

[Cite as *State v. Harris*, 2005-Ohio-399.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84591

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
WILLIAM HARRIS	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	<u>February 3, 2005</u>
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from Common Pleas Court Case No. CR-444177
	:	
JUDGMENT	:	REVERSED AND REMANDED.
	:	
	:	
DATE OF JOURNALIZATION	:	
	:	
APPEARANCES:		
For plaintiff-appellee		WILLIAM D. MASON, ESQ. Cuyahoga County Prosecutor By: COLLEEN REALI, ESQ. Assistant County Prosecutor Justice Center - 8th Floor 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant		JOSE TORRES-RAMIREZ, ESQ. 75 Public Square, Suite 800 Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant William Harris ("Harris") appeals his conviction in the Cuyahoga County Court of Common Pleas for trafficking in marijuana and possessing criminal tools. For the reasons stated below, we reverse and remand.

{¶ 2} Harris's conviction stems from events that occurred on September 18, 2003. On that date, officers from the Cleveland Metropolitan Housing Authority ("CMHA") were investigating drug activity in an area known as Riverside Park Estates. Several of the officers responded to a radio broadcast from a detective who was in an unmarked car and had observed a man approach three individuals and make a hand-to-hand transaction in which a small object was exchanged for money, which was indicative of a street drug sale. The detective provided descriptions of the individuals as well as directions as to where they were going.

{¶ 3} Officer Richard Schilling testified that he and his partner stopped the buyer, who threw down a rock of crack cocaine. The buyer was arrested. The other three individuals walked across a field and into a house at 18132 Parkmount Avenue in Cleveland. Officer Schilling followed the three individuals and went into the house. A review of the entire transcript reflects that no evidence was presented that Officer Schilling or any other officer obtained consent to enter the house.

{¶ 4} Officer Schilling testified that all of the officers who responded arrived at approximately the same time. When he arrived, Officer Schilling observed that the three individuals involved in the drug transaction were in the front room and two other individuals were on the porch. One of the leaseholders was an elderly woman who was in a bedroom and incapacitated because of illness. Her daughter, Sylvia Conway ("Conway"), also a leaseholder, was also in the apartment.

{¶ 5} Officer Schilling did a cursory sweep of the house to clear the house. He asked Conway if anyone else was present. She indicated Harris was in the back bedroom. Although Harris was not a leaseholder, he resided in the home with Conway.

{¶ 6} Officer Schilling went to the back room and found Harris sitting on the bed and holding a dog at bay. Because a police dog was on the scene, Officer Schilling allowed Harris to stay in the back bedroom. The focus at the time was on the three individuals from the drug transaction. Officer Schilling also testified that he did not search the bedroom because he was only doing an initial sweep to clear the area and make sure there was no threat. He further stated "once you have initially cleared an apartment, then you can always go through and do a secondary."

{¶ 7} Officer Paul Shaughnessy testified that he was standing on the front porch of a house where there were several people. The house was an end unit of a row of CMHA housing.

{¶ 8} Officer Shaughnessy could smell marijuana and believed someone had been smoking marijuana outside. The officer proceeded to check around outside the house and found it to be free of contraband. He also noticed that all of the windows were closed.

{¶ 9} A few minutes later, Officer Shaughnessy checked the perimeter of the house again and observed a blue plastic bag outside a window in an area he had already checked. He also noticed the window was open a quarter of an inch and the screen was ajar. The blue bag contained 20 smaller bags of marijuana. Officer Shaughnessy testified the packaging of the marijuana was consistent with the manner in which it is packaged by one engaged in drug trafficking. A scale inside a zip-lock bag was also found.

{¶ 10} Officer Shaughnessy went into the house to see who was in the bedroom with the open window. He was advised that Harris had been in the room.

