[Cite as *State v. McGuire*, 2010-Ohio-6105.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellant	:	C.A. CASE NO. 24106
v.	:	T.C. NO. 09 CR 3580
OLIVER McGUIRE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellee	:	
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O P I N I O N

Rendered on the 10th day of December, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of the State of Ohio, filed June 18, 2010. On December 4, 2009, Oliver McGuire was indicted on one count of illegal cultivation of marijuana, in the vicinity of a juvenile, in violation of R.C. 2925.04(A)(C)(5), a felony of the fourth degree. On March 11, 2010, McGuire filed a

motion to suppress, which the trial court sustained, and the State appeals from that judgment.

{¶ 2} The events giving rise to this matter began on October 22, 2009, when City of Dayton Police officers proceeded to 919 East Stewart Street in order to conduct a "knock and advise" regarding a drug complaint. Officer Matthew Beavers testified at the suppression hearing that detective Doug Kowalski of the Kettering Police Department advised him that he had received a report, from Beavertown Elementary School, that marijuana was being cultivated at the Stewart Street residence. The source of the tip was a seven year old boy, a resident of the home who had told his school counselor about the marijuana. The school counselor had contacted authorities. According to Beavers, when he and Officers Theodore Trupp and Thomas Cope arrived at the address, they initially checked the perimeter of the home for cameras which could alert the residents to their presence. While outside, Beavers testified that he noticed a strong smell of marijuana. Discovering no cameras, the officers then approached and knocked upon the front door, which McGuire answered. When the door was opened, Beavers testified that the officers observed two large, barking pit bulls behind McGuire. Cope asked McGuire if he had "bite insurance" for the dogs as required by the City of Dayton. McGuire indicated that he did not, and Cope advised him that he was under arrest for failure to insure the dogs. Cope stepped "within a foot of the threshold," asked McGuire to turn around, and placed him in handcuffs. Beavers testified that he smelled marijuana within the home. Trupp advised the officers that he observed a plastic bowl containing what he believed to be marijuana in the family room area of the home. Cope removed McGuire from the home and placed him in

the cruiser.

{¶ 3} McGuire's girlfriend, Wendy Willett, was present insisde the home, and she approached the officers and asked them what was happening. They advised her that they were there in response to the tip from the Kettering detective regarding the cultivation of marijuana at the residence. Willette began to cry and confirmed that McGuire cultivated marijuana in the basement of the home, and she told them that the seven year old boy who was the source of the complaint was her son. She also told the officers that she lived there with McGuire, that he was abusive to her, and that she had been trying to find a "way out" of their relationship. The officers observed Willette's personal items throughout the home. She volunteered to show the officers the marijuana, and they followed her to the basement where they found one large marijuana plant and several smaller ones, along with a "grow light."

{¶ 4} The officers went back outside, and Beavers read McGuire his rights. On cross-examination, Beavers testified that pursuant to police department policy when conducting a "knock and advise," the officers "would knock on the door and advise you what the complaint was, ask whether or not you would like to allow us to search the house or not and go from there whether you said yes or no." Beavers acknowledged that the officers did not inform McGuire of the purpose of their visit until after he was arrested.

{¶ 5} McGuire testified that, upon the officers' knock, he opened his front door, and that there was a locked screen door between them. After being asked about "bite insurance" for the pit bulls, McGuire testified that he told the officers that they "needed a warrant to come in." According to McGuire, the officers then yanked the locked screen

door open and placed him under arrest.

{¶ 6} After the defense rested, the court asked Officer Trupp to take the stand. According to Trupp, when McGuire opened the door, "as the pit bulls were barking at us, we at that time advised, asked if he had insurance for [them]. He said, no, and then Officer Cope told him he was going to be under arrest. As Officer Cope was going to grab him to effect the arrest, he made a statement, ['Y]ou have no warrants. You can't come in here.[']' And then he was placed under arrest." At the time, Trupp and Beavers, along with Cope, stood "just inside the doorway of the house." Trupp testified that the officers did not inform McGuire of the purpose of their visit until after he was placed under arrest.

