NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

STEVEN CONRAD ARMSTRONG,

Appellant,

Appeal No. CRC 11-00072APANO
UCN: 522011AP000072XXXXCR

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed November 28, 2012.

Appeal from an Order Denying
Motion to Suppress
entered by the Pinellas County Court
County Judge John D. Carballo

Simone A. Lennon, Esquire
Attorney for Appellant

Jack Delcamp, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Steven Conrad Armstrong's appeal from an order of the Pinellas County Court denying Appellant's Motion to

Suppress. Mr. Armstrong pleaded no contest to Possession of Marijuana but reserved his right to appeal the denial of his motion to suppress. We affirm the trial court.

Background

During the evening of March 24, 2011, the St. Petersburg Police Department responded to 714½ Grove Street North, Apartment 4, to investigate a reported battery. Officer Watson approached the residence to make contact with the Appellant, Steven Armstrong. The officer stood outside an open door of the residence and observed Mr. Armstrong seated at a table inside the apartment approximately four feet away. Officer Watson also observed what he recognized through his training experience to be marijuana on the table directly in front of Mr. Armstrong. Officer Watson got Mr. Armstrong's attention, entered the residence and took the Appellant into custody. A second officer was called to seize the marijuana. No search warrant was obtained.

Mr. Armstrong filed a Motion to Suppress arguing that the entry into the apartment without a search warrant was unlawful. Mr. Armstrong's Motion to Suppress was denied. Mr. Armstrong also filed a Motion to Dismiss arguing Florida Statute § 893.13 is unconstitutional. That motion was also denied.

Issue

The issue in this appeal is the correctness of the trial court's denial of the Motion to Suppress. The Appellant acknowledges that the issue of the correctness of the denial of the Motion to Dismiss is controlled by *Adkins v. State,* 96 So3d 412 (Fla. 2012).

Standard of Review

Our review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. We accord a presumption of correctness with regard to

the trial court's determination of facts where the trial court's factual findings are supported by competent, substantial evidence. All evidence and reasonable inferences therefrom must be construed in a manner most favorable to upholding the trial court's ruling. However, we review the trial court's application of the law to those facts de novo. *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State,* 803 So.2d 598 (Fla.2001); *State v. Pruitt*, 967So2d 1021 (Fla. 2nd DCA 2007); *Newkirk v. State,* 964 So2d 861, 863 (Fla. 2nd DCA 2007).

Involved Points of Law

1. *Constitutional Protections of Residences.* "Article I, section 12 of the Florida Constitution and the Fourth Amendment to the United States Constitution give the citizens of Florida the right to be secure in their homes against unreasonable searches and seizures. The seizure of items from a person's home without a warrant based on probable cause violates this right, rendering the items inadmissible in evidence. Art. I, § 12, Fla. Const. The principles embodied in these constitutional provisions 'evince[ ] the axiom that privacy is not a gratuity which we hold at the whim of our government.' *Hornblower v. State,* 351 So.2d 716, 717 (Fla.1977). Rather, privacy in the home is a constitutional right included within the 'catalog of indispensable freedoms' (footnote omitted) guaranteed to each individual and in accordance with our chosen form of democratic government, the judiciary, not the police, has been designated its guardian." *Davis v. State,* 834 So.2d 322, 326 (Fla. 5th DCA 2003).

> The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is

> accomplished under statutory authority and when probable cause is present. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 573, 100 S.Ct. 1371, 1373 (1980).

2. *Exigent Circumstances.* One of the exceptions to the warrant requirement is the exigency rule. The Florida Supreme Court has addressed the issues presented by an apparent emergency situation requiring police to immediately enter a home without a warrant to assist or render aid.

> A warrantless search of a home is per se unreasonable and thus unconstitutional under the Fourth Amendment. *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). However, several exceptions to this rule have developed. One exception is the presence of an emergency situation which requires the police to assist or render aid. *See Mincey v. Arizona,* 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) ("[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid."). Under this exception, police may enter a residence without a warrant if an objectively reasonable basis exists for the officer to believe that there is an immediate need for police assistance for the protection of life or substantial property interests. *Rolling v. State,* 695 So.2d 278, 293-94 (Fla.1997). It is immaterial whether an actual emergency existed in the residence; only the reasonableness of the officer's belief at the time of entry is considered on review. *State v. Boyd,* 615 So.2d 786, 789 (Fla. 2d DCA 1993). However, this search must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey,* 437 U.S. at 393, 98 S.Ct. 2408 (quoting *Terry v. Ohio,* 392 U.S. 1, 26, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Thus, an officer must cease a search once it is determined that no emergency exists. *Rolling,* 695 So.2d at 293.

