IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: 2010-AP-46
Lower Court Case No: 2010-MM-7650

STATE OF FLORIDA,

Appellant,
vs.

ANTHONY J. RAZZANO, III,

Appellee.
_____/

Appeal from the County Court,
for Orange County, Florida,
Wayne J. Shoemaker, County Court Judge

Lawson Lamar, State Attorney and
David H. Margolis, Assistant State Attorney,
for Appellant

Neal T. McShane, Esq.,
for Appellee

Before POWELL, THORPE, and EGAN, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State appeals from an order granting Appellee Razzano's pretrial motion to suppress. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We conclude the trial judge erred in granting the motion, and reverse.

In *State v. Reaves*, 15 So.3d 784 (Fla. 5th DCA 2009), the Fifth District Court set forth the standard of review for a suppression order. "While the standard of review to be applied to the factual findings of the court is whether there is substantial, competent evidence to support the

findings, the trial court's application of the law to the facts is reviewed de novo." *Id.* at 786 (citations omitted).

The evidence[1] taken at the suppression hearing can be summarized from the record as follows. Two police officers were investigating an anonymous Crimeline report that drugs were being sold at a certain address; that one Anthony Razzano was one of the parties dealing the drugs along with roommates, and that there was a lot of foot and vehicle traffic coming and going from the apartment all times of the night and day. The officers went to the address to conduct a "knock and talk." [2] They had conducted no surveillance and had no probable cause for an arrest or search warrant. Upon arriving at the two story house, they knocked at the front door. Razzano opened the door. Officer Ochiuzzo, a trained and experienced officer, from outside the door where he was standing immediately smelled the odor of burnt marijuana and observed a white bag on a table in the middle the living room. The bag had a green leafy substance protruding out of it which he suspected was marijuana. The two officers entered, handcuffed Appellee, and while Officer Roman detained him, officer Ochiuzzo seized the white bag and a set of weighing scales containing marijuana residue sitting next to it. Without making a sweep of the other rooms in the house, the two officers then immediately left with Razzano in custody and the bag and scales. The whole encounter was a comparatively minimal intrusion, taking approximately two and a half minutes.

The trial judge did not issue a written order detailing his factual findings and conclusions of law. Having reserved ruling, he announced his ruling on the record several days later:

> "After reading the Murphy case – that was the strong case for the state – the Murphy court did say that was a close case. They did indicate that because the – when the officer entered the room, that he was entitled to seize the

[1] Appellee gave testimony contradictory of that of the officers. But a reading of the trial judge's order shows that he credited the testimony of the officers and rejected that of Appellee but misapplied the law.

[2] A "knock and talk" is a legitimate law enforcement investigative technique, absent coercive police conduct or "overbearing tactics", where officers knock on the door, try to make contact with persons inside, and talk with them about complaints of illegal activities occurring there. *See Niemenski v. State*, 60 So.3d 521,527 (Fla. 2nd DCA 2011).

> contraband. So the two distinctions I see in this case versus Murphy, is, number 1, that was dealing with a felony possession of cocaine. This case is $10 worth of cannabis. There was a second person in the room in Murphy. There was nobody else in the room *and home*[3] in this case. The officers entered without a warrant. The State has the burden. I'm going to find they failed to meet their burden. I'm going to grant the Motion to Suppress and that will take care of it.
> Okay?"

It is clear from the trial judge's ruling that he determined as a matter of law that suppression was required because of two factors in *Murphy v. State,* 898 So.2d 1031 (Fla. 5th DCA 2005): (1) another person was in the room at the time of the entry and (2) the contraband was cocaine, a serious offense.

As to the first factor, the officer in *Murphy* had already entered, arrested Murphy and seized the bag of cocaine ***before*** he ever noticed the other person in the motel room. *See also Gilbert v. State*, 789 So.2d 426 (Fla. 4th DCA 2001) and *State v. Carr*, 549 So.2d 701 (Fla. 4th DCA 1989) (where the defendants were alone in their motel rooms and the entries were upheld without any discussion of the presence factor). Rather, we think the proper factor to consider is the *nature* of the contraband – whether it is easily moved, hidden or destroyed. A bag of drugs can quickly be flushed down a toilet whereas a grow room would require the securing of the premises while a search warrant is obtained.

