**[Cite as *State v. Lowe*, 2015-Ohio-1065.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**ASHTABULA COUNTY, OHIO**

| | | |
|---|---|---|
| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellant, | : | **CASE NO. 2014-A-0011** |
| - vs - | : | |
| GLENDA LOWE, | : | |
| Defendant-Appellee. | : | |

Criminal Appeal from the Ashtabula County Court, Eastern Division.
Case No. 2013 CRB 457.

Judgment: Affirmed.

*Lori B. Lamer*, Assistant Ashtabula City Solicitor, Ashtabula Municipal Court, 110 West 44th Street, Ashtabula, OH 44004 (For Plaintiff-Appellant).

*Christopher M. Newcomb*, 213 Washington Street, Conneaut, OH 44030 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

**{¶1}** Appellant, the state of Ohio, appeals the judgment of the Ashtabula County Court, Eastern Division, which granted appellee, Glenda Lowe's, motion to suppress. For the reasons that follow, we affirm.

**{¶2}** On August 17, 2013, Deputy Steven Murphy of the Ashtabula County Sheriff's Office was dispatched to an assault taking place on Stanhope-Kelloggsville Road in Andover, Ohio. Upon arrival, Deputy Murphy initiated contact with the victim

who showed signs of "major injury to her face and head." On the front steps of the residence, Deputy Murphy also located a large clump of hair that had been pulled from the victim's scalp. The victim provided a written statement to Deputy Murphy, stating:

> Jason Lowe came to my house to hang out. [He] started running his mouth [and] I said "If you're going to come here and act like that then please leave." He left, came back, threatened me, knocked my door down, * * *, pushed me, hit me in the face, pulled my hair out, took my phone, as I was trying to call the police, and threw it at my house, ruining my phone, [and] dent[ing] my house and picked [the phone] up and threw it again * * *.

**{¶3}** The victim also claimed that Jason Lowe threatened her, as he "peeled out" of the driveway, by stating that she "was done for." Furthermore, the victim also allowed Deputy Murphy to view threatening messages sent to her by Jason via Facebook. Deputy Murphy also took a statement from one other witness, a friend of the victim.

**{¶4}** Deputy Murphy immediately initiated his effort to locate and arrest Jason. With the assistance of the Andover Police Department, Deputy Murphy first attempted to locate Jason at some "liquor establishments" in the nearby area. Deputy Murphy testified they did not immediately head to Jason's place of residence because Jason was last seen "headed south, not north, which would be [in the direction of] his residence." After failing to locate Jason at any local bars, Deputy Murphy proceeded directly to Jason's Root Road residence in Monroe Township. Jason shared the home with his parents, Terry Lowe and Glenda Lowe. Glenda is the appellee herein.

**{¶5}** Deputy Murphy arrived at the Lowes' address well after midnight. Upon confirming that Jason's silver Chrysler Sebring was parked in the driveway, Deputy Murphy exited his cruiser and approached the property's enclosed back porch. The

porch has a locking door that leads from the porch, down a few stairs, to the property's yard ("the porch door"). A second door leads from the porch into the house ("the house door"). Deputy Murphy initiated contact with Jason at the porch door by telling him that he was under arrest. Jason refused to comply with the Deputy's orders and, instead, retreated through the porch, back into the house, locking the porch door behind him. Once inside the house, Jason began "dancing around and giving the middle finger" to Deputy Murphy.

**{¶6}** Awakened by the commotion, Terry, appellee's husband, came to the porch to speak with Deputy Murphy. The deputy told Terry that his son was under arrest and that Jason needed to get "out here right now." As Terry went back into the home to speak with his son, Deputy Murphy followed Terry through the porch door onto the porch. At the suppression hearing, Deputy Murphy testified that he remained on the porch while Terry went inside the house. While inside the house, Jason allegedly expressed his displeasure with Deputy Murphy's attempt to effectuate an arrest by yelling, "I ain't fucking going with you, you get the fuck out."

**{¶7}** According to Deputy Murphy's testimony, Jason then began to walk back toward the porch. Jason then attempted to slam the house door, which Terry had left open. Deputy Murphy used his foot to keep the house door from being closed and then discharged his taser into Jason's stomach. While Deputy Murphy was handcuffing Jason, it is alleged that appellee and Terry interfered with the arrest.

**{¶8}** On August 26, 2013, a single-count complaint was filed against appellee for interfering with a lawful arrest in violation of R.C. 2921.33(A). On September 12, 2013, appellee made her initial appearance and pled not guilty to the charge.

