

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon: John F. Boggins, P.J.
	:	Hon: W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon: William B. Hoffman, J.
	:	
-vs-	:	Case No. 2004-AP-060048
	:	
JEROLD SEIBERT, JR.	:	
	:	<u>OPINION</u>
Defendant-Appellant	:	

CHARACTER OF PROCEEDING: Criminal appeal from the Tuscarawas County Court of Common Pleas, Case No. 2003CR-08 0197

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 21, 2005

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

DAVID C. HIPPI
Assistant Prosecuting Attorney
125 East High Avenue
New Philadelphia, OH 44663

JOHN M. GARTRELL
237 W. 2nd Street
Dover, OH 44622

Gwin, J.

{¶1} Defendant-appellant Jerold Seibert, Jr. appeals from his conviction and sentence in the Tuscarawas County Court of Common Pleas on one count of possession of cocaine in violation of R. C. 2925.11, a felony of the fourth degree. Plaintiff-appellee is the State of Ohio.

{¶2} The indictment in this case grew out of the execution of a search warrant by the New Philadelphia Police Department on appellant's residence. The warrant was executed on January 31, 2003. The search warrant directed officers to search for computers, equipment, data storage devices, records and other items related to child pornography.

{¶3} Detective Bickford, along with other law enforcement officers, conducted a search of appellant's home for the items described in the warrant. In addition to the computer itself, officers were looking for computer data storage devices as small as three inches in length or the size of an automobile lock remote control, and CD's.

{¶4} Before the search began, and for security purposes, officers secured a firearm, the appellant advised was in the master bedroom. The appellant also stated there was "smoke" located upstairs. Detective Bickford testified she understood this reference to mean marijuana. The searching officers divided responsibility for searching various areas of the house. Detectives Ballentine and Hootman searched the master bedroom. Detective Hootman found in the closet a bag of what appeared to be marijuana. Detective Ballentine was searching the dresser for computer data storage devices. In the top drawer, Detective Ballentine found a four inch by six inch container with a "cloudy top" and transparent sides. Through the sides of the container, the officer

could see a spoon, a battery-operated scale, and a plastic bag of white powder. Based upon the officers' past drug enforcement experience, he recognized those items as likely cocaine and paraphernalia for its use. Detective Ballentine continued to search the drawers until he saw the corner of a plastic bag sticking out from under some clothing. When clothing was removed, the officer found another clear bag containing a substantial amount of white powder.

{¶5} At some point after discovering apparent cocaine and paraphernalia, the officers called the prosecutor for advice on the situation. Thereafter, the officers continued with their search for child pornography, computer equipment, and related items.

{¶6} Ultimately, the officers seized and removed from the home, other than the drug related items, the computer and related equipment, eight pornographic video tapes, CD's and other items. The quantity of the cocaine was later determined to be in excess of eleven grams.

{¶7} On October 2, 2003, defendant-appellant filed a motion to suppress all evidence pertaining to possession of illegal drugs. On February 4, an evidentiary hearing was conducted by the trial court. At the conclusion of the hearing, the trial court overruled the motion to suppress.

{¶8} On May 10, 2004, defendant-appellant entered a plea of no-contest to possession of cocaine in violation of R.C. 2925.11. The trial court deferred the matter for sentencing and ordered a pre-sentence investigation report. The trial court conducted a sentencing hearing on June 22, 2004. The trial court found defendant-appellant amenable to community controlled sanctions and gave him two years of

community control. The court reserved a six-month sentence and ordered he serve a period of thirty days of local incarceration. The defendant-appellant's Ohio driver's license was suspended for a period of six months. A timely notice of appeal was filed.

{¶9} By order of June 29, 2004, the trial court granted a stay of execution of sentence pending an appeal.

{¶10} Appellant raises the following assignment of error for our consideration:

{¶11} "I. DID THE TRIAL COURT ERR IN FAILING TO SUPPRESS THE APPROXIMATE 11 (ELEVEN) GRAMS OF COCAINE SEIZED AT THE RESIDENCE OF DEFENDANT-APPELLANT ON JANUARY 31, 2003."

{¶12} Appellant in his sole assignment of error challenges the trial court's denial of his Motion to Suppress.

