[Cite as *State v. Angelo*, 2009-Ohio-6966.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24751
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAVID M. ANGELO	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CR 09-01-0209

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

BELFANCE, Judge.

{¶1} Appellant, the State of Ohio, appeals the decision of the Summit County Court of Common Pleas that granted the Appellee's motion to suppress. For the following reasons, we affirm.

FACTS

{¶2} On January 15, 2009, Akron police officers were dispatched to a home on Barcelona Drive, in Akron, Ohio. The officers were told that there was a fight at the residence and that two, incomplete calls to 911 emergency services had been made from the Barcelona Drive area.

{¶3} Chante Goldsby greeted the officers at the door and allowed them into the home. Goldsby lived in the home with her boyfriend, Appellee, David M. Angelo. Officers Artis and Stump entered the living room with Goldsby and saw a shattered, glass coffee table and some knick-knacks broken and strewn about the room. Goldsby sat on a couch, holding her child.

Angelo was sitting on a separate couch. Goldsby told the officers that she and Angelo were arguing when she threw the television remote control at him. She said then Angelo pushed her and she retrieved a baseball bat. She admitted that she broke the glass table and struck Angelo with the baseball bat. Angelo had visible injuries. In light of Goldsby's statement and Angelo's injuries, the officers placed Goldsby under arrest and escorted her to the police cruiser in handcuffs.

{¶4} Once in the cruiser with the officers, Goldsby stated that during her fight with Angelo, she retrieved the baseball bat because he had gotten his gun out. She said Angelo kept the gun in the basement. Upon hearing this information, Officer Stump returned to the front door of the home. Officer Stump entered the home. At this time, Angelo was in the living room with Goldsby's mother. Officer Stump asked Angelo if he had a gun and Angelo indicated that he did not. Officer Stump then waited for his supervisor, Sergeant Englehart, to arrive to photograph the crime scene. Officer Stump waited inside the home, speaking with Angelo, but did not request permission to search for the gun.

{¶5} Sergeant Englehart arrived and began photographing the living room. Officer Stump asked Angelo if he could search the home, including the basement, for the weapon. The State alleges that Angelo consented. Sergeant Englehart went into the basement while Officer Stump remained at the top of the basement stairs. Sergeant Englehart located a gun in the basement and Angelo was placed under arrest.

{¶6} As a result of the events of January 15, 2009, Angelo was charged with one count of having weapons under disability and one count of disrupting a public service. Angelo filed a motion to suppress all evidence obtained the evening of his arrest. After a hearing, the trial court granted the motion finding that the Sate failed to prove that an exception to the warrant

requirement existed to allow the officers to enter and search the Barcelona Drive residence after Goldsby was placed in the police cruiser. The State filed the instant interlocutory appeal arguing that the trial court erred in granting the motion to suppress.

STANDARD OF REVIEW

{¶7} An appeal from a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. This Court must defer to the trial court's findings of fact as the trial court is in the best position to evaluate the evidence and determine the credibility of the witnesses. *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶10, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699, and quoting *Akron v. Bowen*, 9th Dist. No. 21242, 2003-Ohio-830, at ¶5. A reviewing court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶6. However, this Court will review the trial court's application of the law to the facts de novo. *Metcalf* at ¶6. That is to say that this Court will determine whether "the facts [found by the trial court] meet the appropriate legal standard." (Internal quotations and citations omitted.) *State v. McCoy*, 9th Dist. No. 08CA009329, 2008-Ohio-4947, at ¶4.

ENTRANCE INTO THE RESIDENCE

{¶8} At the outset, we note that the issue in this matter is whether it was permissible for the police officers to re-enter the home on Barcelona after Goldsby had been arrested and placed in the police cruiser. Additionally, neither party has argued that Angelo himself lacked authority to consent to a search of the residence.

{¶9} "The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides, 'The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]'" *State v. Moore* (2000), 90 Ohio St.3d 47, 48-49. "Section 14, Article I of the Ohio Constitution, nearly identical to its federal counterpart, likewise prohibits unreasonable searches." Id. at 49. "[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Middletown v. Flinchum* (2002), 95 Ohio St.3d 43, 44, quoting *United States v. United States Dist. Court for the E. Dist. of Michigan* (1972), 407 U.S. 297, 313. Evidence gathered during an unreasonable search must be suppressed by the trial court. *Mapp v. Ohio* (1961), 367 U.S. 643, 655-656.

