even assuming arguendo that Appellant does have standing to challenge the warrantless search of Room 101, we find that the search of the red sweatpants, which contained the illegal narcotics, was a search incident to arrest. In order to reach that conclusion, we have determined that the officers were lawfully present in Room 101.

{¶49} A three-step inquiry is required to determine the validity of the officers' warrantless entry into Room 101: (1) Was the "housekeeping" ruse unlawful and did it taint Vervin's consent?; (2) Did the smell of raw as opposed to burning marijuana establish probable cause to believe that a crime was being committed?; and (3) Was the warrantless entry into Room 101 justified by exigent circumstances?

{¶50} The Supreme Court of Ohio has determined "the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement." *State v. Moore*, 90 Ohio St.3d 47, 48, 734 N.E.2d 804 (2000). In *Moore,* the police officer detected the odor of burning marijuana.

{¶51} "In order for evidence to be seized under the plain view exception – or, in this case, the plain smell exception to the search warrant requirement it must be shown that (1) the initial intrusion which afforded the authorities the plain view/smell 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*, 55 Ohio St.2d 82, 82, 377 N.E.2d 1013 (1978), paragraph one of the syllabus.

{¶52} An illegal entry into a dwelling typically makes any ensuing searches or interrogations unlawful. *United States v. Buchanan*, 904 F.2d 349, 356 (6th Cir.1990). If an individual gives consent to a search of the dwelling after the illegal entry, evidence obtained pursuant to the consent must be suppressed unless the individual's consent was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* at

355 (quoting *Brown v. Illinois*, 422 U.S. 590, 599, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)) "In other words, not only must the consent be valid, i.e., voluntary, ... but the causal chain between the illegal [entry] and the consent must be broken to avoid the consequences of the exclusionary rule." *United States v. Lopez-Arias*, 344 F.3d 623, 629 (6th Cir. 2003) (citing *Dunaway v. New York*, 442 U.S. 200, 217–19, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Brown*, 422 U.S. at 602–04, 95 S.Ct. 2254; *Buchanan*, 904 F.2d at 355–56).

{¶53} There is case law in Ohio, specifically in this District, that authorizes police officers to accompany hotel staff members to a hotel room, when the hotel staff intends to evict the occupant. We have further acknowledged a law enforcement officer's authority to assist the hotel staff in the eviction process, up to and including, if necessary, entry into the defendant's hotel room, where any contraband in plain view becomes admissible based on the well-recognized exception to the warrant requirement. *State v. Nickelson*, 7th Dist. Belmont No. 16 BE 0039, 2017-Ohio-7503, ¶ 21-22.

{¶54} Further, courts have concluded that the purposes of the knock and announce rule are not undermined when officers use deception to secure a peaceable admission for the purposes of executing a warrant. *United States v. Alejandro*, 368 F.3d 130, 137 (2d Cir.2004)(officer told defendant through a closed door that he was a utility company employee who needed to check a gas leak); *Adcock v. Commonwealth*, 967 S.W.2d 6, 11 (Ky.1998) (for purposes of the "knock and announce" rule where officers have a warrant, use of a pizza delivery person ruse was permissible because it enticed the defendant to voluntarily open the door, at which point "the necessity for the ruse evaporated").

{¶55} However, the officers in this case were not executing a search warrant, they were acting in the absence of a search warrant. Further, the record establishes that the hotel staff did not request the assistance of the officers to evict Appellant, but, instead, offered to accompany the officers to Room 101 to determine whether it was still occupied. Nonetheless, because the officers did not employ the ruse to gain entry into Room 101, but, instead, relied on the odor of raw marijuana as their reason for the warrantless entry, we find that the ruse did not offend the Fourth Amendment.

{¶56} In this case, Appellant opened the hotel room door as the result of the announcement that a member of the housekeeping staff was at the door. Although these

facts appear to present a matter of first impression in Ohio, several state and federal courts have concluded that a ruse used solely to gain a vantage point into a hotel room does not violate the Fourth Amendment.

{¶57} For example, in *United States v. Garcia*, 997 F.2d 1273, 1280 (9th Cir.1993), officers posing as potential renters of property were speaking to the defendant through the back patio door when they saw a package of cocaine in plain view. The Ninth Circuit concluded that neither the officers' status nor the ruse caused the search to violate the Fourth Amendment. *Id.* at 1280.

{¶58} More pointedly, in *United States v. Leung*, 929 F.2d 1204 (7th Cir.1991), officers asked a hotel housekeeper to knock on the defendant's door and say she was there to clean the room, and the defendant answered the door. The Seventh Circuit concluded that the ruse did not violate privacy interests, as the defendant could have chosen not to answer the door. *Id.* at 1207-08.