{¶13} There are three methods of challenging on appeal the trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St. 3d 19, 437 N.E. 2d 583; *State v. Klein* (1981), 73 Ohio App. 3d 486, 597 N.E. 2d 1141; *State v. Guysinger* (1993), 86 Ohio App. 3d 592, 621 N.E. 2d 726. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App. 3d 37, 619 N.E. 2d 1141, overruled on other grounds. 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 the trial court has incorrectly decided the ultimate or

final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App. 3d 93, 641 N.E. 2d 1172; *State v. Claytor* (1993), 85 Ohio App. 3d 623, 620 N.E. 2d 906.

{¶14} In *United States v. Ross* (1982), 456 U.S. 798, 1012 S. Ct. 2157 the Supreme Court held: "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found***this rule applies equally to all containers." *Id.* at 820-822, 102 S. Ct. at 2170-71. Thus, under *Ross*, any container that is the subject of a validly issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant.

{¶15} The Supreme Court has allowed officers to seize incriminating evidence in plain view during the course of a lawful search because such a seizure "does not involve an intrusion on privacy. If the interest in privacy has been invaded, the violation must have occurred before the object came into plain view." *Horton v. California*, 496 U.S. 128, 141, 110 S.Ct. 2301, 2310, 110 L.Ed.2d 112 (1990). In *Horton*, the Supreme Court set forth three requirements for valid seizures of evidence in plain view. First, the officer must not have violated the Fourth Amendment in "arriving at the place from which the evidence could be plainly viewed." *Id.*, at 136, 110 S.Ct. at 2308. Second,

the incriminating character of the evidence must be "immediately apparent." *Id.* Third, the officer must have "a lawful right of access to the object itself." *Id.*

{¶16} In the case at bar, the police were lawfully on the premises pursuant to a valid warrant to search the home. Appellant does not challenge the validity of the warrant. The first requirement of *Horton* was satisfied.

{¶17} "Immediately apparent" means that the officer must have had probable cause to believe the item was contraband. *Arizona v. Hicks* (1987), 480 U.S. 321, 326. Probable cause merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that a certain item may be contraband. A practical probability that incriminating evidence is involved is all that is required. *Texas v. Brown* (1983), 460 U.S. 730, 742.

{¶18} In the case at bar, Detective Ballentine was authorized to open the dresser drawer and to search its contents in search of the items described in the search warrant. The drawers could easily have contained "floppy disks, cassette or other tapes, CD's, and any other permanent or transient storage devices; records or documents contained on paper in handwritten, typed, photocopied, or printed form, or stored on any other type of media..." Detective Bickford testified at the hearing on appellant's motion to suppress that some of the external storage devices can be as small as a "remote of a key chain." (T. at 11). Consequently, the drawer fell within the scope of the search warrant, and the police officers did not have to obtain an additional warrant to open the drawer.

{¶19} Detective Ballentine testified that he could see through the sides of the container a spoon, battery operated scale and a plastic bag of white powder. (*Id.* at 36-

37; 47). The Detective testified concerning his experience with drug investigation and enforcement. (Id. at 36). Based upon his experience as a police officer he concluded that the items were contraband. (Id. at 36). Upon continued search of the drawer and removal of the clothing within, the Detective found the clear plastic bag containing cocaine.

{¶20} It was reasonable for the Detective to continue searching the drawer because many of the smaller items described in the warrant could have been concealed underneath the clothing. The character of the spoon, scales and white powder were immediately apparent to the detective. Accordingly, the second and third prongs of *Horton* are satisfied.

{¶21} In sum, because 1) the container and the plastic bag came into plain view in the course of Detective Ballentine's search of the dresser; 2) Detective Ballentine's search of the dresser drawer was reasonable under the terms of the warrant which entitled him to search that drawer until he found all of the items described in the warrant that the drawer may have contained; and 3) in glancing at these items long enough to determine that they were not items described in the search warrant, it was immediately apparent, using the knowledge of the officer, that the items were evidence of criminal activity, we hold that the search and seizure of these items did not violate the Fourth Amendment.

{¶22} Appellant's sole assignment of error is overruled.

{¶23} For the foregoing reasons, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

By Gwin, J.,
Boggins, P.J., and
Hoffman, J., concur

JUDGES

WSG:clw 0113

