

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

STATE OF FLORIDA,

Appellant,

vs.

PABLO G. LUCIANO,

Appellee.

_____ /

Appeal from the County Court
for Orange County, Florida
Deborah B. Ansbrosio, County Court Judge

Jeffrey L. Ashton, State Attorney, and
Austin Price, Assistant State Attorney
for Appellant

Robert Wesley, Public Defender, and
Dillon Kate McLean, Assistant Public Defender,
for Appellee

Before LUBET, MYERS, HIGBEE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State of Florida (“Appellant”) appeals the trial court’s final order granting Pablo Luciano’s (“Appellee”) Motion to Suppress. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). We reverse and remand.

On June 10, 2014, Appellee was charged by Information with one count of Possession of 20 Grams or Less of Cannabis. On July 2, 2014, Appellee, through counsel, filed a Motion to

Suppress Evidence Unlawfully Obtained. On August 18, 2014, the trial court conducted a suppression hearing and granted the motion.

At the hearing, three Orange County Sheriff's Office deputies testified. The testimony of Deputy Fernando Zeppieri ("Zeppieri") is summarized as follows: On May 19, 2014, Zeppieri, Deputy Charles Barrett ("Barrett"), Corporal White ("White"), and Deputy Stephen Wathen ("Wathen"), all in plain clothes, responded to a narcotics tip at 12600 Enclave Drive, in Orange County, Florida, with the intent to conduct a "knock and talk" investigation. Deputies Zeppieri and Wathen stayed behind while Deputy Barrett and Corporal White approached the front door and knocked multiple times with no response. After receiving no response at the door, they began to leave. As they returned to the driveway, an individual opened an upstairs window, stuck his head out, spoke with Corporal White and Deputy Barrett, and then went back inside. Deputy Zeppieri repositioned himself in front of the garage directly underneath the window the person had opened. At that point, he smelled the odor of burnt cannabis, which he has smelled hundreds of times. A few minutes later, the same person who spoke with the deputies from the window came to the front door, spoke with them, and he was secured. After speaking with the secured individual, the deputies concluded there was someone else inside the house. Deputy Zeppieri thought the individual stated "there was a roommate or something to that nature."

Subsequently, the deputies went to the front door, announced their presence, and two people inside the house were called out and secured. When they called for anyone inside to come outside, the front door was open, and the odor of cannabis was stronger. From the front door, Deputy Zeppieri did not hear any toilets flush or see any weapons. After the additional occupants of the house were secured, the deputies conducted a protective security sweep to ensure there were no other individuals inside who had weapons or were destroying evidence.

The sweep took approximately two to three minutes. He did not see any evidence when conducting the sweep. After the protective sweep, Deputy Barrett wrote the search warrant and Deputy Zeppieri left the scene having no other involvement.

The testimony of Deputy Barrett is summarized as follows: On May 19, 2014, Deputy Barrett went to a residence at 12600 Enclave Drive to investigate a Crimeline narcotics tip. He approached the house and stood at the front door while Corporal White knocked. After a few minutes, a man opened a window above the garage and stuck his head out. Corporal White identified himself and asked if he could speak with the individual. The individual at the window stated he would be down in a few minutes. Deputy Barrett did not smell anything when the window was open due to sinus issues from multiple surgeries which have on occasion caused him difficulty with his sense of smell.

After waiting five or six minutes, Appellee, the individual who opened the window, exited the front door and closed it behind him. Appellee spoke with Deputy Barrett and Corporal White. The deputies noticed a small piece of cannabis on Appellee's shirt and pointed it out to him and Appellee brushed it off the shirt. The deputies indicated they wanted to go inside the house to recover the drugs that were inside, but Appellee refused to allow them to enter without a search warrant. Appellee was secured. Deputy Barrett participated in a protective sweep of the residence, which lasted approximately two minutes. When asked if anyone else was in the house, Deputy Barrett believed Appellee stated that he had two roommates. Two individuals exited the house. The deputies conducted a protective sweep to make sure nothing was destroyed inside the home. Deputy Barrett did not see any cannabis during the protective sweep. Deputy Barrett wrote the search warrant basing the probable cause on the smell of burnt cannabis that Deputy Zeppieri and Corporal White detected coming out of the window when it was opened.

Appellee remained detained outside of the residence while Deputy Barrett obtained the search warrant.

The final witness to testify was Deputy Wathen and his testimony is summarized as follows¹: After arriving at 12600 Enclave Drive, Deputy Wathen positioned himself approximately a house and a half away from Appellee's home. He was not present when Appellee exited the house. Eventually, Deputy Wathen made his way to the house, approached the front door, which was cracked open, and smelled a strong odor of burnt and raw cannabis coming from the front door. He smelled the cannabis prior to conducting a protective sweep. The purpose of the protective sweep was to look for people inside the residence and it lasted approximately two to three minutes. He did not observe any cannabis during the sweep. After the search warrant was issued, Deputy Wathen assisted in searching the residence.

The trial court orally made the following findings of fact: (1) "Nobody in this case immediately smelled marijuana and in fact, one said he never did until he got in;" (2) "They asked the defendant if anybody was there and the defendant said, oh, no, there is nobody there;" (3) "They ordered any occupants to come out. When there was no response, they went in;" and (4) "One officer said he had one roommate. One officer said he had two roommates, said he's - - said the defendant said he had two roommates. I never heard anybody say they told them to come out." At the conclusion of the hearing, the trial court granted Appellee's Motion based on *Alderton v. State*, 438 So. 2d 1000 (Fla. 2d DCA 1983), finding it factually similar.

Appellant raises the following two issues on appeal²: (1) the trial court erred when it granted Appellee's Motion to Suppress because the smell of cannabis established the probable

¹The parties stipulated Deputy Wathen was present at the scene on May 19, 2014, and was acting in his capacity as a law enforcement officer.

² Appellant also raises the issue that the trial court incorrectly construed material facts from the testimony presented at the hearing.

cause for the search warrant, irrespective of the protective sweep; and (2) the trial court erred by improperly applying the independent source exception to the exclusionary rule.

A trial court's ruling on a motion to suppress is subject to a mixed standard of review. The standard of review of the findings of fact is whether competent, substantial evidence supports the trial court's factual findings. An appellate court reviewing a ruling on a motion to suppress presumes that a trial court's findings of fact are correct and reverses those findings only if they are not supported by competent, substantial evidence. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). The historical facts should be reviewed only for clear error. The trial court's application of law to the facts is reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *C.G. v. State*, 689 So. 2d 1246, 1248 (Fla. 4th DCA 1997); *State v. Quinn*, 41 So. 3d 1011, 1013 (Fla. 5th DCA 2010).

The trial court's factual findings are inconsistent with the testimony presented at the hearing, and additionally, are inconsistent with each other. We conclude that the trial court's findings of fact are not supported by competent, substantial evidence and are clearly erroneous. In light of our holding, we do not find it necessary to address the issues presented on appeal.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's order granting the motion to suppress is **REVERSED** and this cause is **REMANDED** for a hearing *de novo* on Appellee's motion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 18th day of May, 2015.

/S/

MARC L. LUBET
Presiding Circuit Judge

MYERS and HIGBEE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Austin Price, Assistant State Attorney**, 415 N. Orange Avenue, Ste. 300, Orlando, Florida 32801; and to **Dillon Kate McLean, Assistant Public Defender**, 435 North Orange Avenue, Suite 400, Orlando, Florida 32801, on this 18th day of May, 2015.

/S/ _____
Judicial Assistant