{¶59} Similarly, in *United States v. Wright*, 641 F.2d 602 (8th Cir.), cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981), officers knocked a on motel room door pretending to be travelers seeking assistance due to car trouble. The officers saw suspected contraband while standing outside when the door was opened, and obtained a search warrant based on that observation. The Eighth Circuit found no Fourth Amendment violation. *Id.* at 606; see also *Herring v. State*, 279 Ga.App. 162, 630 S.E.2d 776, 778 (2006) (police officer throwing a plastic cup at the door, prompting occupant to open door, thus enabling the officer to see cocaine in plain view on a table inside, did not violate the defendant's rights); *State v. Dixon*, 83 Hawai'i 13, 924 P.2d 181, 191 (1996) (police used a security guard to knock on the defendant's door and claim he needed to check the air conditioning; court held that, where an entry is obtained by a ruse, "there is no unwarranted intrusion on the occupant's privacy because the occupant has voluntarily surrendered his or her privacy by opening the door"); *Brown v. State*, 378 Md. 355, 835 A.2d 1208, 1213 (2003) (where officer represented himself as a maintenance person wanting to check the thermostat, which induced nothing more than the opening of the door, the ruse did not invalidate subsequent consent to enter).

{¶60} Based on the foregoing case law, we find that Appellant abandoned his expectation of privacy when he opened the hotel room door. Appellant voluntarily

exposed the contents of the room, including the odor emanating from the marijuana in the red sweatpants, to any person that might be outside the hotel room door, including the officers. Therefore, we find that the ruse employed by the officers did not invalidate their warrantless entry into the Room 101.

{¶61} The Ohio Supreme Court, in *Moore*, predicated its finding of probable cause to search a motor vehicle based on the odor of burning marijuana. In this case, the officers relied on the odor of raw marijuana to enter Room 101. However, in the years following the *Moore* decision, Ohio appellate courts have extended the holding in *Moore* to include the smell of raw marijuana. See *State v. Brown*, 6th Dist. Sandusky No. S-20-015, 2021-Ohio-753, ¶ 39 (extending "plain smell" exception to search vehicle to raw marijuana); *State v. Cook*, 5th Dist. Muskingum No. 2010-CA-40, 2011-Ohio-1776, ¶ 48 (smell of "green and growing marijuana" sufficient to establish probable cause for issuance of search warrant); *State v. Gonzales*, 6th Dist. Wood No. WD-07-060, 2009-Ohio-168, ¶ 25 (officer testified that marijuana is an "odiferous plant"); *State v. Dixon*, 2nd Dist. Montgomery No. 22147, 2008-Ohio-1978, ¶ 10 (smell of raw marijuana emanating from interior of vehicle justified warrantless search of duffel bag on rear seat).

{¶62} In the two cases analyzing the "plain smell" doctrine as it applies to a dwelling, law enforcement relied on the odor of raw marijuana in order to obtain a search warrant. In *State v. Woljevach*, 6th Dist. No. H-040027, 160 Ohio App.3d 757, 2005-Ohio-2085, 828 N.E.2d 1015, the Sixth District opined that the odor of marijuana detected by a law enforcement officer standing in the curtilage of a barn, which was not open to the public, did not establish probable cause to issue a search warrant for the barn because the officer was not on a public part of the property. Insofar as the officer "was in a place where he had no lawful right to be," the Sixth District opined that "his odor detection may not properly form the basis of the search warrant." *Id.* at ¶ 31. In *Cook, supra,* the Fifth District distinguished *Woljevach* because the officers in *Cook* detected the odor of raw marijuana in a public place. *Id.* at ¶ 68.

{¶63} As previously stated, we find that the officers in this case were lawfully standing outside of Room 101 when Appellant opened the door. Based on the foregoing case law, we further find that probable cause existed when Appellant opened the hotel

room door, that is, "a reasonably prudent person would believe that there is a fair probability that the place to be searched contains evidence of a crime." *Gates, supra.*

{¶64} Finally, a warrantless entry to prevent the destruction of evidence is justified if the state demonstrates: (1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that these third parties may soon become aware the police are on their trail, so that the destruction of evidence would be in order. *State v. Thomas*, 10th Dist. No. 16AP-852, 2018-Ohio-758, 107 N.E.3d 172, ¶ 25, citing *United States v. Lewis*, 231 F.3d 238, 241 (6th Cir. 2000).

{¶65} We find that the officers' entry into Room 101 was justified insofar as Appellant was aware of their presence and would likely destroy any contraband if they did not enter and secure the room. Further, although a small amount of marijuana was seized, McLaughlin's testimony that the odor of raw marijuana was detectable when Appellant opened the hotel room door is bolstered by the fact that Appellant had the red sweatpants containing the marijuana in his hand when he opened the hotel room door.

{¶66} In summary, we find that the officers made a lawful entry into Room 101 as (1) the "housekeeping" ruse was permissible; (2) the officers relied on the odor of raw marijuana in order to enter the hotel room; and (3) Appellant was aware of their presence and would likely destroy any contraband had the officers failed to immediately enter and secure the contents of Room 101.

SEARCH INCIDENT TO ARREST

{¶67} Appellee argues that the search of the red sweatpants was a search incident to arrest because the officers had probable cause to arrest Appellant when he failed to follow their commands after they entered Room 101. R.C. 2921.31, captioned "Obstructing official business," reads, in its entirety:

> (A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.

