IN THE SUPREME COURT OF OHIO

ORIGINAL

14-0612

STATE OF OHIO,	)	COA NO.: 13-100019
PLAINTIFF-APPELLEE,	)	LOWER COURT CASE NO.: 12-CRB-563268-B
VS.	)	
MAURICE MOWLER,	)	LOWER COURT JUDGE: JOHN D. SUTULA
DEFENDANT-APPELLANT.	)	

DEFENDANT-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

OFFICE OF THE CUYAHOGA
COUNTY PROSECUTOR'S OFFICE
JUSTICE CENTER-COURT TOWERS
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PROPOSITION OF LAWS

I. DEFENDANT-APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS.

II. DEFENDANT-APPELLANT ASSERTS THAT HIS CONVICTION IS AGAINST THE SUFFICIENCY OF THE EVIDENCE.

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

In this instant matter that is now before this Honorable Court, is a case of Public and/or Great General Interest that involves several substantial constitutional questions. The Appellant asserts that this Honorable Court should accept Jurisdiction due to the fact that several substantial constitutional questions exist.

Fundamental fairness on which our justice system is based requires that a miscarriage of justice should be avoided at all cost. A Defendant's constitutional rights must be protected to ensure public trust of our justice system. Failure to do so would affect substantial rights and that would seriously affect the fundamental fairness, integrity or public reputation of our judicial proceedings. ***Johnson v. United States***, 117 S. Ct. 1544 (1977).

Therefore, any case that avoids a miscarriage of justice surely is a case of public and/or great general interest as in this pending matter including but not limited to the issues of substantial constitutional questions. In this instant matter, the Defendant-Appellant's constitutional rights to be free from unreasonable search and seizure was violated pursuant to the Fourth Amendment to the United States Constitution as well as the Supreme Court decision thereafter on this subject matter, thereby creating a miscarriage of justice entitling this Appellant to a review of this present issue to this Honorable Court. Defendant-Appellant also asserts that there is insufficient evidence to support his conviction in this matter.

STATEMENT OF THE CASE AND FACTS

On or about Thursday, May 31, 2012 law enforcement officers seized a suspicious parcel at FedEx in Bedford Heights, Ohio, that was to be delivered to 12910 Hlavin Road in Cleveland, Ohio. Eventually, the package was opened pursuant to a search warrant and found to contain marijuana. It should be noted that the initial search was not challenged by this Defendant-Appellant; in that the pertinent package (box) was not addressed to the Defendant-Appellant, and was found at an address totally unrelated to the Defendant-Appellant. However, it should be noted that on August 22, 2013, Defendant-Appellant filed a motion to suppress pursuant to the actions of law enforcement's on May 31, 2012 for the reasons presented and discussed in the hereto following.

On Thursday May 31, 2012, at about 1:40 p.m., an undercover detective posing as a FedEx delivery person delivered the package (box) to 12910 Hlavin, near East 131st Street; other defendants, in the above captioned case, gained possession of the subject box. Said other defendants and the box exited the 12910 Hlavin Road in a red Expedition vehicle.

A purple Isuza vehicle which was parked on Hlavin Road began in route down Hlavin Road. The purple Isuza was occupied and driven by the Defendant-Appellant (hereinafter referred to as Mr. Mowler). Both vehicles, the Isuzu and the red Expedition ended up in the parking area adjacent to the Sherwood Apartments at 15500 Lake Shore Avenue, Cleveland, Ohio. It should be noted that at all times pertinent, relevant law enforcement officers never lost sight of the hereto pertinent vehicles.

On arrival at the Sherwood Apartments, police surveillance units moved in and arrested the occupants of the Expedition and detained/arrested the hereto Defendant-Appellant, Mr. Mowler who was still in the Isuza. The package (box) was found in the rear of the Expedition. After being advised of his rights, Mr. Mowler spoke briefly to the police. The police officers all armed and in uniform, demanded of the Defendant-Appellant, the right to search his vehicle; ie, the purple Isuzu. Mr Mowler while under custodial control agreed to the search. The search resulted in nothing being found in Mr. Mowler's purple Isuzu.