{¶ 7} In granting McGuire's motion to suppress, the trial court specifically found Officers Beavers and Trupp to be more credible than McGuire. The court determined that the officers' initial encounter with McGuire was consensual. During the course of the encounter, the officers developed probable cause to arrest McGuire for violating R.C. 955.22(E), a misdemeanor of the first degree, since he did not carry "bite insurance" for the dogs. The court further found, however, that "probable cause to arrest McGuire for this nonviolent misdemeanor offense did not convey to the officers authority to make a warrantless, nonconsensual entry into the residence to effect the arrest of McGuire" in the absence of "exigent circumstances."

{¶ 8} Given the unlawful entry, the court determined that the evidence derived from that lilegality was subject to exclusion. According to the court, quoting McGuire's post-hearing brief, Trupp "'was only able to see a plastic bowl [of suspected marijuana] on the right side <u>after</u> the officers were inside the residence.'" Regarding the marijuana plants in

the basement, the court considered the following facts and circumstances:

{¶ 9} "First, the consent to search the basement was not obtained from McGuire, but from Wendy Willett, who voluntarily gave consent.

{¶ 10} "Second, the consent was obtained from Willett immediately after the officers made illegal entry into her residence and, more importantly, while the officers were still illegally present in her residence. The officers could have, but did not, 'purge the primary taint' of the illegal entry by exiting the residence and, thereafter, obtaining Willett's consent to re-enter and search the basement.

{¶ 11} "Third, as Officer Beavers testified, it was after McGuire, Ms. Willett's boyfriend, had been arrested and removed from the residence that the officers initiated a conversation with Willett and 'advised her of the situation and complaint that we got from the Kettering detective.' * * * [quoting transcript of suppression hearing]. Ms. Willett 'began crying and said that she's been trying to leave him because he does grow marijuana and because he is abusive * * * .' Id. She then volunteered to lead the officers to the basement, where they were shown McGuire's 'marijuana grow operation.'" According to the trial court, the "sequence and interconnection of these events is important: (a) The officers illegally entered the residence. (b) This illegal entrance enabled the officers to arrest and remove McGuire from the residence. (c) This arrest and removal of McGuire from the residence enabled the officers to initiate a conversation with McGuire's girlfriend, Ms. Willett, outside McGuire's presence and influence. (d) In the course of that conversation Willett volunteered to lead the officers to McGuire's 'marijuana grow operation.'

{¶ 12} "The above first factor (i.e., consent obtained not from McGuire, but from

Willett), attenuates the connection between the illegal entry and the discovery and seizure of the 'marijuana grow operation.' However, the second and third factors strengthen the connection. In weighing all three factors, this Court is not convinced that Ms. Willett's consent to search the basement was not obtained by exploitation of the illegal entry. The Court is not persuaded that the circumstances in which the officers obtained Willett's consent to search are so attenuated from the illegal entry as to dissipate the taint of that illegality. Therefore, the evidence of the 'marijuana grow operation' must be suppressed as the 'fruit of the poisonous tree.'"

{¶ 13} The State asserts one assignment of error as follows:

{¶ 14} "THE TRIAL COURT ERRED IN SUSTAINING MCGUIRE'S MOTION TO SUPPRESS.

{¶ 15} "A. MS. WILLETT'S CONSENT TO SEARCH THE BASEMENT PURGED ANY TAINT OF THE UNLAWFUL ARREST.

{¶ 16} "1. WENDY WILLETT HAD THE AUTHORITY TO GIVE CONSENT TO ALLOW OFFICERS TO SEARCH 919 EAST STEWART STREET.

{¶ 17} "2. MS. WILLETT'S CONSENT WAS VOLUNTARY.

{¶ 18} "3. MS. WILLETT'S CONSENT WAS AN ACT OF FREE WILL INDEPENDENT OF ANY ILLEGAL ENTRY AND PURGED ANY TAINT."

{¶ 19} "Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and

evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser,* Greene App. No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 20} According to the State, "the discovery of the marijuana grow operation was not the result of an illegal arrest, but, rather, an act of Ms. Willett's independent free will." "Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are 'per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions.' (Citations omitted). One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. (Citation omitted). The State is required to establish, by clear and convincing evidence, that consent to the search was freely and voluntarily given. (Citations omitted). Furthermore, 'the question whether a consent to search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.' (Citation omitted).

{¶ 21} " '[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party

who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.' " (Citation omitted). *State v. Knisley,* Montgomery App. No. 22897, 2010-Ohio-116, ¶ 31-32. We agree with the State that Willett, as a resident of the home, had the authority to consent to the search.

