[Cite as *Willoughby v. Dunham*, 2011-Ohio-2586.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

CITY OF WILLOUGHBY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2010-L-068
- vs -	:	
		5/27/11
CHARLES E. DUNHAM,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 10 TRC 00280.

Judgment: Affirmed.

Richard J. Perez, Assistant Director of Law for City of Willoughby, One Public Square, Willoughby, OH 44094 (For Plaintiff-Appellee).

Paul H. Hentemann, NorthMark Office Building, 35000 Kaiser Court, #305, Willoughby, OH 44094-4280 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Charles E. Dunham, appeals from the judgment entered by the Willoughby Municipal Court overruling his motion to suppress evidence. For the reasons discussed in this opinion, we affirm the judgment of the trial court.

{¶2} On January 14, 2010, at approximately 4:30 a.m., Tracy Ryan arrived at the Willoughby Police Department to report an alleged "hit-skip." Officer Matthew Tartaglia took Ryan's report. According to Ryan, the accident occurred at the intersection of Vine Street and the Route 2 westbound exit ramp. While on the exit

ramp traveling towards Cleveland at Vine Street, Ryan stated she was struck by another vehicle from behind. The driver of the other vehicle did not stop, but Ryan was able to identify the vehicle as a pickup truck and the driver as a white male with a "scruffy" beard. She further provided the officer with the truck's license plate number.

{¶3} Officer Tartaglia entered the plate number into the LEADS database, which revealed the plate was registered to a pickup truck owned by appellant. The LEADS program further provided appellant's address and photograph. The photograph matched Ryan's description of the driver of the truck that struck her vehicle. After the officer examined the damage to Ryan's vehicle, he drove to appellant's address.

{¶4} The officer testified he pulled his cruiser to the front of appellant's property and saw a pickup truck in the driveway. He was able to read the license plate, confirming it matched the information given by Ryan. Because the truck had been backed into the driveway, the officer was able to observe damage to the front of the vehicle from his cruiser. The officer then entered appellant's driveway, exited his vehicle, and approached appellant's home.

{¶5} Appellant's sister answered the door and, after a brief inquiry, she stated appellant had recently returned home from work and was in bed. The officer stated he wished to speak with appellant because he was investigating an accident involving appellant's vehicle. While appellant was awakened, the officer remained outside on the porch. As appellant maneuvered from his bedroom, Officer Tartaglia observed him stumbling through the home, using furniture and other fixtures to stabilize himself. When appellant came to the door, the officer testified appellant appeared noticeably

intoxicated, with a strong odor of alcoholic beverage on his breath, bloodshot eyes, and slurred speech.

{¶6} Once inside the home, the officer explained the reason for his visit. Appellant immediately admitted he was involved in the accident and conceded he did not stop and speak with the driver of the other vehicle. Appellant also admitted he had consumed multiple drinks throughout the night: first, at a bar in Perry, then at Silvestro's Depot in Painesville, and, finally, one beer after he arrived home. Based upon his observations and appellant's admissions, the officer concluded appellant was "highly intoxicated" and arrested appellant, citing him for operating a vehicle while intoxicated ("OVI"), for failing to provide assured clear distance ahead, and for leaving the scene of an accident.

{¶7} Appellant eventually entered a plea of "not guilty" and filed a motion to suppress evidence. A hearing on appellant's motion was held, at which Officer Tartaglia and appellant testified. After hearing evidence, the trial court denied appellant's motion. Appellant ultimately entered a plea of no contest to the OVI charge and the trial court dismissed the remaining charges.

{¶8} Appellant now appeals, alleging two assignments of error. His first assignment of error provides:

{¶9} "One and one-half (1-1/2) hours after an unseen accident, the arresting officer should have obtained a search warrant before entering Appellant's property to inspect his vehicle."

{¶10} Appellate review of a trial court's judgment relating to a motion to suppress evidence presents mixed questions of fact and law. *State v. Burnside*, 100

Ohio St.3d 152, 2003-Ohio-5372, at ¶8. We review the facts only for clear error, giving due weight to the trial court's findings regarding the inferences drawn from those facts. *State v. Bing* (1999), 134 Ohio App.3d 444, 448, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699. Accordingly, this court accepts the factual determinations of the trial court if they are supported by competent, credible evidence, and without deference to the trial court's conclusions, we consider "whether, as a matter of law, the facts meet the appropriate legal standard." *State v. Curry* (1994), 95 Ohio App.3d 93, 96.