> (B) Whoever violates this section is guilty of obstructing official business. Except as otherwise provided in this division, obstructing official business is a misdemeanor of the second degree. If a violation of this section creates a risk of physical harm to any person, obstructing official business is a felony of the fifth degree.

{¶68} R.C. 2935.04, captioned "When any person may arrest," reads, in its entirety, "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained." RC 2935.04 authorizes the warrantless arrest of a person for a misdemeanor when the arresting officer knows that the person has a previous conviction which will enhance the misdemeanor to a felony. *State v. Wac*, 68 Ohio St.2d 84, 428 N.E.2d 428, (1981). Further, "an officer may make a warrantless arrest for a misdemeanor when the offense is committed in the officer's presence." *State v. Henderson*, 51 Ohio St.3d 54, 56, 554 N.E.2d 104 (1990), citing, *State v. Lewis*, 50 Ohio St. 179, 33 N.E. 405 (1893) syllabus.

{¶69} The trial court held that Appellant's attempt to "slam the door of Room 101" and his failure to comply with the officer's commands to "get down" constituted probable cause to arrest him for a violation of R.C. 2921.31. Although Appellant was initially charged with a second-degree misdemeanor violation of R.C. 2921.31, the charge was dismissed as a term of his "no contest" plea.

{¶70} The search incident to arrest exception to the warrant requirement "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Thus, an officer making a lawful arrest may conduct a warrantless search of the arrestee's person and of the area within his immediate control, which includes "the area from within which he might gain possession of a weapon or destructible evidence." *Id.*

{¶71} The state appears to presume in its argument that Appellant was wearing the red sweatpants when he was arrested. However, the testimony at the hearing establishes that Appellant was not wearing the red sweatpants when he was arrested, but, instead, he donned them prior to being taken into custody, and solely out of necessity,

that is, he was only wearing underpants and the red sweatpants were the only pants in the hotel room. In other words, the record reflects that the red sweatpants were on the bed when Appellant's arrest was effected.

{¶72} However, the law in Ohio had long been that "the right to search incident to arrest exists even if the item is no longer accessible to the arrestee at the time of the search. * * * As long as the arrestee has the item within his immediate control near the time of the arrest, the item can be searched." *State v. Adams*, 144 Ohio St.3d 429, 45 N.E.3d 127, 2015-Ohio-3954, ¶ 183, citing *United States v. Romero*, 452 F.3d 610, 619 (6th Cir. 2006) and *Northrop v. Trippett*, 265 F.3d 372, 379 (6th Cir. 2001) (applying 1985 law, specifically *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), which permitted the warrantless vehicle search after the occupants had all been removed). Therefore, we find that the search of the red sweatpants was valid insofar as the red sweatpants were within Appellant's immediate control at the time of his arrest.

{¶73} Appellant's arrest was not contemporaneous with the commission of the misdemeanor. However, the United States Supreme Court has held that the actual arrest need not precede the search, as long as the arrest "followed quickly on the heels of the challenged search of petitioner's person," and the fruits of the search are not used to support probable cause for the arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). Further, the Second District has opined that the offense for which a defendant is ultimately arrested need not be the same offense that justified the search incident to an arrest and the key is whether there was probable cause to arrest when the search was conducted. *State v. Hunter*, Montgomery App. No. 20917, 2006-Ohio-2678.

{¶74} Here, Appellant's arrest occurred after he was questioned by the officers for approximately thirty minutes, Vervin was intercepted and searched, she executed a consent to search form, and the search of Room 101 was conducted. Therefore, it can be gleaned from the record that a considerable amount of time passed between the commission of the misdemeanor and the arrest. However, based on the continuing drug investigation that occurred after the commission of the misdemeanor, but prior to the arrest, we conclude that the arrest occurred within a reasonable time after the misdemeanor was committed.

{¶75} Accordingly, we find that the search of the red sweatpants was part of a search incident to arrest. The pants were in the area within Appellant's immediate control, as the testimony at the hearing established that he was seated at the foot of the bed during his questioning by the officers. Further, insofar as the red sweatpants were the only pants in the hotel room, the officers would be permitted to search them prior to handing them over to Appellant to wear in order to be transported to the police station. Finally, the arrest occurred within a reasonable time due to the continuing drug investigation.

CONCLUSION

{¶76} In summary, we find that Appellant did not have standing to challenge the search of Room 101, because he was not a registered guest or an overnight guest of Vervin. Even assuming that Appellant had standing to challenge the search, we find that the officers gained a lawful vantage point into Room 101 and exigent circumstances excused their warrantless entry, that is, they detected the odor of raw marijuana, and Appellant, aware of their presence, would likely have destroyed the contraband had they not entered the hotel room and secured its contents. Finally, although the Appellant was not wearing the red sweatpants, they were within his immediate control and he donned them before being transported to the police station. The time that elapsed between Appellant's commission of the misdemeanor and his arrest was reasonable based on the continuing drug investigation. Accordingly, we find that the search of the red sweatpants constituted a search incident to arrest.

{¶77} Based on the foregoing analysis, we find that Appellant's sole assignment of error has no merit, and the judgment entry of the trial court overruling Appellant's motion to suppress is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.