{¶ 22} The trial court found that Willett's consent was "voluntarily" given, and we have previously concluded that "the unlawful entry into a defendant's home may taint an otherwise voluntary consent to search thereafter obtained. The U.S. Sixth Circuit Court of Appeals reached this conclusion in *United States v. Buchanan* (6th Cir. 1990), 904 F.2d 349, 355-56, reasoning that when a consent to search is obtained after an illegal entry, the consent is invalid unless the taint of the initial entry dissipated before the consent was given. The question is whether the consent was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.' (Citations omitted). 'Dissipation of the taint resulting from an illegal entry "ordinarily involves showing that there was some significant intervening time, space, or event." ' " (citations omitted). *State v. Cooper*, Montgomery App. No. 20845, 2005-Ohio-5781, ¶ 20; *City of Dayton v. Lowe* (Dec. 31, 1997), Montgomery App. No. 16358 (*"the temporal proximity of the arrest and confession, the presence of intervening circumstances*, *(citation omitted), and, particularly, the purpose and flagrancy of the official misconduct are all relevant*," emphasis in original and citing *Wong Sun v. United States* (1963), 371 U.S. [471], at 491).

{¶ 23} In the present matter, while Willett's consent was "voluntarily" given in the ordinary sense of the word, we agree with the trial court that it was tainted by the illegal entry into the residence. As the trial court noted, Willett's consent was

obtained "immediately" after the illegal entry into the home, and while the illegality was continuing. As the trial court further noted, the officers could have, but did not, exit the home and then attempt to obtain Willett's consent to re-enter and search the basement. Further, "the entry into the home was a serious violation of the Fourth Amendment. See *Payton v. New York* (1980), 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (recognizing that 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed')." *Cooper*, ¶ 21. Accordingly, we conclude that evidence of the "marijuana grow operation" was properly suppressed, and the State's sole assigned error is overruled. The judgment of the trial court is affirmed.

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BROGAN, J., concurs.

FAIN, J., concurs in judgment only.

FAIN, J., concurring in the judgment:

{¶ 24} There are interesting legal issues concerning whether McGuire's arrest was unlawful, and, if so, whether Willett's consent was "sufficiently an act of free will to purge the primary taint," in the sense contemplated by *Wong Sun v. United States* (1963), 371 U.S. 471, 486, 83 S.Ct. 407, 416-417, 9 L.Ed.2d 441; see 4 LaFave Search and Seizure 78, §8.2(d). I am not completely convinced that McGuire's arrest was unlawful (which the State does not seem to be disputing on appeal), and I am fairly well persuaded that on the evidence of the arresting police officers, which the trial court found to be credible and adopted as its findings of fact, Willett's consent to search was sufficiently an act of her free will to have purged the

primary taint of McGuire's unlawful arrest. After all, her bags were packed, lending credence to her statement that she was planning to leave McGuire, and to the inference that she welcomed the arrival of the police and arrest of McGuire as her opportunity to leave.

{¶ 25} But I am persuaded that none of this matters. In *Georgia v. Randolph* (2006), 547 U.S. 103, 126 S.Ct. 1515, 104 L.Ed.2d 208, the Supreme Court of the United States has held that where one of two co-occupants of a residence is present on the scene, and objects to the police searching the residence without a warrant, the other co-occupant does not have the apparent authority to override the first co-tenant's objections, and authorize a search. The only potential distinction in the case before us is that here, unlike in *Georgia v. Randolph*, supra, the objecting co-tenant was removed from the residence by police before the co-operating co-tenant gave her consent. I am not persuaded that this distinction is material. The practical assumption that one co-tenant has authority to give consent for the other has been rebutted in either case – the officer knows that the non-consenting co-tenant is objecting to a warrantless search. As the court explained:

{¶ 26} "This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he

expresses it." *Georgia v. Randolph*, supra, 547 U.S. 121-122, 126 S.Ct. 1527.

{¶ 27} In the case before us, McGuire objected to the police entering his home without a warrant. The trial court specifically found: "As Officer Cope secured the defendant to arrest him, the defendant stated the officers had no warrant and could not come in. (Tr. 62)." It would be exalting form over substance to argue that McGuire was only objecting to an entry into his home for the purpose of effecting his arrest without a warrant, but was not objecting to an entry to conduct a search without a warrant.

{¶ 28} Under the authority of *Georgia v. Randolph*, supra, I concur in the judgment of this court affirming the trial court.

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