{¶11} Under his first assignment of error, appellant first argues the trial court erred in denying his motion to suppress evidence because the arresting officer did not observe appellant operating his truck while intoxicated. He further asserts that, without a warrant, the officer lacked authority to (1) "look at the Dunham vehicle" for indicators it had been involved in the reported accident and (2) enter his property and arrest him inside his home for OVI.

{¶12} With respect to appellant's first point, it is generally true that a police officer may not make a warrantless arrest for a misdemeanor unless the offense is committed in the officer's presence. *State v. Lewis* (1893), 50 Ohio St. 179; see, also, *State v. Henderson* (1990), 51 Ohio St.3d 54, 56. In *Oregon v. Szakovits* (1972), 32 Ohio St.2d 271, however, the Supreme Court of Ohio acknowledged an exception to this rule where the arresting officer has probable cause to believe that the suspect was operating a motor vehicle while under the influence of alcohol or drugs. In a concurring opinion, Justice Leach explained:

{¶13} "The holding in *Lewis* was predicated upon the conclusion that the power to arrest without warrant for breach of peace or other minor offense is given in order to

maintain the public peace; that it therefore ceases when the offense is an accomplished fact which can no longer be prevented.

{¶14} "*** [T]he presence of an intoxicated individual in, or in the vicinity of, an automobile which obviously had been driven by him clearly indicates that he was intoxicated while driving. Under such circumstances, *** the offense is not 'an accomplished fact' which could no longer be prevented since such individuals could have easily resumed driving, in such intoxicated condition, unless prevented from doing so by the officer." *Szakovits*, supra, at 275-276.

{¶15} In this case, even though the officer did not observe the commission of the offense, appellant admitted he had been drinking and driving prior to returning to his residence. After drinking at two locations, appellant further admitted he struck another vehicle. In conjunction with this information, the officer testified appellant appeared "highly intoxicated." Upon emerging from his bedroom, the officer immediately observed appellant had an unbalanced and unsteady gate pattern. The officer further noticed a strong odor of alcoholic beverage emanating from appellant; that appellant's speech was slurred; that he had bloodshot eyes; and he exhibited confusion about the details of the accident. Given these points, we hold that Officer Tartaglia possessed the requisite probable cause to arrest appellant for the offense of OVI even though he had not observed appellant actually operating the vehicle.

{¶16} Next, appellant argues that, because the officer had no warrant, he had neither the authority to examine his vehicle for signs of damage nor the authority to arrest him in his home. We disagree.

{¶17} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. Section 14, Article I of the Ohio Constitution contains language essentially identical to that of the Fourth Amendment, and similarly prohibits unreasonable searches and seizures. See *State v. Kinney* (1998), 83 Ohio St.3d 85, 87. Generally, warrantless searches and seizures are per se unreasonable, subject to several specifically established and well-delineated exceptions. *Katz v. United States* (1967), 389 U.S. 347, 357.

{¶18} In this case, the victim of the hit-skip filed a report in which she identified the location of the accident; the type of vehicle that struck her vehicle; the license plate number of the vehicle; and a description of the driver of the vehicle. A LEADS search provided the address of the person to whom the vehicle was registered and a photograph of that individual. The officer testified the photo matched the description given by the victim. After taking the report, the officer found the address and, before pulling into the driveway, observed the subject vehicle from his cruiser. The vehicle had been backed into the driveway and the officer testified he was able to observe "fresh damage on the front bumper of the vehicle."

{¶19} Appellate courts, including this one, have held that homeowners, or other legal occupiers of a residence, do not have a reasonable expectation of privacy as to what can be routinely viewed from their driveway, sidewalk, doorstep, or other normal routes of ingress to or egress from the home. See *State v. Durch* (1984), 17 Ohio App.3d 262, 263; see, also, *State v. Golubov*, 9th Dist. No. 05CA0019, 2005-Ohio-4938,

at ¶11; *State v. Alexander* (Oct.6, 2000), 2d Dist. No. 2000-CA-6, 2000 Ohio App. LEXIS 4646, *6. In support of this view, the Second Appellate District has opined:

{¶20} "'In the course of urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police[.] If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.