**{¶9}** On November 8, 2013, appellee filed a motion to suppress, in which she argued that because Jason's arrest was unlawful, Deputy Murphy's "nonconsensual and warrantless entry into [her] home" was in violation of her Fourth Amendment rights. The trial court then held a hearing on appellee's motion to suppress. Appellee and appellant each called one witness.

**{¶10}** Deputy Murphy testified on behalf of appellant. Deputy Murphy testified that his first interaction after arriving at appellee's address was with Jason. The deputy testified that he attempted to persuade Jason to come out of the porch and down into the yard. When this failed, Jason retreated into the house. Deputy Murphy's next interaction was with appellee's husband, Terry. Deputy Murphy testified that he attempted to encourage Terry to persuade Jason to cooperate. Deputy Murphy testified he entered the porch while Terry went inside the house to speak with Jason. Deputy Murphy also testified that he followed Terry onto the porch because the porch door was left open. The deputy testified that he did not enter any part of the home besides the porch. Finally, Deputy Murphy testified that he discharged his taser only after he saw Jason approach him with "clenched fist[s]" and after Jason attempted to slam the house door in his face.

**{¶11}** Terry testified on behalf of appellee. Terry testified that consent was never given for Deputy Murphy to enter the porch. Terry further testified that as he, appellee, and Jason approached Deputy Murphy, the deputy used his shoulder to open the house door and, upon gaining access into the house, immediately discharged his taser. According to Terry's testimony, Deputy Murphy then pulled Jason onto the porch, handcuffed him, and dragged him down the porch steps to the cruiser.

**{¶12}** On February 4, 2014, the trial court granted appellee's motion to suppress. The trial court's judgment entry did not make express findings of fact. However, the trial court concluded that "[t]he acts which were probably committed by Jason Lowe * * * did constitute a basis for offense(s) of violence and did not constitute 'minor' charges." Next, the trial court made a finding that, as the porch was an integral part of appellee's residence, there was an "expectation of privacy as to said area given its use as a living area at least part of the year." The trial court also considered the fact that Jason's arrest occurred at night, thereby creating "an atmosphere and situation charged with fear, suspicion, potential physical defense of the home, and potential protracted litigation. It created a potential powderkeg." After making these findings, the trial court determined that "all evidence arising from the arrests and of things occurring at [appellee]'s home are excluded from evidence."

**{¶13}** Appellant filed a timely notice of appeal of the trial court's February 4, 2014 judgment, setting forth the following assignments of error:

> [1.] The trial court's decision to grant the appellee's motion to suppress was not supported by the facts or the law.
>
> [2.] The trial court erred when it granted the appellee's motion to suppress.

As both assignments of error argue that the trial court erred by granting appellee's motion to suppress, they are considered in a consolidated fashion.

**{¶14}** "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside*, 100 Ohio St.3d 152, 2003-

Ohio-5372, ¶8, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Additionally, this court has stated:

> When reviewing a motion to suppress, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these findings of facts as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard.

*State v. Jones*, 11th Dist. Ashtabula No. 2001-A-0041, 2002-Ohio-6569, ¶16 (citations omitted).

**{¶15}** Initially, we note appellee is challenging the legality of Jason's arrest in order to establish that the charge against her of resisting arrest is unfounded. R.C. 2921.33(A) provides: "No person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another." Therefore, a "lawful arrest" is an essential element of "resisting arrest." *State v. Lamm*, 80 Ohio App.3d 510, 515 (4th Dist.1992).

**{¶16}** The Fourth Amendment to the U.S. Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment has been interpreted by the United States Supreme Court as prohibiting warrantless arrests in the home absent probable cause and exigent circumstances. *Payton v. New York*, 445 U.S. 573, 589 (1980).

**{¶17}** In *Payton*, the Supreme Court endorsed the position of the Second Circuit Court of Appeals, which held that allowing arrests in the home absent probable cause and exigent circumstances is "simply too substantial an invasion to allow." *United*

*States v. Reed,* 572 F.2d 412, 423 (2d Cir.1978). At its very core, the Fourth Amendment protects individuals from the unreasonable governmental intrusion of their homes. *Payton*, *supra*, at 589-590, citing *Silverman v. United States*, 365 U.S. 505, 511 (1961). Ultimately, a court conducting a Fourth Amendment analysis makes a determination of reasonableness. *Dorman v. United States*, 435 F.2d 385, 389 (D.C.Cir.1970). *See also State v. Tackett*, 11th Dist. Ashtabula No. 2012-A-0015, 2013-Ohio-4286, ¶32.

