[Cite as *State v. Cal*, 2004-Ohio-1329.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-03-025

Appellant — Trial Court No. 03-CR-009

v.

Joel Cal — **DECISION AND JUDGMENT ENTRY**

Appellee — Decided: March 19, 2004

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and Lorrain Croy, Assistant Prosecuting Attorney, for appellee.

Michael Sandwisch, for appellant.

* * * * *

SINGER, J.

{¶1} This matter comes before the court on appeal from the Ottawa County Court of Common Pleas wherein the trial court granted appellee, Joel Cal's, motion to suppress. For the following reasons we affirm the decision of the trial court in part and reverse the decision of the trial court in part.

{¶2} On January 23, 2003, a four count indictment was filed against appellee charging him with felonious assault on a peace officer, assault on a police dog, aggravated menacing and obstructing official business. Appellee filed a motion to suppress on April 10, 2003. A hearing commenced on May 15, 2003.

{¶3} Danbury Township police officer Charles DeVore testified that on December 24, 2002, he was dispatched to an apartment complex on North Lake Pine Drive in response to a domestic disturbance call. He could hear people yelling when he entered the hallway of the apartment building. DeVore followed the noise to apartment No. 2. He did not have a search warrant. DeVore knocked on the door and identified himself as a police officer. Appellee opened the door and asked DeVore what he wanted. DeVore testified that from the doorway he could see a woman standing in the kitchen of the apartment. DeVore testified: "[A]s soon as he opened the door, I stepped right into the opening of the doorway to prevent the door from being shut while we investigated the complaint." When the prosecutor asked DeVore why he placed his foot in the doorway, DeVore stated he did it to prevent appellee from shutting the door before he could determine that everyone was safe. DeVore further explained that his "body was at the threshold, right at the doorway as it opened."

{¶4} DeVore testified he asked appellee what was going on and appellee told him that nothing was going on. DeVore attempted to question the woman in the kitchen but appellee kept interrupting him, telling him nothing was going on and to "get out of my house." DeVore and his fellow officer, Sergeant Fultz, tried to get appellee to move into the hallway or in another room so they could talk to the woman. Appellee refused stating "[T]his is my house. You have no reason to be here. Get out." Appellee still refused to cooperate after he was warned that he would be arrested for obstructing official business. He was then placed in handcuffs and escorted out of the building by the officers. DeVore then returned to the apartment to talk with the woman in the kitchen,

Debra Meadows. Meadows told DeVore that she and appellee had a verbal argument with no physical altercation. Devore testified that both parties appeared intoxicated.

{¶5} DeVore testified that after arresting appellee he did not Mirandize him. DeVore also testified that he did not ask appellee any questions on the way to the Ottawa County Detention facility. Before reaching the detention facility, Officer DeVore lost control of his cruiser resulting in a one vehicle accident. DeVore claimed he lost control of the cruiser when appellee grabbed the steering wheel. On October 23, 2003, the trial court granted appellee's motion to suppress. Pursuant to App.R. 4(B) (4), the state now appeals setting forth the following assignments of error:

{¶6} "I. THE COURT ERRED BY GRANTING THE APPELLEES MOTION TO SUPPRESS.

{¶7} "II. THE COURT ERRED BY EXCLUDING ALL OF THE EVIDENCE FOLLOWING ITS FINDINGS OF THE INITIAL ENTRY TO BE ILLEGAL."

{¶8} In its first assignment of error, the state contends that DeVore's warrantless entry of appellee's apartment was justified by an exigent circumstance. Specifically, the state contends that the court erred in suppressing evidence that appellee was guilty of obstructing official business.

{¶9} When considering a motion to suppress**,** the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of a witness. *State v. Mills* (1992), 62 Ohio St. 3d 357. Consequently, in its review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App. 3d 592, 621 N.E.2d 726. Accepting the facts as found by the trial court as true,

the appellate court must then independently determine as a matter of law, without deferring to the trial court's conclusions, whether the facts meet the applicable legal standard. *State v. Klein* (1991), 73 Ohio App. 3d 486, 597 N.E.2d 1141.

{¶10} Warrantless entry by law enforcement personnel into premises in which an individual has a reasonable expectation of privacy is per se unreasonable, unless it falls within a recognized exception to the warrant requirement. *Minnesota v. Olson* (1990), 495 U.S. 91, 109 L. Ed. 2d 85, 110 S. Ct. 1684. One such exception is the exigent circumstances exception. This exception applies when there is a reasonable basis for the police to believe that entry into a structure is necessary to protect or preserve life, or to avoid serious injury. *Mincey v. Arizona* (1978), 437 U.S. 385, 392-393, 57 L. Ed. 2d 290, 98 S. Ct. 2408.