The police officers, while yet having the Defendant-Appellant (Mowler) within custody and control, demanded to search his premises/residence. The Defendant-Appellant's premises/residence was not located in the parking lot of Sherwood Apartments at 15500 Lake Shore Avenue, Cleveland, Ohio; but in fact were an apartment beyond a locked outer door, and a locked apartment door. While in custody of armed uniformed officers, Mr. Mowler conceded to the demands and signed a search consent form and a search ensued. The search resulted in a quantity of marijuana being found in the common area of Mr. Mowler's apartment.

On January 25, 2013, the trial court held a hearing on a motion to suppress by Mr. Mowler and thereafter on January 29, 2013 the trial court denied the aforementioned motion. After several pre-trials were had with no resolutions being found, a jury trial began on April 30, 2013; trying all three (3) defendants together. At trial, all three (3) defendants, including the hereto Defendant-Appellant were presented with the same evidence, and the evidence of marijuana found in the red Expedition belonging to the co-defendant's, and the marijuana found in Defendant-appellant's apartment were all merged together for purposes of establishing guilt.

The jury returned a verdict that found Mr. Mowler and his co-defendants guilty of Drug Trafficking, a violation of the Ohio Revised Code Section 2925.03 A(2), a felony of the third degree with forfeiture specifications (2941.1417) as charged in count one of the indictment; guilty of Drug Possession a violation of the Ohio Revised Code Section 2925.11, a felony of the third degree with forfeiture specifications (2941.1417) as charged in count two of the indictment and Possession of Criminal Tools a violation of the Ohio Revised Code Section 2923.24, a felony of the fifth degree with forfeiture specifications (2941.1417) as charged in count three of the indictment. The trial court order a presentence investigation report and set sentencing for May 31, 2013.

On June 4, 2013, the trial court imposed a term of imprisonment on Mr. Mowler to be served at Lorain Correction Institution of nine (9) months. Counts 1 and 2 merge and the State elects to proceed on count one (1). Nine (9) months on count one (1), low tier felony three (3); Six (6) months on count three (30, felony five (5). Counts to run concurrent to each other for a total of nine (9) months. Post release control is part of the sentence for up to three (3) years for the aforementioned felonies under O.R.C. 2967.28.

On June 20, 2013, Defendant-Appellant Mowler filed a timely appeal to the Eighth District Court of Appeals of Ohio, the trial court's ruling and verdict. The Eight District Court of Appeals of Ohio affirmed the trial court's ruling on March 06, 2013. Now the Defendant-Appellant is timely appealing to this Honorable Court.

PROPOSITION OF LAW NO. I

DEFENDANT-APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS.

There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the findings of fact are against the manifest weight of the evidence. State v. Fanning (1982), 1 Ohio St. 3d 19; State v. Klein (1991), 73 Ohio App. 3d 486; State v. Guysinger (1993), 86 Ohio App. 3d 592.

Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the finding of fact. In that case an appellate court can reverse the judgment of the trial court for committing an error of law. State v. Williams (1993), Ohio App. 3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue that the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. State v. Starkey (1993), 183 Ohio App. 3d 215.

When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. State v. Curry (1993), 95 Ohio App. 3d 93; State v. Claytor (1993), 85 Ohio App. 3d 623. As the United States Supreme Court held in Ornelas v. United States (1996), 517 U.S. 690, 116 S. Ct. 1657, 1663, "As a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

To establish probable cause adequate to justify issuance of a search warrant, the governmental entity or agent seeking the warrant must submit to the magistrate an affidavit that establishes

"a fair probability that contraband or evidence of a crime will be found in a particular place." **United States v. Brooks, 594 F. 3d 488 (6th Cir. 2010); United States v. Berry 565 F. 332, 338 (6th. Cir. 2009) (quoting Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, (1983)).** Whether the affidavit gives rise to this fair probability "depends on the totality of the circumstances." **United States v. Brooks, 594 F. 3d 488 (6th Cir. 2010); United States v. Frazier, 423 F. 3d 526, 531 (6th Cir. 2005); (quoting Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, (1983)).** "The probable cause standard is a 'practical, non-technical conception' that deals with the factual and practical considerations of everyday life.'" **Gates, supra at 462 U.S. at 231).**