The other factor the trial judge determined was controlling was the gravity of the offense underlying Razzano's arrest – possession of less than 20 grams of marijuana. The trial judge followed several cases originating with *Welsh v. Wisconsin*, [4] relied upon by Appellee's counsel in argument at the hearing and in his briefs. In *Welsh*, the United States Supreme Court held that the

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[3] This is not correct. There was no one present with Razzano in the living room, but since the officers did not conduct a sweep of the other rooms of Razzano's "home" (apartment) they did not know whether his roommates or others were present in those rooms or elsewhere on the premises who might have had access to the bag of marijuana and scales.

[4] 466 U.S.740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

gravity of the offense was an important, but not an absolute factor in determining whether a warrantless, non-consensual entry of a home and an arrest and/or seizure of contraband in plain view was constitutionally permissible. Since Razzano's arrest was for what he felt was a minor offense ("$10 worth of cannabis" as he put it), not a felony such as possession of cocaine, the trial judge concluded that *Welsh* and the cases following it required suppression.

The courts of other states have been divided on this issue. Our independent research revealed several reported cases factually on all fours with ours where a misdemeanor quantity of marijuana was seized: The closest on point is *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky.2006). There the Kentucky Supreme Court easily distinguished *Welsh*, which dealt with a warrantless nighttime entry into a home to arrest for a first-time DUI, a civil non-jailable offense under Wisconsin law. The court then pointed out that under Kentucky law, possession of even a minor quantity of marijuana was classified as a Class A misdemeanor carrying a penalty of 12 months imprisonment, which "belies the contention that such crimes are 'minor'." *Id.* at174.

After citing cases from other jurisdictions pro and con on the issue, it concluded:

> Because the contraband in this case was in plain view and possession of such contraband is a crime subject to as much as twelve (12) months imprisonment, we find the officer's warrantless entry into Appellant's home to secure the contraband was justified by exigent circumstances, namely, to preserve the imminent destruction of evidence.

Posey v. Commonwealth, 185 S.W.3d at 174.

See also Tolley v. State, 383 So.2d 949 (Fla. 4th DCA 1980) where denial of defendant's motion to suppress was affirmed per curiam without opinion based on the fact that, as stated in the dissenting opinion, an officer accompanied the director of housing, who had information from a confidential student informant concerning drug trafficking, to defendant's dorm room. Standing in the corridor they smelled a strong odor of marijuana, and entered the room through the unlocked door. For

cases from other jurisdictions *see U.S. v. Grissett*, 925 F.2d 776 (4th Cir. 1991); *Cherry v. Comm.*, 605 S.E.2d 297 (2004); *Randolph v. State*, 152 S.W.3d.764 (Tex.App. 2004); and *People v. Pierini*, 664 N.E.2d 140 (1996); *Mendez v. People*, 986 P.2d 275 (Colo.1999); Fern L. Kletter, Annotation, *Validity of Warrantless Search of Other than Motor Vehicle or Occupant of Vehicle Based on Odor of Marijuana—State Cases*, 122 A.L.R.5th 439 (2004)(entries based on odor of marijuana).

We agree with the reasoning in *Posey*. Under Florida law possession of less than 20 grams of marijuana is a misdemeanor of the first degree punishable by imprisonment in county jail for up to 12 months, and thus not a "minor" offense.

Recognizing that this is an issue of the first impression in Florida, and there is a conflict in the cases elsewhere, we believe the better view is that the first degree misdemeanor offense of possession of less than 20 grams of marijuana is not a "minor offense" within the purview of *Welsh* and its prodigy requiring suppression on the facts of this case. We hold that the entry, arrest and seizure of the bag of marijuana and the weighing scales here was reasonable and lawful, and that the trial court erred in suppressing the evidence. Consequently, the order appealed from is reversed, and the case remanded for further proceedings with directions to deny Appellee's motion to suppress. **REVERSED and REMANDED** with directions.

DONE AND ORDERED at Orlando, Florida this __19th___ day of _September___, 2011.

__/S/_____
ROM W. POWELL
Senior Judge

__/S/_____
JANET C. THORPE
Circuit Judge

_/S/_____
ROBERT J. EGAN
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **David H. Margolis, Assistant State Attorney,** 415 N. Orange Avenue, Ste. 200, Orlando, Florida 32802-1673; **Neal McShane, Esquire,** 836 N. Highland Avenue, Orlando, Florida 32803; and **Honorable Wayne J. Shoemaker**, 425 N. Orange Avenue, Orlando, Florida 32801, by mail, this __19th__ day of ___September_____, 2011.

_/S/_____
Judicial Assistant