{¶ 11} Officer Thomas Williams testified he went to the house to assist the other officers. He was let into the house by another officer. He stated that Conway signed a search form. Around this time, Officer Williams heard a noise in the rear bedroom. He went to the bedroom and observed Harris sitting on a bed with the dog. He did not notice if the window was open. As he escorted Harris out of the bedroom, another officer approached to place Harris

under arrest because of the marijuana that was found outside the bedroom window.

{¶ 12} Officer Paul Hermensky testified he had interviewed the buyer from the drug transaction and noticed his co-officers were at the house conferring with persons on the front porch. He was with Officer Shaughnessy during the second sweep of the perimeter when the blue bag was found. He also arrested Harris.

{¶ 13} Officer Hermensky further testified that Harris told him he was not going to let his wife take the hit for it, referring to Conway. Officer Hermensky also learned that both Harris and Conway stayed in the bedroom in which Harris was found.

{¶ 14} At the close of the state's case, Harris moved for acquittal under Crim.R. 29. The motion was denied by the court.

{¶ 15} Harris testified that he was sleeping when the officers arrived and was not aware of their presence until he got up to use the bathroom and saw his wife walking down the hall with an officer. He indicated the officer instructed him that he could stay back in the bedroom with his dog. Harris stated he could hear officers outside his window on their radios and that his window was open a crack. He also stated the window was kept open at night in the summer. However, he did not remember the screen being ajar. At one point an officer allowed Harris's wife into the room to get a cigarette, but Harris claimed she did not have any drugs.

{¶ 16} Harris further testified that after being arrested and placed in the police car, the officer said they knew the marijuana was not his and that if he worked with them they would work with him, or else everybody would be taken to jail. Harris claimed he then took the weight so his wife and son would not be taken away.

{¶ 17} Following trial, the court found Harris guilty of trafficking in marijuana and possessing criminal tools. The court sentenced him to one year of community control sanctions.

{¶ 18} Harris has appealed his conviction, raising three assignments of error for our review. His first and second assignments of error provide:

{¶ 19} "Appellant's conviction was contrary to the sufficiency of the evidence."

{¶ 20} "Appellant's conviction was contrary to the manifest weight of the evidence."

{¶ 21} When an appellate court reviews a record upon a sufficiency challenge, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 22} In this case, Harris was convicted of trafficking in marijuana and possessing criminal tools. R.C. 2925.03(A)(2),

trafficking in drugs, provides that no person shall knowingly prepare a controlled substance for distribution when the offender has reasonable cause to believe the controlled substance is intended for sale or resale by the offender or another person. R.C. 2923.24, possessing criminal tools, provides that no person shall possess or have under his control any instrument with purpose to use it criminally.

{¶ 23} The record in this case reflects that Officer Shaughnessy did not see anything outside the window when he first walked around the house. Minutes later, when he walked around the house again, he discovered the bag full of smaller bags of marijuana and a scale beneath the window of the room in which Harris was sitting. The officer also noticed the window was now open and the screen was ajar. We find, based on the totality of the circumstances, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶ 24} Next, in reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of

justice that the conviction must be reversed and a new trial ordered." *Leonard*, 104 Ohio St.3d at 68 (internal quotes and citations omitted).

{¶ 25} Upon our review, we find substantial evidence existed to support convictions on both counts.

{¶ 26} Because we do not find the judgment to be against the sufficiency or manifest weight of the evidence, Harris's first and second assignments of error are overruled.

{¶ 27} Harris's third assignment of error provides:

{¶ 28} "Appellant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶ 29} To establish ineffective assistance of counsel, a defendant must show "(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Sapp*, OH S.Ct. No. 2003-0135, 2004-Ohio-7008.

{¶ 30} Harris argues his trial counsel's performance was deficient for failing to file a motion to suppress because the record demonstrates the officers entered and searched the premises without a warrant. Our review of the record reflects that the

state did not provide any evidence that it had consent to enter the premises. Officer Williams testified that after he field interviewed Conway, she consented to sign a search form. No evidence was presented that Williams or any other officer had initially obtained consent to enter the home. Upon the record before us, there can be no doubt that Conway's consent to search was the fruit of a warrantless entry.

{¶ 31} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution secure an individual's right to be free from unreasonable searches and seizures, and require warrants to be particular and supported by probable cause. Warrantless entry by law enforcement personnel into premises in which an individual has a reasonable expectation of privacy is per se unreasonable, unless, it falls within a recognized exception to the warrant requirement. *Minnesota v. Olson* (1990), 495 U.S. 91; *Payton v. New York* (1980), 445 U.S. 573.

{¶ 32} The existence of exigent circumstances, coupled with probable cause, is a well recognized and carefully delineated exception to the warrant requirement. *Olson*, 495 U.S. at 100; *Welsh v. Wisconsin* (1984), 466 U.S. 740, 749. The United States Supreme Court has identified four situations which form the appropriate standard for determining the existence of exigent circumstances; (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent escape, and (4)

the risk of danger to police or others. *Id.* Law enforcement agents bear a heavy burden when attempting to demonstrate exigent circumstances that might justify a warrantless entry. See *Welsh*, 466 U.S. at 749.

{¶ 33} The facts in this case do not support the presence of an exigent circumstance. There was no evidence presented that the officers were in hot pursuit or that the individuals were fleeing. Instead, the evidence shows that the officers had stopped the buyer in a field and that the other individuals were walking across it. It is unclear whether the individuals were even aware of the officers' presence. Further, there was no showing of a need to prevent escape or a risk of danger to the police or others. Absent exigent circumstances, law enforcement officers are required to knock on the door, announce their presence and await admittance for a reasonable time before forcibly entering a residence. See *Wilson v. Arkansas* (1995), 514 U.S. 927, 929.

{¶ 34} While the state claims the officers obtained consent to enter and search the home, our review reflects no evidence that consent to enter the home was obtained. The Fourth Amendment confers the right to refuse consent to entry of a defendant's residence. *State v. Robinson* (1995) 103 Ohio App.3d 490. Further, although Harris was not one of the leaseholders, a criminal defendant is not required to have an ownership or possessory interest in the premises in order to have standing to complain of a

Fourth Amendment violation with respect to a law enforcement officer's entry into those premises; a defendant is required only to have a reasonable expectation of privacy in the premises. *Olson*, 495 U.S. at 95. In *Olson*, the United States Supreme Court held that an overnight guest may have a legitimate expectation of privacy in another's home even when his occupation of the premises is not exclusive. *Id.*

{¶ 35} In this case the evidence established that Harris resided in the home. He was found in his bedroom. Because Harris had a legitimate challenge to the warrantless entry to the home, we find that his counsel's failure to file a motion to suppress constituted deficient performance. We also find that this failure resulted in prejudice to Harris.

{¶ 36} To further the Fourth Amendment's guarantee against unreasonable searches and seizures, evidence obtained by an unlawful entry into one's home may be excluded from trial. *Mapp v. Ohio* (1961), 367 U.S. 643. Insofar as the state contends that Harris threw the bag of drugs outside the window, this evidence was obtained as a direct result of an unlawful entry into the home. See e.g., *Hobson v. United States*, (8th Cir. 1955) 226 F.2d 890 (court suppressed property thrown from a window after officers had, without probable cause, sought to gain admission to defendant's home); *Segura v. United States* (1984), 468 U.S. 796, 804 ("the exclusionary rule reaches not only primary evidence obtained as a

direct result of an illegal search * * * but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree' * * * It 'extends as well to the indirect as [it does to] the direct products' of unconstitutional conduct").

{¶ 37} We find Harris has established a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶ 38} We conclude that Harris did not receive effective assistance of counsel as guaranteed by the Sixth Amendment and find this assignment of error has merit.

Judgment reversed and case remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee costs herein.

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

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

ANN DYKE, P.J., AND

FRANK D. CELEBREZZE, JR., J., CONCUR.

SEAN C. GALLAGHER
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).