To establish probable cause to support a search warrant, there must be some nexus between the illegal activity suspected and the property to be searched. **United States v. McPhearson, 469 F. 3d 518 (6th. Cir. 2006)** (mere fact that a man is arrested for non-drug offense had drugs on his person did not establish the requisite nexus to search his home for drugs); **United States v. Terry 522 F. 3d 645 (6th. Cir. 2008)** and **United States v. Carpenter, 360 F. 3d 591, 594 (6th. Cir. 2004).** The Federal Sixth Circuit Court of appeals also held that the fact that marijuana was found growing near a residence, by itself, fell short of establishing the required nexus between the residence and evidence of marijuana manufacturing. **United States v. Terry, supra.**

The illegal detained/arrest of Mr. Mowler requires suppression of the evidence directly obtained from that arrest as well as the evidence derivatively obtained. **Mapp v. Ohio** 376 U.S. 643, 81 S. Ct. 1684 (1961) (Fourth Amendment exclusionary rule applies to States via Fourteenth Amendment); **Wong Sun v. United States**, 371 U.S. 471, 83 S. Ct. 407 (1963) (fruit of the poisonous tree doctrine requires exclusion of tainted evidence derived from preceding illegality).

Defendant-Appellant, Mr. Mowler, had no real connection to the package located at Hlavin Road address, in that it was not delivered to him; and he did not reside there, and it was never transported in his vehicle. Further, upon arriving at the Sherwood Apartment address, and the searching of the vehicles, the co-defendants, and Mr. Mowler's vehicle, revealed nothing illegal within the Defendant-Appellant's (Mowler) vehicle. Hence, at all times, there was no probable cause to detain; or for a custodial hold, or arrest the Defendant-Appellant. In fact, Mr. Mowler should have been released to continue his lawful business. However, Mr. Mowler was not allowed to continue about his lawful business, and as such was illegally detained; and/or arrested

In this case, the Ohio Constitution's search and seizure provision-Article I, Section 14—has also been violated. The Fourth Amendment "provides a floor below which state court decisions may not fall." **Arnold v. Cleveland**, 67 Ohio St. 3d 35, 616 N.E. 2d 163 (1993). The was no probable cause to believe that Mr. Mowler was involved in any criminal activity therefore he should have never been arrested at no time.

It is axiomatic that an arrest must be supported by probable cause. **Illinois v. Gates,** 462 U.S. 213, 103 S. Ct. 2317 (1983). Probable cause must be premised upon articulable facts that would cause the arresting officer to believe that Mr. Mowler had committed or was committing a crime. **State v. Gooden**. 8th Dist. App. No. 88174, 2007- Ohio-2371, 2007 WL 1447712. A general suspicion will not suffice. *Id.*

Here, there is an insufficient amount of evidence to support probable cause. There is no evidence that Mr. Mowler was the recipient or intended recipient of the package. All the police knew at the time of arrest was that Mr. Mowler had possibly ridden in tandem with the Expedition to the same apartment complex; where he lived. Whether they even intended to go to Mr. Mowler's apartment – as opposed to the myriad of other apartments on the premises – is not clear.

In short, the actions of the police were premature as to the Defendant-Appellant, Mr. Mowler being arrested in the parking lot of the Sherwood Apartments at 15500 Lake Shore Avenue, Cleveland, Ohio. Merely driving in a possible tandem method was not sufficient for an arrest of Mr. Mowler. Arriving in a parking lot was not sufficient for an arrest of Mr. Mowler. A mere search of a vehicle, which Mr. Mowler had not ridden, where alleged contraband was found was not sufficient to arrest Mr. Mowler. Last, were a search of Mr. Mowler's revealed **No Contraband**, no bases, for a future **Search, Arrest Custody, Detainment, in that no determination of probable Cause Existed.**

In **State v. Blackshear**, *8th Dist. App. No. 95424, 2011-Ohio-1806, 2011 WL 1419730,* the Cuyahoga County Court of Appeals reversed the conviction of defendant Blackshear on the *basis that* the evidence was insufficient to conclude that he knowingly possessed a package of marijuana. The FedEx package intercepted by the police was then delivered by an undercover officer to the residence. The defendant told the undercover-officer posing-as-a-deliveryman that the defendant was expecting a package. Approximately two hours later, the police search the residence and found the unopened package in the home.

The Eighth District Court of Appeals believes there is a different between **Blackshear** and this present case. Defendant-Appellant asserts that the circumstance are more in common than they are different therefore Defendant-Appellant asserts that the Court of appeals is in error.

It is axiomatic that the Fourth Amendment's exclusionary rule prohibits the admission of both evidence that was illegally obtained and evidence that derived from the illegally obtained evidence. **Wong Sun v. United States**, 371 U.S. 471, 83 S. Ct. 407 (1963). Accordingly, Mr. Mowler asserts that this court should find that his post-arrest statements and post-arrest "consent" to search are fruit of the illegal arrest, and therefore should have been suppressed.

A statement to the police by a person who has been illegally arrested is inadmissible unless the state can establish that the taint of the arrest was purged before the statement was made. Id. Merely giving Miranda warnings is insufficient to purge the taint. **State v. Gooden**, 8th Dist. App. No. 88174, 2007-Ohio-2371, 2007 WL 1447712 (Miranda warnings and three-day delay between arrest and statement insufficient where defendant remained incarcerated). Here, the state cannot establish that the taint of the illegal arrest, to which Mr. Mowler was still being subjected, had been purged when he made his statements to the police.

The illegal arrest also taints the ensuing searches, which was unwarranted and which the state is expected to maintain was conducted pursuant to Mr. Mowler's consent. United States Supreme Court precedent, has recognized that an illegal arrest taints a subsequent consent to search unless there is a "break in the chain of police illegality." **State v. Heaven**, 65 Ohio App. 3d 832, 585 N.E. 2d 521 (8th Dist. App. 1990), citing Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983). Here the state cannot establish such a break in the chain whose first link was the unsupported arrest of Mr. Mowler.

For all the reasons set forth above, the Appellant-Defendant (Mowler) prays that this Honorable Court will accept jurisdiction of this case and give a de nova review of this matter thereafter reverse the lower court's ruling along with any and all other relief that this Defendant-Appellant may be entitled to as a matter of law, justice and equity.

PROPOSITION OF LAW NO. II

DEFENDANT-APPELLANT'S ASSERTS THAT HIS CONVICTION IS AGAINST THE SUFFICIENCY OF THE EVIDENCE.

A claim of insufficient evidence invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law. **State v. Thompkins** (1997), 78 Ohio St. 3d 380, 386, 678 N.E. 2d 541; **State v. Martin** (1983, 20 Ohio App. 3d 172, 175, 20 OBR 215, 485 N.E. 2d 717. In reviewing such a challenge, "[t]he relevant inquiry is 37 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. Jenks** (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492, paragraphs two of the syllabus, following **Jackson v. Virginia** (1979), 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560.

A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id. However, if the judgment is not supported by "substantial and competent evidence" upon the record as a whole, the judgment must be reversed. **U.S. v. Khabil** 279 F. 3d 350, 368 (6th Cir. 2002).

In the instant case, there is an insufficient amount of evidence to support a conviction. There is no evidence that Mr. Mowler was the recipient or intended recipient of the package. All the police knew at the time of arrest was that Mr. Mowler had traveled in tandem in his vehicle with the red Expedition to the same apartment complex; where he lived. Whether they even intended to go to Mr. Mowler's apartment, as opposed to the myriad of other apartments on the premises is not clear. Hence, there was not sufficient evidence to convict Mr. Mowler of the crimes charged herein.

In **State v. Blackshear**, *8th Dist. App. No. 95424, 2011-Ohio-1806, 2011 WL 1419730,* the Cuyahoga County Court of Appeals reversed the conviction of defendant Blackshear on the *basis that* the evidence was insufficient to conclude that he knowingly possessed a package of marijuana. The FedEx package intercepted by the police was then delivered by an undercover officer to the residence. The defendant told the undercover-officer posing-as-a-deliveryman that the defendant was expecting a package. Approximately two hours later, the police search the residence and found the unopened package in the home.