{¶21} "'There would be no colorable Fourth Amendment question had the police walked up the driveway in order to knock on [the defendant's] door to ask him some questions. Criminal investigation is as legitimate a societal purpose as is census taking or mail delivery. The "plain view" doctrine would clearly have applied to any observations made on the way to the door.'" (Citations omitted). *Alexander*, supra.

{¶22} In this case, the officer drove to appellant's address in service of a "legitimate societal purpose," viz., investigating the reported hit-skip. Upon his arrival, the officer was able to see the damage to the vehicle in "plain view" from the street (even before entering appellant's driveway). Prior to knocking on appellant's door, the officer took a closer look at the damage to the pickup to confirm his initial observations. Because any member of the public could have observed what Officer Tartaglia saw from the street or appellant's driveway, appellant clearly had no reasonable expectation of privacy in the condition of his pickup. Thus, no Fourth Amendment interest was implicated by the officer's conduct in viewing the damaged vehicle.

{¶23} We shall next address whether a warrant was required before Officer Tartaglia could arrest appellant in his home. We hold it was not.

{¶24} Generally, a warrantless search or seizure in a private home is per se unreasonable in the absence of exigent circumstances. See *Payton v. New York* (1980), 445 U.S. 573, 590; see, also, *Katz*, supra. As emphasized in *Payton*:

{¶25} "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their *** houses *** shall not be violated.' That language unequivocally establishes the proposition that '[at] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' *Silverman v. United States*, 365 U.S. 505, 511. 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*, supra, 589-590.

{¶26} Although exigency is a hallmark exception to the warrant requirement, the *Payton* rule also does not apply where the entry is occasioned by the voluntary consent of the occupant. *State v. Roberts*, 110 Ohio St.3d 71, 81-82, 2006-Ohio-3665, citing *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-455. When an officer's entry into a private residence is at issue, the prosecution bears the burden of demonstrating that the occupant consented to the entry "freely and voluntarily." *State v. Robinette* (1998), 80 Ohio St.3d 234, 243; see, also, *State v. Posey* (1988), 40 Ohio St.3d 420,

427. Whether a suspect has given voluntary consent is a question of fact to be determined from the totality of the circumstances. *State v. Cummings*, 9th Dist. No. 20609, 2002-Ohio-213, 2002 Ohio App. LEXIS 98, *8.

{¶27} Here, the record indicates that after appellant was awakened, the officer was invited into the home where a discussion took place between himself and appellant regarding the accident. The officer did not gain entry by deception or force his way into the residence through physical acts or a display of authority. And at no point did appellant or his sister decline the officer admission into the home. In effect, both the officer's and appellant's testimony reflect that the officer was voluntarily allowed inside without question or hesitation. Under the circumstances of the case, we hold appellant "freely and voluntarily" permitted Officer Tartaglia to enter the home and therefore the officer did not need a warrant.[1]

{¶28} We shall next address the validity of appellant's arrest. In *Welsh v. Wisconsin* (1984), 466 U.S. 740, the United States Supreme Court stated that, before governmental agents may invade a private home, the prosecution bears the burden to demonstrate exigent circumstances that overcome the presumption of unreasonableness attaching to all warrantless home entries. Id. at 750. The court expressed hesitation permitting an exigency exception to the warrant requirement when the underlying offence is "relatively minor," even where an officer possesses probable cause. The court emphasized that, in conjunction with exigent circumstances, the gravity and severity of the underlying offense is an important factor to consider in

1. It is important to note that had there been no consent for the officer to enter, the outcome of this case would have been different. After all, "[t]he Fourth Amendment confers the constitutional right to refuse to consent to warrantless entry, and the assertion of that right cannot be a crime." *State v. Cummings*, 9th Dist. No. 20609, 2002-Ohio-213, 2002 Ohio App. LEXIS 98, *8, citing *Camara v. Municipal Court of San Francisco* (1967), 387 U.S. 523, 530-540.

deciding whether a warrantless arrest in a suspect's home is constitutional. Id. at 753. The court observed that if the government's interest is only to arrest for a "minor offense," the presumption of unreasonableness of a seizure is difficult to rebut. While expressing concern about extending the exigent circumstances exception to so-called "minor offenses," the court did not define the term. And the court declined to address whether the Fourth Amendment imposed an "absolute ban" on warrantless arrests in the home where such "minor offenses" are at issue. Id. at fn. 11.