{¶10} A warrantless search of a person's home is presumed unreasonable unless an exception to the warrant requirement is shown. *State v. Cooper*, 9th Dist. No. 21494, 2003-Ohio-5161, at ¶7. "The state bears the burden to demonstrate that the warrantless search falls within one of the established exceptions." Id. The recognized exceptions are:

> "(a) [a] search incident to a lawful arrest; (b) consent signifying waiver of constitutional rights; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search, and the presence of exigent circumstances; * * * (f) the plain view doctrine[;] or (g) an administrative search[.]" (Internal quotations and citations omitted.) *State v. Price* (1999), 134 Ohio App.3d 464, 467.

The State argues that the applicable exceptions in this case are consent and exigent circumstances.

Consent

{¶11} In order to demonstrate that an individual consented, "the state must show by 'clear and positive' evidence that the consent was 'freely and voluntarily' given based on the totality of the circumstances." *State v. Hetrick*, 9th Dist. No. 07CA009231, 2008-Ohio-1455, at ¶23, quoting *Cooper* at ¶12, quoting *State v. Posey* (1988), 40 Ohio St.3d 420, 427. "'Clear and

positive' evidence is equivalent to clear and convincing evidence." *Hetrick* at ¶23, quoting *Cooper* at ¶12. Consent may be expressed or implied. *Cooper* at ¶9.

{¶12} In the factual findings of the trial court's judgment entry, the court stated that Officer Stump went back to the front door of the house after Goldsby stated in the police cruiser that Angelo had a gun and had retrieved it during their argument. Officer Stump testified that the storm door was closed, but the main door to the house was open. Because the storm door contained a full-length window, he could see Angelo in the living room with some other people he believed were Angelo's relatives. Officer Stump testified that he knocked on the storm door and said *someone* in the home said "Come in[]" and *someone* opened the door for him. He then entered the house and began talking to Angelo. The trial court also stated that Angelo denied ever allowing Officer Stump or any of the other officers into the house.

{¶13} Initially, we note that the consent given when the officers initially arrived does not extend to subsequent entries after the officers have exited the house. See *State v. McCormick*, 2nd Dist. No. 19505, 2003-Ohio-5330, at ¶81 (holding that officers' re-entry into defendant's home was justified by exigent circumstances after initial entry for victims and/or suspects); *State v. Zax-Harris*, 166 Ohio App.3d 501, 2006-Ohio-1855, at ¶21 (holding that the defendant, who had been the victim of a home invasion, did not give consent for a subsequent entry of her home for further questioning by the police).

{¶14} The trial court found that the State did not prove that Angelo or Goldsby gave the officers consent to re-enter the home on Barcelona. Essentially, the trial court determined that the State failed to meet its burden by clear and positive evidence that consent was freely and voluntarily given. We reiterate that we must defer to the trial court's findings of fact as the trial court is in the best position to evaluate the evidence and determine the credibility of the

witnesses. The trial court found that the State did not produce any evidence that Goldsby granted officer Stump permission to re-enter the home. In addition, there was no evidence that Angelo told the officers that they could re-enter the home. The trial court further evaluated Officer Stump's testimony. Officer Stump testified that although he could see Angelo and the other people inside the home through the storm door, he could neither identify the person who opened the door nor identify the person who said he could come in. In light of this evidence, the trial court determined that the State did not provide sufficient evidence that either Goldsby or Angelo gave the officers consent to re-enter Angelo's home. Further, because Stump was unsure as to who said he could come in, it was "uncertain" that "whoever it was had the capacity to grant such consent." Thus, although the trial court recognized that it might have been possible to obtain third-party consent, it found that the State, in failing to provide any details regarding the alleged consent, failed to meet its burden of proof. Furthermore, while consent may also be implied by conduct, the State offered no testimony that Angelo actually heard someone yell out to Officer Stump or actually witnessed the person allegedly letting him into the home. To the contrary, Angelo stated that no one permitted Officer Stump to enter the residence.