The indictment filed against Mr. Mowler in this case, alleged he was involved in drug trafficking and drug possession pursuant to a box that Mr. Mowler never was legally in possession of that contained roughly 15 pounds of marijuana. The aforementioned box was in the back of that red Expedition and it defies our common sense and reasoning to say that Mowler was in possession of a box that was not addressed to him, he never physically took possession of it. There's no way to assume that Mowler was even aware that the box was put in the back of the red Expedition before the red Expedition pulled out and he followed it.

It would be wrong and unfair to conclude that the state has presented evidence sufficient to raise to that level of proof beyond a reasonable doubt that Mr. Mowler was in possession, actual or otherwise, of a box that he never touched, that he never saw.

There is no evidence that Mowler was acting as a lookout. None! Clearly none, what is the difference between parking your car and waiting at the end of the street versus acting as a lookout? The difference is, there is nothing to suggest that he was nervously looking up and down the streets, nothing to suggest that he was in telephone communication with either of the other two co-defendants in this case, or anybody for that matter. To assert that there is evidence that Mr. Mowler aided and abetted, either or both

of these co-defendants in possessing that box, because he was parked at the end of the street is wrong, unfair and unjust to Mr. Mowler.

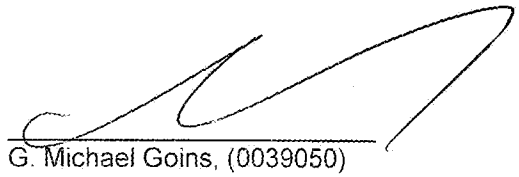
The evidence presented to support a conviction must be substantial, it must do more than raise a mere suspicion of guilt. The Defendant-Appellant, Mr. Molwer contends that no reasonable inference that he possessed the aforementioned box or that he aided and abetted either or both of the co-defendant's in this case. Therefore, viewing the evidence in the light most favorable to the State, this Honorable Court should rule as a matter of law, that the Jury did not have sufficient evidence to convict the Defendant-Appellant Molwer in this case. Clearly, the record in this case shows that there is insufficient evidence to support a conviction in this matter.

For all the reasons set forth above, the Appellant-Defendant (Mowler) prays that this honorable court after giving this instant case a de nova review will reverse the lower court's ruling along with any and all other relief that this Defendant-Appellant may be entitled to as a matter of law, justice and equity.

CONCLUSION

For all the reasons set forth above, the Appellant-Defendant prays that this Honorable Court after giving this instant case a de nova review will accept jurisdiction over this case and reverse the lower court's ruling along with any and all other relief that this Defendant-Appellant may be entitled to as a matter of law, justice and equity.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

A true copy of the foregoing document was sent by regular U.S. mail with the proper postage on this 14th day of April, 2014 to the Cuyahoga County Prosecutor Office, at the Justice Center, 8 & 9 floors, 1200 Ontario Street, Cleveland, Ohio 44113.

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MAR 06 2014

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100019

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAURICE MOWLER

DEFENDANT-APPELLANT

CA13100019
83298561

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-563268-B

BEFORE: E.T. Gallagher, J., Jones, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: March 6, 2014

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FILED AND JOURNALIZED
PER APP.R. 22(C)

MAR 0 6 2014

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Maurice Mowler ("Mowler"), appeals the denial of his motion to suppress and three drug-related convictions. We find no merit to the appeal and affirm.

{¶2} On May 31, 2012, Detective Michael Trombly ("Trombly") of the Cuyahoga County Sheriff's Office, and Detectives Franklin Lake ("Lake") and Edwin Cuadra ("Cuadra") of the Cleveland Police Department's Narcotics Unit were searching for contraband at a FedEx facility in Bedford Heights. They were trained to look for packages that were heavily taped, contained odor-masking substances such as coffee or mustard, or were shipped from certain well-known source states. Cuadra spotted a heavily taped package sent from someone Cuadra had intercepted contraband from in the past.