{¶29} While the holding in *Welsh* does not prohibit warrantless home arrests under exigent circumstances for "minor offenses," courts in Ohio are nevertheless split on the substantive implications of the case. Some appellate courts have required that the underlying offense be a felony before the exigency exception applies. See *State v. Scott M.* (1999), 135 Ohio App.3d 253, 258 [Sixth District]; *State v. Banks* (Aug. 20, 1999), 1st Dist. No. C-980774, 1999 Ohio App. LEXIS 3835; *Cleveland v. Shields* (1995), 105 Ohio App.3d 118, 122 [Eighth District]. Other courts have concluded the exigency exception applies to any criminal offense, whether felony or misdemeanor. See *Middletown v. Flinchum* (Dec. 18, 2000), 12th Dist. No. CA99-11-193, 2000 Ohio App. LEXIS 5908, *10-*11; *Beachwood v. Sims* (1994), 98 Ohio App.3d 9, 16 [Eighth District]; *State v. Rouse* (1988), 53 Ohio App.3d 48, 51 [Tenth District]; *State v. Marlow* (Feb. 28, 1996), 9th Dist. No. 17400, 1996 Ohio App. LEXIS 761, *12.

{¶30} In *Middletown v. Flinchum*, 95 Ohio St.3d 43, 2002-Ohio-1625, however, the Supreme Court of Ohio accepted the Twelfth Appellate District's opinion in *Flinchum*, 2000 Ohio App. LEXIS 5908, supra, for review. In that case, the Supreme Court was asked to resolve the relatively broad question of "whether the Fourth

Amendment to the United States Constitution is contravened by a warrantless home entry to effect an arrest for a misdemeanor." Id. at 44. The Court answered the question in the negative. In so doing, however, the Court held officers in "hot pursuit" of a suspect that flees into a house in order to avoid arrest may enter the house without a warrant to arrest the suspect for a misdemeanor. Id. at syllabus. Although the Supreme Court's holding does not directly answer the question of whether a warrantless home arrest is constitutional based upon the exigency exception, it does indicate a warrantless home arrest of a suspect for a misdemeanor is not completely prohibited.

{¶31} We are mindful that the Supreme Court of the United States significantly restricted the use of the exigency exception to warrantless home arrests where a "minor offense" has been committed. *Welsh*, however, did not preclude the application of the exception under circumstances where the crime is a misdemeanor and not a felony. The Ohio Supreme Court appears to have acknowledged this in *Flinchum*. The question therefore becomes whether the offense prompting the warrantless home entry or arrest is "minor" for purposes of the constitutional analysis.

{¶32} We believe the Twelfth Appellate District's decision in *Flinchum*, supra (affirmed by the Supreme Court), provides sound and persuasive guidance on this issue. In that case, the court observed:

{¶33} "We decline to define all of Ohio's misdemeanors as 'minor offenses' to which the exigent circumstances exception would not apply. Instead, we determine that, consistent with *Welsh*, the operative analysis for determining whether the underlying offense is a 'minor' one for purposes of an officer's warrantless entry into a home is not whether the offense is a felony or a misdemeanor; the determinative factor

is whether the offense is one that is punishable by jail or imprisonment." *Flinchum*, 2000 Ohio App. LEXIS 5908, *10, citing *State v. Dobbins* (Sept. 22, 1994), 10th Dist. No. 94APC02-276, 1994 Ohio App. LEXIS 4137, *3.

{¶34} In this case, Officer Tartaglia effected a warrantless home arrest of appellant for OVI, a first-degree misdemeanor punishable by a maximum jail term of 180 days. As OVI is a "jailable offense," we hold it is not a "minor offense" for constitutional purposes.[2] With this in mind, we must consider whether the officer possessed probable cause and the circumstances were sufficient to trigger the exigency exception. We answer both questions in the affirmative.

{¶35} During the course of the officer's inquiry into the hit-skip, appellant openly admitted to his involvement in the accident as well as driving after drinking alcohol at two different locations. Although the accident had occurred approximately one hour before Officer Tartaglia arrived at appellant's residence, the officer noted multiple signs of appellant's heightened intoxication. Because appellant admitted to drinking only one beer after returning to his residence, the officer could reasonably infer appellant had been operating his vehicle, prior to that one beer, while intoxicated. Given the evidence, the facts and circumstances, as established by the testimony at the hearing, were sufficient for Officer Tartaglia to believe that appellant had committed the crime of OVI. Probable cause was therefore present.

{¶36} With respect to exigency, one established exigent circumstance which may justify a warrantless search or seizure occurs when there is an urgent need to

2. By saying an M-1 is "not a minor offense," we do not wish to imply it is a "serious offense." We acknowledge that a first-degree misdemeanor is a "petty offense" in Ohio, not a "serious offense." See Crim.R. 2(C) and (D). The negative phraseology is therefore not intended to create a dichotomy between "minor" and "serious" offenses; it is simply a useful means of framing the constitutional issue created by *Welsh*.

prevent evidence from being lost or destroyed. See, e.g., *State v. Johnson*, 187 Ohio App.3d 322, 327, 2010-Ohio-1790. In order to invoke this exception, there must be an objectively reasonable basis for concluding that the loss or destruction of evidence is imminent. See, e.g., *State v. Williams*, 8th Dist. No. 88137, 2007-Ohio-3897, at ¶27.

{¶37} In this case, the record indicates appellant, after being arrested, was given a breathalyzer, registering .160. It is beyond cavil that alcohol in an individual's system progressively dissipates over a short period of time. See, e.g., *Schmerber v. California* (1966), 384 U.S. 757, 770-771. This is why "[a]cohol in body substances is [considered] evanescent evidence." *Englewood v. Gootee* (Sept. 14, 1990), 2d Dist. No. 12085, 1990 Ohio App. LEXIS 4023, *4. The officer's action of seizing appellant was therefore objectively reasonable and necessary to prevent the evanescent evidence of appellant's blood alcohol content from being lost. We accordingly hold the exigency exception to the warrant requirement was applicable to this set of facts.

{¶38} Because the warrantless home arrest was supported by probable cause and justified by exigent circumstances, Officer Tartaglia's actions in this case were reasonable and did not run afoul of the Fourth Amendment.

{¶39} One final point deserves attention. The dissent emphasizes, and we recognize, that Officer Tartaglia conducted an extraterritorial arrest in this case, in violation of R.C. 2935.03. The dissent maintains that such an arrest creates an unreasonable breach of the Ohio and Federal Constitutions and, hence, the BAC evidence should be suppressed. Although the state identified and discussed this issue in its brief and the point was discussed at oral argument, appellant *did not* challenge the effect of the extraterritorial arrest in either the trial court or in his appellate brief. As a

result, the issue was waived and we shall not address the implications of the extraterritorial arrest in the context of this case. By failing to raise the argument at any point in the proceedings, we conclude the issue is not properly before this court. *Girard v. Rodomsky* (Dec. 31, 1998), 11th Dist. No. 97-T-0107, 1998 Ohio App. LEXIS 6359, *8; see, also, App.R. 12(A)(2); App.R. 16(A)(7).

{¶40} Appellant's first assignment of error lacks merit.

{¶41} For his second assignment of error, appellant asserts:

{¶42} "After the unauthorized inspection of the Appellant's vehicle by the arresting officer, and while the officer was at the Appellant's home, was the Appellant then in oblique custody and did the continued interrogation by the officer violate the guidelines of *Miranda*?"

{¶43} Under this assigned error, appellant essentially claims the officer's inquiries occurred in the context of a custodial interrogation, which required the officer to notify appellant of his rights as required by *Miranda v. Arizona* (1966), 384 U.S. 436. We disagree.

{¶44} *Miranda* warnings exist "solely to counterbalance the coercive atmosphere created by in-custody interrogation." *State v. Schrock* (Nov. 8, 1991), 11th Dist. No. 89-L-14-099, 1991 Ohio App. LEXIS 5361, *7. In determining whether *Miranda* applies, we must observe whether the incriminating statements at issue were a result of a custodial interrogation. See *State v. Buchholz* (1984), 11 Ohio St.3d 24, 26. The ultimate question is whether there was a formal arrest or a restraint of appellant's freedom of movement commensurate with that of a formal arrest. *California v. Beheler* (1983), 463 U.S. 1121, 1125. In evaluating the issue, we consider, given the totality of the

surrounding circumstances, whether a reasonable person in the suspect's shoes would have understood his situation to constitute custody. See *Stansbury v. California* (1994), 511 U.S. 318.

{¶45} *Miranda* makes it clear that the warnings must be given whenever one's "freedom of action is curtailed in any *significant* way from being compelled to incriminate themselves." (Emphasis added.) Id. at 467. If a suspect has been significantly deprived of his freedom, he is in custody and *Miranda* applies. If, on the other hand, there is a deprivation of freedom but it is insignificant, there is no custodial interrogation. The deprivation of freedom required for a "custodial interrogation" situation need not be as great as an arrest. The pressures must nevertheless be greater than general "on-the-scene questioning." *State v. Wassil*, 11th Dist. No. 2004-P-0102, 2005-Ohio-7053, at ¶21, citing *State v. Smith* (Dec. 7, 1981), 8th Dist. No. 43490, 1981 Ohio App. LEXIS 13508, *6. "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkermer v. McCarty* (1984), 468 U.S. 420, 437.

{¶46} In this case, the record reflects that appellant, after the officer explained the reason for his visit, volunteered the information regarding his involvement in the accident and his subsequent failure to stop and speak with the driver of the car he struck. The officer then asked whether he had been drinking. Appellant answered he had consumed alcohol throughout the evening and conceded he was "under the influence," which, according to Officer Tartaglia, was empirically apparent from appellant's physical condition.

{¶47} Although the officer's question elicited an incriminating response, the location and circumstances of the inquiry demonstrate appellant's freedom of movement or action was not curtailed in *any* way. Appellant was in his home and consequently there is no indication he was being "detained" as the term is generally understood. The conversation lasted for "five, six, maybe ten minutes" and thus the meeting had a very limited duration. And at no point during the conversation did Officer Tartaglia coerce appellant into making his statements. We therefore hold a reasonable person in appellant's shoes would not have considered himself in custody. As appellant was not in custody when the officer made his inquiries regarding the circumstances of the accident, he was not entitled to be warned pursuant to *Miranda*. See *State v. Hoskins*, 2d Dist. No. 1544, 2001-Ohio-1632, 2001 Ohio App. LEXIS 4711, *7-*8 (a suspect deemed not in custody when, after leaving the scene of an accident, he was found in his garage, interviewed by an officer, and eventually arrested for OVI).

{¶48} Appellant's second assignment of error is overruled.

{¶49} For the reasons discussed in this opinion, appellant's assignments of error are without merit. Therefore, the judgment of the Willoughby Municipal Court is affirmed.

THOMAS R. WRIGHT, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part and dissents in part, with Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, P.J., concurring and dissenting.

{¶50} I respectfully concur in part and dissent in part from the opinion of the majority.

{¶51} In this case, a city of Willoughby police officer went to appellant's home, located in the city of Willowick, to investigate a complaint of a hit-skip accident. Appellant was aroused from his sleep and came to the door where he was questioned by the officer. Up to this point, the officer's conduct was appropriate. However, I dissent from the majority's analysis with respect to the officer then placing appellant, who was secure in the environment of his own home, under arrest. This is a violation of appellant's rights under the Fourth and Fourteenth Amendments to the United States Constitution, and Section 14 of the Ohio Constitution.

{¶52} R.C. 2935.03 governs territorial and extraterritorial arrests by municipal police officers. It provides, in pertinent part:

{¶53} "(A)(1) A *** municipal police officer *** shall arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the political subdivision *** in which the peace officer is *** employed *** a law of this state, an ordinance of a municipal corporation, or a resolution of a township.

{¶54} "***

{¶55} "(B)(1) When there is reasonable ground to believe that an offense of violence *** has been committed within the limits of the political subdivision *** in which the peace officer is appointed, employed, or elected or within the limits of the territorial jurisdiction of the peace officer, a peace officer described in division (A) of this section

may arrest and detain until a warrant can be obtained any person who the peace officer has reasonable cause to believe is guilty of the violation.

{¶56} "***

{¶57} "(D) If a *** municipal police officer *** is authorized by division (A) or (B) of this section to arrest and detain, within the limits of the political subdivision *** in which the officer is appointed, employed, or elected *** a person until a warrant can be obtained, the peace officer, outside the limits of that territory, may pursue, arrest, and detain that person until a warrant can be obtained if all of the following apply:

{¶58} "(1) The pursuit takes place without unreasonable delay after the offense is committed;

{¶59} "(2) The pursuit is initiated within the limits of the political subdivision, *** in which the peace officer is appointed, employed, or elected or within the limits of the territorial jurisdiction of the peace officer;

{¶60} "(3) The offense involved is a felony, a misdemeanor of the first degree or a substantially equivalent municipal ordinance, a misdemeanor of the second degree or a substantially equivalent municipal ordinance, or any offense for which points are chargeable pursuant to section 4510.036 of the Revised Code."

{¶61} In this case, it is clear there was an arrest outside of the officer's territorial jurisdiction. The offense was not committed in the officer's presence; it was not observed by the officer; nor was there a hot pursuit of appellant. Therefore, the city of *Willoughby* officer was without authority to arrest appellant in the city of *Willowick*.

{¶62} The state argues that, based on *State v. Weideman*, 94 Ohio St.3d 501, an extraterritorial stop in violation of this statutory provision does not rise to the level of

a constitutional violation and, therefore, does not call for suppression of evidence. The question before the *Weideman* Court was "whether a stop and detention of a motorist by a police officer, who is *beyond* his or her jurisdiction limits, for an offense observed and committed *outside* the officer's jurisdiction automatically constitutes a *per se* unreasonable seizure under the Fourth Amendment, thereby triggering the mandatory application of the exclusionary rule to suppress all evidence flowing from the stop." (Emphasis sic). Id. at 504. *Weideman* makes note of two important considerations: first, the court observed that the defendant was simply stopped and detained without authority, *not arrested*, until an officer with statutory authority arrived to make the arrest; and, second, the court specifically stated that "*** this court has consistently considered the totality of the circumstances in determining whether a violation of a statutory standard is unreasonable *per se* thus requiring suppression of evidence." Id at 504.

{¶63} Consequently, the question is, under the facts of this case, whether the seizure and arrest of appellant, in clear violation of the above-referenced statute, was an "unreasonable" seizure. If it was, we must therefore determine that this statutory violation rose to the level of a constitutional violation.

{¶64} The majority holds that the officer's extraterritorial, warrantless home arrest did not rise to the level of a constitutional violation—the officer in question possessed probable cause and the circumstances were sufficient to trigger the exigency exception. Under the "totality of the circumstances," however, there cannot be more of an "unreasonable" constitutional breach of the protection of Section 14 of the Ohio Constitution; that is: "[t]he right of the people to be secure in their persons, houses,

papers, and possessions, against unreasonable searches and seizures shall not be violated[.]"

{¶65} Where an offense is punishable by jail or imprisonment, police may effect a warrantless entry of a home if probable cause and exigent circumstances support the intrusion. Here, I believe the fact that the instant offense is a misdemeanor charge is of particular importance, since it is a factor to consider in making the assessment of whether exigent circumstances exist. While the majority cites to *Welsh*, that case did not involve police conduct that was statutorily prohibited. Based on the facts and circumstances of this case, I would find that the officer's statutory violation requires suppression of the evidence.

{¶66} I believe to hold otherwise is to render the statutory parameters of authority in R.C. 2935.03 meaningless.