**{¶18}** For the following reasons, we hold that, based upon the trial court's findings of fact, the trial court properly applied the law and properly granted appellee's motion to suppress.

**{¶19}** The record contained ample evidence to support the trial court's conclusion that probable cause existed to arrest Jason. The trial court properly concluded that the offenses perpetrated on Stanhope-Kelloggsville Road constituted non-minor charges. Indeed, the facts presented at the suppression hearing are sufficient to show that probable cause existed to arrest Jason for both felonious assault, a second-degree felony, and disrupting a public service, a fourth-degree felony. Accordingly, whether the warrantless, home arrest of Jason was constitutionally permissible depends on whether appellant could demonstrate the existence of exigent circumstances.

**{¶20}** Exigent circumstances exist when there is "such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *United States v. Adams*, 621 F.2d 41, 44 (1st Cir.1980). The exigent circumstances doctrine must also take into account the entry and arrest itself. *See United States v. Sangineto-Miranda*,

859 F.2d 1501, 1513 (6th Cir.1988), citing *United States v. Socey*, 846 F.2d 1439, 1448 (D.C.Cir.1988). Exigent circumstances are "few in number and carefully delineated." *United States v. U.S. Dist. Court E. Dist. Michigan*, 407 U.S. 297, 318 (1972), citing *Katz v. United States*, 389 U.S. 347, 357 (1967). Accordingly, the police bear a heavy burden when attempting to demonstrate the necessity to make an immediate warrantless arrest. *Welch v. Wisconsin*, 466 U.S. 740, 749-750 (1984).

**{¶21}** In this case, no exigent circumstances existed due to the lack of any ongoing threat Jason posed to the victim. While the trial court specifically found that Deputy Murphy "stayed within the porch area at all times" and did not enter beyond the house door to the main portion of the home, it also found the deputy entered the enclosed porch to get to that door and determined the enclosed porch was an integral part of the living area. Further, there was minimal explanation presented by appellant as to why Deputy Murphy could not call for a warrant and monitor the residence to ensure that Jason did not leave while the deputy waited. If such evidence had been presented, it may well have established exigent circumstances sufficient to justify the actions of Deputy Murphy.

**{¶22}** It is worthy of note that this was a difficult call for the deputy and that he exercised significant restraint in dealing with Jason. However, it remains that the record is devoid of an explanation as to why it was not safe or reasonable to attempt to secure a warrant while Jason was in the house. Therefore, under the totality of the circumstances in this case and the factual findings rendered by the trial court, it was not proper to effect a warrantless home arrest of Jason.

**{¶23}** Appellant also argues that the exigent circumstance of "hot pursuit" applies in this case. The trial court found, "[t]o hold that there was hot pursuit would stretch those terms beyond any recognizable logic." While we do not necessarily embrace the trial court's phrasing, we also agree that appellant's argument is premised on an overly-broad definition of "hot pursuit."

**{¶24}** The United States Supreme Court has held that police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. *See United States v. Santana*, 427 U.S. 38, 42-43 (1976). The Ohio Supreme Court has also embraced the position that police officers, in hot pursuit of a fleeing suspect, may enter premises without a warrant. *See, e.g.*, *Middletown v. Flinchum*, 95 Ohio St.3d 43, 44-45 (2002). In *Flinchum*, the officers observed the defendant engage in reckless operation of his vehicle on more than one occasion. *Id.* at 45. The defendant ignored the officer's commands to stop, and a chase ensued; the defendant then fled to his home in order to avoid arrest. *Id.* The *Flinchum* Court, relying on United States Supreme Court precedent, held that a suspect cannot thwart police action by fleeing into a private place. *Id.* at 44-45.

**{¶25}** In this case, the facts are insufficient to demonstrate that the police were in hot pursuit of Jason. Deputy Murphy did not observe any criminal activity. In fact, Deputy Murphy did not have any interaction with Jason until he arrived at the Root Road address, two hours after responding to the victim's call. For these reasons, we do not accept appellant's argument that the trial court erred when it concluded that Deputy Murphy was not in hot pursuit of Jason.

**{¶26}** We do not agree with appellant's contention that the porch was a public area, primarily because the trial court concluded, based upon testimony, that the porch was "an integral part of the residence." The trial court's finding was based on testimony from Deputy Murphy that the porch was completely enclosed; had windows and a locking door; and that when Jason retreated into the house, he locked the porch door. For the same reason, we disagree with appellant's contention that consent was freely given for Deputy Murphy to enter the enclosed porch.

**{¶27}** For the reasons stated in this opinion, the judgment of the Ashtabula County Court, Eastern Division, is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.