Seibert v. State, 923 So2d 460, 468 (Fla. 2006). Entry may also be justified where a reasonable police officer has an objective basis to conclude that there is not sufficient time to seal off the constitutionally protected area and obtain a search warrant before observed contraband could or likely would be destroyed, looking at the facts known to

the police officer at the moment of entry. *See United States v. Rivera,* 825 F.2d 152 (7th Cir.1987); *Gilbert v. State,* 789 So.2d 426 (Fla. 4th DCA 2001); *Murphy v. State*, 898 So.2d 1031, 1034 (Fla. 5th DCA 2005); *See also Illinois v. McArthur,* 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (occupant of residence was arguably "seized" while warrant was being obtained to present him from destroying contraband in residence, held reasonable under exigent circumstances); *U.S. v. Carter,* 315 F.3d 651 (6th Cir.2003) (officers who saw contraband through open hotel door had exigent circumstances to enter room, arrest defendant and seize drugs); *State of Louisiana v. Deary,* 753 So.2d 200 (La.2000) (similar facts); *State v. Hughes,* 233 Wis.2d 280, 607 N.W.2d 621 (2000).

3. *The Plain View Doctrine.* The *plain-view* doctrine generally provides the police authority to seize an incriminating object or contraband discovered within the parameters of a validly executed search warrant or one of the exceptions to the warrant requirement.[1]

> "The United States Supreme Court affirmed, holding that a warrantless seizure of evidence found in plain view is admissible if at the time of the search: (1) the seizing officer was legitimately in a place where the object could be plainly viewed; (2) the incriminating nature of the seized object was immediately apparent to the police officer; and (3) the seizing officer had a lawful right of access to the object itself. *See Horton,* 496 U.S. at 136-37, 110 S.Ct. 2301. *With regard to the third requirement, the Court explained that the seizing officer may lawfully seize an incriminating object if the officer has probable cause prior to the seizure and it was discovered within the parameters of a validly executed search warrant or one of the exceptions to the warrant. See id.* at 138, 110 S.Ct. 2301; *accord Jones v. State,* 648 So.2d 669, 676 (Fla.1994). Indeed, " 'seizure of property in plain view involves no invasion of privacy and is

[1] A *plain-view* situation should be distinguished from an *open-view* situation. In the *plain-view* situation, the officer has a constitutional right to be in the place where the seizure is made. In an *open-view* situation, the officer sees the contraband from a place he or she has a right to be, outside a constitutionally protected area, but may not have constitutional access to the place the contraband is located when seized. In such cases, there must be a Fourth Amendment exception, such as exigent circumstances, to justify the warrantless entry and seizure. *See Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Ensor v. State,* 403 So.2d 349 (Fla.1981); *Murphy v. State,* 898 So.2d 1031, 1033 -1034 (Fla. 5th DCA 2005).

> presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.' " *Texas v. Brown,* 460 U.S. 730, 741-42, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (quoting *Payton v. New York,* 445 U.S. 573, 587, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980))." (Emphasis added).

Rimmer v. State, 825 So.2d 304, 313 (Fla. 2002). "[W]hether law enforcement has a lawful right of access to an object is 'generally determined by the scope of the search permitted by either the terms of a validly issued warrant or the character of the relevant exception to the warrant requirement.' *Jones v. State,* 648 So.2d 669, 677 (Fla.1994)." *Jones v. State*, 895 So.2d 1246, 1249 (Fla. 2nd DCA 2005). Fundamentally, once probable cause based on plain view exists, police must still obtain a warrant to search a premises where contraband is found, unless exigent circumstances exist. *State v. Walker*, 729 So.2d 463, 465 (Fla. 2nd DCA 1999).

The Present Case

In the present case the trial court ruled "I'm going to deny the motion to suppress. The illegal nature of the substance was readily apparent to the officer from -- he was positioned in a non-Constitutionally protected area, i.e. outside, and it was the type of contraband that could be easily destroyed." The trial court's factual findings were clearly supported by competent, substantial evidence and are accorded a presumption of correctness. There was no error in the trial court's application of the law to those factual findings.

Conclusion

The order of the trial court denying Appellant's Motion to Suppress should be affirmed. The order of the trial court denying Appellant's Motion to Dismiss based on

Shelton v. Secretary, Dept. of Corrections, 6:07-cv-839-Orl-35-KRS (M.D. Fla., July 27, 2011) is controlled by *Adkins v. State,* 96 So3d 412 (Fla. 2012) and should be affirmed.

IT IS THEREFORE ORDERED that the orders of the trial court denying Appellant's Motion to Suppress and Motion to Dismiss are affirmed.

ORDERED at Clearwater, Florida this 28th day of November, 2012.

Original order entered on November 28, 2012, by Circuit Judges Raymond O. Gross, L. Keith Meyer, Jr., and R. Timothy Peters.

cc: Honorable John D. Carballo
Simone A. Lennon, Esquire
Office of the State Attorney