{¶3} Computer research revealed that the shipper was not associated with either the return address or the receiving address on the shipping label. The recipient's name was also not associated with the shipping address. Trombly's K-9 partner, Sam, who had been trained to scratch objects when he encountered the smell of illegal narcotics, located and scratched the package amidst numerous other packages.

{¶4} Pursuant to a search warrant, Cleveland police detectives opened the package and discovered a large bundle of marijuana inside. Cuadra removed a small piece of marijuana for testing and placed an alarm and tracking device

inside the package before resealing it. Detective Lake, disguised as a FedEx driver, delivered the package to the delivery address, 12910 Hlavin Road in Cleveland. Detective Ricardo Ruffin ("Ruffin") arrived on the street in an undercover capacity before Lake to conduct surveillance on the house prior to delivery. A man, later identified as Mowler, arrived in a purple Isuzu Trooper and parked on the street immediately behind Ruffin.

{¶5} A short time later, Detective Lake arrived at the address and delivered the package to a man, later identified as Reginald West ("West"). West placed the package on the front porch of the house. Five minutes later, a red Ford Expedition pulled into the driveway. West picked up the package, got into the front passenger seat of the Expedition, and headed eastbound on Hlavin Road toward East 131st Street. The Isuzu and undercover police cars who had been conducting surveillance followed the Expedition to an apartment complex located at 15500 Lakeshore Boulevard, a gated community.

{¶6} Upon arrival, Mowler used a key to open a gate for access to the parking lot. The Expedition and the Isuzu entered the complex followed by undercover police. Detectives Lake, Cuadra, and Ruffin stopped Mowler, who initially denied living in the complex but later allowed police to search his apartment. Detective Patrick Andrejcak ("Andrejcak") and SWAT members removed West and Tyshawn Ball ("Ball") from the Expedition. As a group, they proceeded to Mowler's apartment.

{¶7} Inside the apartment, Andrejcak's K-9 partner Daisy alerted detectives to the presence of drugs in a garbage can in the kitchen. The marijuana was hidden underneath a bag containing regular garbage. Detectives found $9,000 in nine separate packs of $1,000 each and an additional $694 in a kitchen drawer. They also recovered a scale, packaging material, and a food saver device used to shrink wrap food or small packages.

{¶8} Mowler was charged along with codefendants West and Ball, with one count of drug trafficking, one count of drug possession, and one count of possessing criminal tools. All three counts contained forfeiture specifications pursuant to R.C. 2941.1417(A) for the money, the scale, the food saver device, and cell phones.

{¶9} Mowler filed a motion to suppress evidence of the physical items confiscated from his apartment and all statements he made to police. Following a hearing, the trial court denied the motion, and the case proceeded to trial at which time a jury found Mowler guilty on all three counts in the indictment, including the specifications. The court merged the drug trafficking and drug possession counts for sentencing, and the state elected to proceed on the drug trafficking conviction. The court sentenced Mowler to nine-months imprisonment for drug trafficking and six months for possessing criminal tools, to be served concurrently. The sentence also included three years of postrelease control. Mowler now appeals and raises two assignments of error.

Motion to Suppress

{¶10} In the first assignment of error, Mowler argues the trial court erred in denying his motion to suppress. He contends there was insufficient evidence to support the probable cause necessary to arrest him and that all the evidence seized following his arrest was illegally obtained.

{¶11} Appellate review of a motion to suppress involves a mixed question of law and fact. "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility." *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994). The reviewing court must accept the trial court's findings of fact in ruling on a motion to suppress if the findings are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. Accepting the facts as true, the reviewing court must then independently determine as a matter of law, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard. *Id.*

{¶12} The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *." The Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

{¶13} There are, however, exceptions to the Fourth Amendment's warrant requirement. For example, a warrantless arrest is constitutionally valid if, at the time of the arrest, the facts and circumstances within the officer's knowledge were sufficient to warrant a prudent person to believe that the suspect had committed an offense. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). Probable cause for a warrantless arrest exists when the officer has sufficient information, from his own knowledge or a reliable source, to merit a reasonable belief that the accused has committed a felony. *State v. Timson*, 38 Ohio St.2d 122, 127, 311 N.E.2d 16 (1974).