{¶11} In *State v. Bowe* (1988), 52 Ohio App. 3d 112, 114, the Ninth Appellate District identified the six factors constituting exigent circumstances mandating a warrantless entry of a home as established by federal courts: (1) the offense involved is a crime of violence, (2) the suspect is reasonably believed to be armed, (3) a clear showing of probable cause to believe that the suspect committed the crime involved, (4) a strong reason to believe that the suspect is in the premises being entered, (5) the likelihood that the suspect will escape if not swiftly apprehended, and (6) the entry, though not consented, is made peaceably. "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin* (1984), 466 U.S. 740, 753, 80 L. Ed. 2d 732, 745, 104 S. Ct. 2091.

{¶12} In the instant case, Officer DeVore testified that he heard two people yelling when he entered the apartment building. After knocking, DeVore testified that he entered appellee's apartment "as soon as [appellee] opened the door." DeVore did not testify that he heard evidence of physical violence or that he suspected the occupants of the apartment were armed. DeVore stepped inside the doorway in anticipation that appellee would close the door though there is no evidence in this case suggesting that appellee attempted to close the door on the officers. DeVore testified that from the open door he could see Debra Meadows in the kitchen. Given the facts of this case, we can only conclude that Officer DeVore's act of immediately stepping inside the apartment was unnecessary as he was capable of ascertaining the safety of the occupants from outside of the doorway. Accordingly, the court did not err in suppressing evidence that appellee had obstructed official business. Appellant's first assignment of error is found not well taken.

{¶13} The state's second assignment of error concerns the remaining charges of felonious assault of a peace officer, assault of a police dog and aggravated menacing. The state contends that the trial court erred in excluding evidence in support of the contention that appellee purposely caused DeVore's cruiser to crash. The state contends that this evidence is not excludible as it was not obtained as a direct consequence of DeVore's unlawful entry.

{¶14} The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree**.**" *Segura v. United States* (1984), 468 U.S. 796, citing, *Nardone v. United States* (1939), 308 U.S. 338, 84 L. Ed. 5.

307, 60 S. Ct. 266. "The reason for the rule is the concern that if derivative evidence were not suppressed, police would have an incentive to violate constitutional rights in order to secure admissible derivative evidence even though the primary evidence secured as a result of the constitutional violation would be inadmissible." *State v. Carter* (1994), 69 Ohio St. 3d 57, 67, citing, Katz, Ohio Arrest, Search and Seizure (3 Ed.1992), Section 2.07.

{¶15} However, "[w]e need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *State v. Couch*, (June 25, 1999), Montgomery App. No. 17520. The exclusionary rule does not apply if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.' *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182. If an independent source exists for the evidence apart from the illegal search or seizure, then the evidence may not be suppressed. Voluntary acts of a suspect may constitute an independent source, if the voluntary act is not itself a result of the illegal arrest. *State v. Byrd* (June 29, 1987), Warren App. No. CA86-08-057. See also LeFave, Search and Seizure (1996), Section 11.4(j), "Crime Committed in Response to Illegal Arrest or Search as Fruit" (generally, evidence of physical attacks on an officer making an illegal arrest is not excluded).

{¶16} "The Fourth Amendment's exclusionary rule does not sanction violence as an acceptable response to improper police conduct. The exclusionary rule only pertains to evidence obtained as a result of an unlawful search and seizure. *Mapp v. Ohio* (1961), 367 U.S. 643. Further criminal acts--including assault and resisting arrest--are not

legitimatized by Fourth Amendment transgressions." *State v. Ali*, 154 Ohio App.3d 493, 499, 2003-Ohio-5150, ¶16 citing *United States v. Bailey* (C.A.11, 1982), 691 F.2d 1009, 1016-1018, certiorari denied (1983), 461 U.S. 933.

{¶17} In *Middleburg Heights v. Theiss* (1985), 28 Ohio App.3d 1, the court upheld convictions for resisting arrest and assault on police officers, even though they found entry into the home for suspected misdemeanor charges was outside Fourth Amendment bounds. It recognized a "limited right to resist entrance, such as locking the door or physically placing one's self in the officer's way," because "the assertion of that [Fourth Amendment] right cannot be a crime." Id. at 4. But the defendant's subsequent assault on police officers was not privileged, because it did not relate to the entry of the premises, but was "*after access had been gained*." Id. at 5 (emphasis in original). Thus, a defendant's voluntary criminal act is not an exploitation of a prior illegal search and seizure, but constitutes an independent source of evidence.

{¶18} In this case, evidence that appellee purposely caused Officer DeVore's cruiser to crash amounted to evidence of an independent act of free will on the part of appellee which was so attenuated as to dissipate the taint caused by DeVore's previous unlawful entry into appellee's apartment. Accordingly, we find that the trial court erred in suppressing evidence of felonious assault of an officer, assault of a police dog and aggravated menacing. The state's second assignment of error is found well-taken.

{¶19} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed as to the court's suppression ruling regarding the charge of obstructing official business and reversed as to the court's suppression ruling regarding the charges of assault on a peace officer, assault on a police dog and aggravated

menacing. This cause is remanded to said court for further proceedings not inconsistent with this decision. Court costs assessed to appellee.

JUDGMENT REVERSED.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE