[Cite as *State v. Morris*, 2019-Ohio-248.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	Case No. 18CA3638
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
MARK W. MORRIS,	:	
Defendant-Appellant.	:	RELEASED 01/15/2019

APPEARANCES:

James R. Kingsley, Circleville, Ohio, for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

PER CURIAM.

{¶1} Mark W. Morris, Jr., appeals his conviction for assaulting a police officer in violation of R.C. 2903.13. On appeal, Morris contends that the trial court erred in denying his motion to suppress evidence obtained as the result of an alleged illegal entry into his residence. Because we conclude that the trial court did not err in overruling his motion to suppress evidence, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶2} Morris was indicted by the Ross County Grand Jury on one count of assault upon a police officer, a felony of the fourth degree, in violation of R.C. 2903.13. He entered a plea of not guilty.

{¶3} Morris filed a motion to suppress any and all evidence obtained by law enforcement on the grounds that law enforcement unlawfully entered his home without a warrant, and unlawfully detained him. He asserted that consent to enter the residence given by the co-tenant, Yalanda Iser, was invalidated when he denied entry into the residence; and that no specific and articulable facts otherwise existed to justify the warrantless entry into his residence.

{¶4} A hearing on Morris's motion to suppress was held before the trial court. At the hearing, the trial court heard from law enforcement on the scene, Sgt. Shane Daubenmire of the Ross County Sheriff's Office, and Trooper Tyler Boetcher, of the Ohio State Highway Patrol. Iser also testified, but her testimony was abruptly ended after she invoked her Fifth Amendment rights. The trial court also reviewed State's Exhibit 1, Sgt. Daubenmire's body cam video of the incident[1]. Collectively, the evidence established the following:

{¶5} Sgt. Daubenmire was dispatched to a residence in Adelphi, Ohio, on June 4, 2017, to respond to a 911 call of domestic dispute. When he arrived to the residence he met with Iser who was waiting outside and appeared to him to be visibly upset, but did not appear to have any physical injuries. Iser reported that Morris, her live-in boyfriend of 18 years, had come home intoxicated and had threatened to kill her if she did not get her "shit and leave". The couples son, age 16, was also outside when Sgt. Daubenmire first arrived, but their daughter, age 13, remained inside and according to Iser the daughter refused to leave because she did not "want to leave [Morris]". Eventually, the daughter exited the house but Morris remained inside. During Sgt. Daubenmire's initial encounter with Iser, and in response to his questions, Iser reported that Morris "had weapons" in the home. However, she did not believe that he had weapons on his person.

[1] State's Exhibit 1 was ultimately admitted as evidence and is a part of the record on appeal.

{¶6} Trooper Boetcher had arrived to the scene as back-up for Sgt. Daubenmire. Together the officers knocked on the door of the residence and asked Morris to come outside. Morris shut the door and refused to speak with the officers, telling them they could not enter the residence without a warrant. Sgt. Daubenmire described Morris's demeanor as belligerent and uncooperative, noting that Morris was yelling that he was not going to cooperate or come out of his home. Trooper Boetcher described his demeanor as aggressive. Sgt. Daubenmire then asked Iser for permission to enter the residence; and Iser granted consent but added one last warning telling Sgt. Daubenmire to "be careful because he does have weapons in there". Iser herself then approached the door and unlocked it for the officers.

{¶7} Sgt. Daubenmire testified that they did not leave the residence after Morris refused entry because they were still investigating the complaint that Morris had made a threat of serious physical harm; and because he was concerned about the report that weapons were present in the home. On cross-examination, Sgt. Daubenmire testified that he did not know Morris's criminal history.

{¶8} Once inside the home, the officers attempted to detain Morris. However, Morris resisted the officers' efforts to place him in handcuffs, at one time even noting that he was "about to get an assault charge". Morris eventually broke his right arm free and in one continuous motion struck Trooper Boetcher in the face with his fist. Sgt. Daubenmire testified that "it appeared to be a closed fist" and "purposeful" punch.

{¶9} The trial court issued a ruling on the motion to suppress from the bench. It concluded that while law enforcement did not have proper consent to enter the residence, exigent circumstances existed that justified the officers' entry into the home. Specifically, the trial court determined that the State presented evidence that law enforcement had reasonable cause to

believe that Morris had access to weapons, and was likely to use a weapon or become violent. Accordingly, the trial court denied the motion to suppress. The trial court's ruling was later memorialized in a judgment entry.

{¶10} Morris then filed a motion to reconsider, and the State filed a response in opposition. The trial court again overruled Morris's motion.

{¶11} The case proceeded to trial and a jury ultimately found Morris guilty of assault of a police officer. The trial court sentenced Morris to five years of community control sanctions as well as 90 days incarceration in the Ross County Jail and 100 hours of community service. Morris filed a timely appeal.

II. Assignment of Error

{¶12} Morris assigns the following error for our review:

Assignment of Error:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED DEFENDANT'S MOTION TO DISMISS/SUPPRESS.

III. Law and Analysis

{¶13} In his sole assignment of error, Morris contends that the trial court erred in overruling his motion to suppress evidence. Specifically, he argues that the officers' warrantless intrusion into his private residence to detain him and further investigate a domestic threat allegation violated his Fourth Amendment rights.

A. Standard of Review

{¶14} Our review of a trial court's decision on a motion to suppress presents a mixed question of law and fact. *State v. Jones,* 4th Dist. Washington No. 11CA13, 2012–Ohio–1523, ¶

6, citing *State v. Roberts,* 110 Ohio St.3d 71, 2006–Ohio–3665, 850 N.E.2d 1168, ¶ 100 and *State v. Burnside,* 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶ 8. When considering a motion to suppress, the trial court acts as the trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Accordingly, we defer to the trial court's findings of fact if they are supported by competent, credible evidence. *Id*. citing *State v. Landrum,* 137 Ohio App.3d 718, 722, 739 N.E.2d 1159 (4th Dist.2000). Accepting those facts as true, we must independently determine whether the trial court reached the correct legal conclusion in analyzing the facts of the case. *Id.* citing *Roberts* at ¶ 100 and *Burnside* at ¶ 8.

B. Fourth Amendment Analysis

{¶15} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Moreover, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed * * *." *United States v. United States Dist. Court for E. Dist. of Michigan*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). Consequently, the Fourth Amendment generally prohibits police from making a warrantless and nonconsensual entry into a suspect's home. *Payton v. New York*, 445 U.S. 573, 576, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *State v. Bowe*, 52 Ohio App.3d 112, 113, 557 N.E.2d 139 (9th Dist.1988).

{¶16} However, one exception to the warrant requirement, the presence of exigent circumstances, permits warrantless entry inside the home. *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *Payton* at 583–590; *State v. Jenkins*, 104 Ohio App.3d 265, 268-269, 661 N.E.2d 806, (1st Dist.1995). "[A]n exigent circumstance is an emergency that prompts police to believe there is reasonable cause to enter a home without a

warrant when a person in the home is in need of immediate aid or to prevent a situation threatening life or limb, or the immediate loss, removal, or destruction of evidence or contraband." *State v. Sladeck*, 132 Ohio App.3d 86, 90, 724 N.E.2d 488 (1st Dist.1998) (Gorman, J., dissenting), citing *Mincey v. Arizona*, 437 U.S. 385, 392–393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *see also State v. Fisher*, 5th Dist. Fairfield No. 13CA35, 2014-Ohio-3029, ¶ 28 ("The exigent-circumstances exception has been recognized in situations of hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect's escape, and risk of danger to the police and others."). The scope of this exception must be strictly circumscribed by the exigencies that justify the entry, and "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh* at 749–750; *Blanchester v. Hester*, 81 Ohio App.3d 815, 818, 612 N.E.2d 412 (12th Dist.1992).

{¶17} The issue in this case is whether there exist any exceptions to the warrant requirement that would justify the entry into Morris's home.

1. Iser's Consent to Enter the Residence Does Not Support Entry

{¶18} Morris first argues that the officers did not have valid consent to enter the residence. Consent given by third parties with common or apparent authority over the premises is generally an exception to the warrant requirement. *See United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), and *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (in which the Court recognized the constitutionality of searches conducted based on consent given by third parties with common or apparent authority over the premises to be searched). However, Morris argues that Iser's consent to enter the residence was vitiated by his presence in the residence, and his insistence that law enforcement not enter the residence without a warrant. We agree.

{¶19} In *Georgia v. Randolph*, 547 U.S. 103, 120, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), the United States Supreme Court addressed the constitutionality of a warrantless home search when one tenant consents and another refuses to consent, and concluded that a physically present tenant's refusal to consent overrides the other tenant's consent. Specifically, the Court held that under those narrow circumstances, when "a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search." *Id.* at 121. As a result, the Court in that case upheld the suppression of evidence resulting from the warrantless search. *Id.* at 123.

{¶20} Here, Morris was present and contemporaneously and expressly objected to the officers' presence in the residence, thereby invalidating his cotenant Iser's consent to enter. *See United States v. Tatman*, 397 Fed.Appx. 152, 157 (6th Cir.2010)[2], citing *Randolph* (during domestic violence investigation, defendant's objections to the officer's entry invalidated consent of defendant's wife to police entry). Accordingly, under the facts and circumstances of this case, we conclude that Iser's consent to enter was invalidated and did not give the officers legal authority to enter the residence.

2. Exigent Circumstances Exist to Support Entry

{¶21} The question remains whether any exigent circumstances extinguished the need for a warrant. The trial court determined that the officers were permitted to enter Morris's home because they were faced with a danger to their safety, as well as Iser's and the children's safety, because Iser had told them on two occasions that there were weapons present in the home and because Morris had made serious physical threats to Iser. The trial court especially found that the

[2] Ironically *Tatman*, a federal case, originated from Ross County, Ohio. *Tatman* at 155.

second warning to Sgt. Daubenmire to "be careful because he does have weapons in there" to be indicative of a dangerous situation justifying the entry into the residence.

{¶22} First, we note that "[a] report of domestic violence alone does not justify a warrantless entry and the [S]tate must still establish, under the facts and circumstances of the case, an exception to the warrant requirement applies." *Fisher*, *supra*, at ¶ 38, citing *State v. Delong*, 4th Dist. Ross No. 06CA2920, 2007-Ohio-2330, ¶ 11 (finding warrantless entry not justified by any exception to warrant requirement where officers did not witness domestic violence or any evidence establishing danger to purported victim).

{¶23} Moreover, evidence that firearms may be located within a residence, by itself, is not sufficient to create an exigent or emergency circumstance. *United States v. Bates,* 84 F.3d 790, 795 (6th Cir.1996); *State v. Sharpe*, 174 Ohio App.3d 498, 2008-Ohio-267, 882 N.E.2d 960, ¶ 50 (2d Dist.). However, the presence of a weapon can create an exigent circumstance if "the government is able to prove they possessed information that the suspect was armed and likely to use a weapon or become violent." *Bates* at 795; *see also Sharpe* at ¶ 50 ("a risk of danger from its use" does create an exigent circumstance).

{¶24} Here, we believe that exigent circumstances justified the officers' warrantless entry into the residence. Notably, the officers were responding to a 911 call in which Iser had reported that Morris had made a serious threat of violence towards her. *State v. May*, 4th Dist. Ross No. 06CA10, 2007-Ohio-1428. When the officers arrived, Iser and the children were visibly distraught. Morris was also uncooperative and, according to the officers' testimony, acted in a belligerent and aggressive manner. Iser had also reported that Morris was intoxicated. Most importantly, Iser had told the officers to "be careful" because Morris had weapons in the house - thus insinuating that Morris had access to weapons and was capable of using them. Also, after

officers subdued Morris they found a knife on his person. The evidence adduced at trial indicated that Iser provided a written statement to the officers that Morris had also told her that he intended to "slit her throat." Finally, Iser and the children were still present at the scene, and any threat of harm had yet to completely terminate. Given the record evidence – the 911 call, the threat of violence, the demeanor of Iser and the children, the indication that Morris had access to weapons and was capable of using them, and Morris's behavior – we conclude that exigent circumstances existed justifying the officers' warrantless entry into the residence.[3]

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[3] We additionally point out that over a decade ago, the Ohio General Assembly enacted legislation that, inter alia, speaks to the legislature's concern about the crime of domestic violence and sets forth the preferred course of action that Ohio law enforcement officers should follow in a domestic violence situation. R.C. 2935.03(A)(3) provides in pertinent part:

> (a) For purposes of division (B)(1) of this section, a peace officer described in division (A) of this section has reasonable grounds to believe that the offense of domestic violence or the offense of violating a protection order has been committed and reasonable cause to believe that a particular person is guilty of committing the offense if any of the following occurs:
>
> * * *
>
> (ii) No written statement of the type described in division (B)(3)(a)(i) of this section is executed, but the peace officer, based upon the peace officer's own knowledge and observation of the facts and circumstances of the alleged incident of the offense of domestic violence or the alleged incident of the offense of violating a protection order or based upon any other information, including, but not limited to, any reasonably trustworthy information given to the peace officer by the alleged victim of the alleged incident and the offense or any witness of the alleged incident of the offense, concludes that there are reasonable grounds to believe that the offense of domestic violence or the offense of violating a protection order has been committed and reasonable cause to believe that the person in question is guilty of committing the offense.
>
> * * *
>
> (b) If pursuant to division (B)(3)(a) of this section a peace officer has reasonable grounds to believe that the offense of domestic violence or the offense of violating a protection order has been committed and reasonable cause to believe that a particular person is guilty of committing the offense, it is the preferred course of action in this state that the officer arrest and detain that person pursuant to division (B)(1) of this section until a warrant can be obtained.
>
> * * *
>
> (c) If a peace officer described in division (A) of this section does not arrest and detain a person whom the officer has reasonable cause to believe committed the offense of domestic violence or the offense of violating a protection order when it is the preferred course of action in this state pursuant to division (B)(3)(b) of this section that the officer arrest that person, the officer shall articulate in the written report of the incident required by section 2935.032 of the Revised Code a clear statement of the officer's reasons for not arresting and detaining that person until a warrant can be obtained.

{¶25} Additionally, we recognize that this result is unfortunate for all concerned. Here, the officers did not initiate or seek contact with Morris, but instead responded to a 911 emergency call. Had Morris refrained from acting in a belligerent and aggressive manner throughout this encounter, including his decision to assault an officer, Morris would have certainly benefitted from a more favorable result.

{¶26} Based on the foregoing, Morris's sole assignment of error is overruled.

IV. Conclusion

{¶27} Having overruled Morris's sole assignment of error, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

In the case sub judice, the officers, who responded to a 911 call, acted in accordance with this legislative directive.

Hoover, P.J., dissenting:

{¶28} I respectfully dissent from the lead opinion. Rather, I would sustain Morris's sole assignment of error and reverse the judgment of the trial court.

{¶29} First, I note that the second warning issued by Iser, to "be careful because he does have weapons in there", that the trial court found especially indicative of a dangerous situation, was issued *after* Sgt. Daubenmire asked Iser for her consent to enter the residence. Thus, it appears that Sgt. Daubenmire had made the decision to enter the residence even before this information was available. Second, Iser only told Sgt. Daubenmire that there were "weapons" in the residence. She explicitly stated that she did not believe Morris had weapons on his person, and she never identified what type of "weapons" were present, i.e., firearms, knives, swords, etc.… Moreover, upon reviewing the body cam footage of the incident, I disagree with a few key points of testimony. For one, while I agree that Morris was uncooperative, it does not appear that he was belligerent or aggressive when he told the officers they could not enter his home without a warrant. He never threatened the officers; and the threat against Iser seemed to have dissipated since Iser was no longer in the home. *See Delong*, *supra*, at ¶ 17 (no imminent danger existed to alleged victim of domestic violence or to her daughters where the defendant was not in their vicinity when law enforcement arrived). The children on scene, while clearly upset, did not seem to be afraid. Rather, they seemed upset at Iser for calling the police; and both told the officers that Morris did not do anything wrong. Iser herself did not appear to be scared or fearful of the situation. In fact, she walked right up to the door of the residence and unlocked it for the officers, and stuck around to yell a few parting shots at Morris as he was being detained. The officers did not clear the children or Iser from the scene, or do anything else to suggest they were fearful that Morris was armed and likely to become violent. The officers were not aware of whether Morris

had a criminal record reflecting violent tendencies; and no indication exists in the record that Morris had a verified reputation of a violent nature. No one was present in the home other than Morris. This was not a situation where domestic violence was in progress or where the officers could hear sounds from inside the home indicative of violence. *See State v. Applegate*, 68 Ohio St.3d 348, 626 N.E.2d 942 (1994), syllabus ("Exigent circumstances justify a warrantless entry into a residence by police when police are there pursuant to an emergency call reporting domestic violence and where the officers hear sounds coming from inside the residence which are indicative of violence.")

{¶30} The lead opinion also posits that "[h]ad Morris refrained from acting in a belligerent and aggressive manner throughout this encounter, including his decision to assault an officer, [he] would have certainly benefitted from a more favorable result." However, I fail to see how the assault on the officer, which occurred after law enforcement entered the residence, has any bearing on our determination of whether exigent circumstances justified the entry. In the same vein, I find the lead opinion's reliance on trial evidence such as the knife found on Morris's person, and the written statement made by Iser, improper when considering the issue at hand. Finally, footnote 3 of the lead opinion suggests that the officers could rely upon R.C. 2935.03 to enter the residence and arrest Morris, but this Court has previously held that that statute does not justify a police officer's warrantless entry of defendant's residence. *Delong* at ¶ 11.

{¶31} This Court is charged with independently determining, without deference to the trial court's conclusion, whether the record evidence before us meets the appropriate legal standard. *Fisher*, *supra*, at ¶ 44. That said, given the record evidence, in particular the body cam video footage, I would conclude that no exigent circumstances or other exception to the warrant requirement existed to justify the officers' warrantless entry into the residence. Accordingly, I

would sustain Morris's sole assignment of error and reverse the trial court's judgment. As such, I respectfully dissent.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.
Hoover, P.J.: Dissents with Dissenting Opinion.

For the Court,

By: _____
Peter B. Abele, Judge

By: _____
Matthew W. McFarland, Judge

By: _____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.