{¶14} A warrantless arrest does not require the officer's absolute knowledge that a crime has been committed; it requires only a reasonable belief based on the totality of the circumstances. *Id.* Probable cause is a pliant common sense standard that requires only a showing that a probability, rather than an actual showing, of criminal activity existed. *Texas v. Brown*, 460 U.S. 730, 732, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *Illinois v. Gates*, 462 U.S. 213, 245, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

{¶15} At the time of Mowler's arrest, police knew Mowler had watched a package of marijuana being delivered to his accomplice. Prior to delivery, Ruffin had observed Mowler seated in the Isuzu watching traffic on the street. Ruffin testified that police often observe an accomplice acting as a "lookout" during drug operations. Moments after Lake delivered the package, Ruffin observed

Mowler follow West and Ball from Hlavin Road to his apartment at 15500 Lakeshore Boulevard. According to Cuadra, the drive took approximately 35 minutes. Ruffin testified that during the drive, he observed Ball pull over to the curb, and Mowler stopped alongside Ball's Expedition to have a brief conversation. After the conversation, Mowler took the lead for the remainder of the journey. When they reached their destination, Mowler was in a position to open the gate with his key to allow himself and his codefendants to enter.

{¶16} Although the package was not in Mowler's vehicle, the careful coordination of activity between Mowler and his codefendants related to the delivery of the package is sufficient to support probable cause for Mowler's arrest. Any reasonable police officer observing the events and the defendant's careful coordination of activity would have a reasonable belief that Mowler was aware of and involved in the transportation of the package containing a large amount of marijuana.

{¶17} In support of his argument for suppression, Mowler relies on *State v. Blackshear*, 8th Dist. Cuyahoga No. 95424, 2011-Ohio-1806 (in which this court reversed the defendant's trafficking conviction on the basis of sufficiency). As in the instant case, police had intercepted a package containing marijuana that was delivered to the defendant's residence. After the delivery, the defendant placed the package near a cocktail table by the door where his father kept his mail, and resumed playing video games with his friend.

{¶18} Two hours later, police searched the residence pursuant to a warrant and found the unopened package in the home. The defendant and another male were in the living room playing video games. This court reversed the conviction because there was insufficient evidence to demonstrate that the defendant knew there was marijuana in the package. *Id.* at ¶ 41-42. The defendant's name was not on the package, and he had reason to believe the package was a typical delivery for his father, who often received packages in the mail. *Id.*

{¶19} We find the instant case distinguishable from *Blackshear*. The defendant in *Blackshear* was not expecting a package and assumed the package was for his father. By contrast, the defendants' action in this case demonstrate they were expecting a delivery. West was waiting outside the house at the delivery address, and Mowler was acting as a lookout on the street until the package was delivered.

{¶20} Furthermore, Mowler gave the police permission to search his apartment. "[A] search of property without a warrant or probable cause but with proper consent having been voluntarily obtained does not violate the Fourth Amendment." *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 98, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 249, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Posey*, 40 Ohio St.3d 420, 427, 534 N.E.2d 61 (1988).

{¶21} Detective Lake advised Mowler of his *Miranda* rights as soon as the police made contact with him. After a brief discussion, Mowler signed a written consent form allowing the police to search his apartment. The consent form, which Detective Lake read to Mowler before he signed it, states:

> I, Maurice Mowler, having been informed of my constitutional rights not to have a search made of premises hereafter mentioned, without a search warrant, and of my right to refuse to consent to search, * * * hereby authorize Captain Heffernan and their narcotics and SWAT unit and detectives to conduct a complete search of my premises located at 15500 Lakeshore, #706. I am the lessee of the premises to be searched.
>
> * * *
>
> This written permission is being given by me to the above named persons voluntarily and without threats or promises of any kind.

{¶22} Thus, there was competent, credible evidence demonstrating that not only did police have probable cause to arrest Mowler, but Mowler gave written consent to police to search his apartment. Any evidence discovered in the apartment was therefore discovered legally.

{¶23} Accordingly, we overrule the first assignment of error.

Sufficiency of the Evidence

{¶24} In the second assignment of error, Mowler argues the evidence adduced at trial is insufficient to sustain his convictions. He contends there was no evidence that he knew there was marijuana in the package delivered to West and that he never had possession of marijuana.

{¶25} Crim.R. 29(A) provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶26} Defendant was convicted of drug trafficking in violation of R.C. 2925.03(A)(2), and possessing criminal tools in violation of R.C. 2923.24(A). R.C. 2925.03(A)(2) states:

> No person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶27} R.C. 2923.24(A), which governs possession of criminal tools, prohibits one from possessing or having under the person's control "any substance, device, instrument, or article, with purpose to use it criminally."

{¶28} Additionally, R.C. 2923.03(A)(2), Ohio's complicity statute provides, in relevant part, that "[n]o person, acting with the kind of culpability required

for the commission of an offense, shall * * * [a]id or abet another in committing the offense." R.C. 2923.03(F) provides that anyone guilty of aiding or abetting the principal offender shall be prosecuted as if he were the principal offender.

{¶29} To support a conviction for complicity by aiding and abetting, the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. *State v. Johnson*, 93 Ohio St.3d 240, 754 N.E.2d 796 (2001), syllabus. Evidence of aiding and abetting may be demonstrated by both direct and circumstantial evidence. *State v. Molina*, 8th Dist. Cuyahoga No. 83731, 2004-Ohio-4347, ¶ 26. Therefore, "'participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *Id.* quoting *State v. Cartellone*, 3 Ohio App.3d 145, 150, 444 N.E.2d 68 (8th Dist.1981).

{¶30} Although West received the package, and the package was transported in the Expedition instead of Mowler's Isuzu, Mowler's collaboration in the transportation of the package from the delivery address to his apartment demonstrates that Mowler aided and abetted his codefendants in drug trafficking. Detectives testified that the two vehicles traveled in tandem for approximately 35 minutes. During this time, the vehicles were never separated by more than two cars. Ball, who was driving the Expedition, pulled over to the

side of the road to allow Mowler to lead the way and open the gate to his apartment complex on arrival.

{¶31} Furthermore, the detectives observed Mowler acting as a lookout while he and his codefendants were waiting for the package to be delivered. Mowler's intent to aid and abet drug trafficking is also evidenced by the fact that the large package of marijuana was transported to his apartment where Mowler kept a scale, packaging material, and a food saver machine. Detective Lake testified that the food saver device is often used in drug trafficking because the shrink wrap eliminates the air and odor from packages. Scales are used in drug trafficking to weigh quantities of drugs for sale.

{¶32} Moreover, the detectives found marijuana and substantial sums of money in Mowler's apartment. The scale and food saver device were obviously used to prepare the marijuana for sale in smaller quantities and therefore constituted criminal tools. Thus, the circumstantial evidence suggests that Mowler and his codefendants were transporting the package of marijuana to Mowler's apartment to be weighed and packaged for distribution. We find this evidence is sufficient to sustain Mowler's convictions.

{¶33} Therefore, the second assignment of error is overruled.

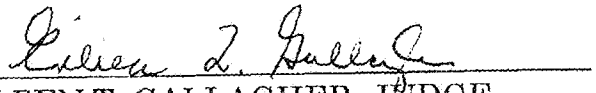
{¶34} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the common pleas court for execution of sentence.

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

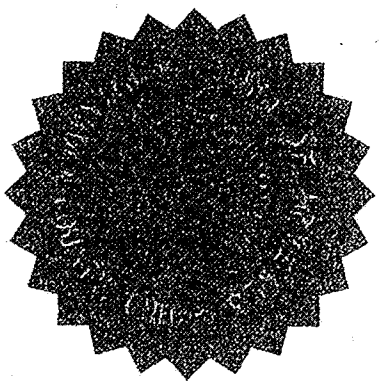


EILEEN T. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
TIM McCORMACK, J., CONCUR

The State of Ohio, Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 3/6/14 CA 100019 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 3/6/14 CA 100019 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 6 day of March A.D. 20 14

ANDREA F. ROCCO, *Clerk of Courts*

By _____ Deputy Clerk

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