{¶15} After a thorough review of the record, we conclude that the trial court's findings are supported by competent, credible evidence. *Metcalf* at ¶6. Based on the state of the evidence, the trial court determined that the evidence presented by the State did not satisfy its burden necessary to provide "clear and positive" evidence of consent. *Hetrick* at ¶23, quoting *Cooper* at ¶12, quoting *Posey*, 40 Ohio St.3d at 427. Furthermore, as the court was confronted with conflicting evidence concerning the officers' entry into Angelo's home, the trial court may have determined that the State's witnesses were not entirely credible. Accordingly, the trial court did not err in finding a lack of consent for subsequent re-entry into the home and that as a

consequence, any subsequent statements made by Angelo or evidence gathered should be suppressed because they were improperly obtained.

Exigent Circumstances

{¶16} Police are permitted to enter a residence without a warrant if such entrance is justified by exigent circumstances. *State v. Applegate* (1994), 68 Ohio St.3d 348, 349. An exigent circumstance can be defined as "[t]he need to protect or preserve life or avoid serious injury[.]" *State v. White*, 175 Ohio App.3d 302, 2008-Ohio-657, at ¶17, quoting *Mincey v. Arizona* (1978), 437 U.S. 385, 392. Pursuant to this exception, police intrusion into a home without a warrant is justified if the officers can provide articulable facts supporting a reasonable belief that there is an emergency in the home. *White* at ¶¶17-18. "[T]here must be specific facts, discovered prior to the warrantless entry, that would lead a prudent officer to the objectively reasonable belief that this is, in fact, the scene of an emergency." (Quotations and citations omitted.) Id. at ¶18. The State must show that someone in the home "is in need of immediate aid." (Quotations and citations omitted.) Id. at ¶17.

{¶17} Here, the police were called to the home on Barcelona to investigate a possible fight. Upon arrival, the fight had concluded and Angelo and Goldsby were sitting in the living room. Angelo was injured and Goldsby admitted to striking him and damaging some of the contents of the living room. The officers decided to arrest her. The officers did not observe Angelo with a gun and only became aware of its existence after Goldsby was taken into custody. Even though a gun was eventually found in the home as Goldsby alleged, the gun was located in the basement, not with Angelo in the living room.

{¶18} We conclude that the State also failed to present evidence of articulable facts that the officers reasonably believed that re-entry into the home was necessary to respond to some

emergency. Id. at ¶¶17-18. Neither officer testified that Angelo or Goldsby were exhibiting frantic or erratic behavior or otherwise impeding the officers' investigation. The officers did not describe the scene at the home as hectic or chaotic. Goldsby and Angelo were no longer physically or verbally assaulting each other when the officers arrived and it is reasonable to believe that removing Goldsby from the home quelled the threat of further violence. Moreover, Officer Stump testified that he was able to observe Angelo through the window in the front door as Angelo was sitting on the couch speaking with others in the house. Officer Stump did not testify that Angelo was exhibiting erratic or aggressive actions as they observed him. Additionally, as Goldsby was secured in the police cruiser, she was no longer in any danger by way of any conduct Goldsby attributed to Angelo prior to the police arriving. Finally, at no point while the officers were at the home was Angelo armed with a weapon. The facts presented do not demonstrate that there was an emergency in the home that required response from the officers on scene. Accordingly, it was not an error for the trial court to find that exigent circumstances did not justify re-entry into the home.

III.

{¶19} In light of the above, we do not find the State's argument on appeal to be well taken. The trial court did not commit reversible error when it granted Angelo's motion to suppress. The State's sole assignment of error is overruled and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶20} I respectfully dissent because I believe that Angelo impliedly consented to the officer's entry into his home.

{¶21} One's consent to entry by the police may be express or implied, and may be evidenced by words or actions. *State v. Asworth* (Apr. 11, 1991), 10th Dist. No.90AP-916, citing *United States v. Turbyfill* (C.A.8, 1975), 525 F.2d 57, 59, and *United States v. Rodriguez* (C.A.1, 1980), 625 F.2d 1021. Moreover, a third party's consent to entry is valid, even if the third party lacks common authority over the premises, if the police reasonably believed that such person had authority to consent. *Asworth*, supra.

{¶22} I agree with the majority's statement of law that this Court grants deference to the trial court's findings of facts because the lower court is in the best position to assess the credibility of the witnesses. I also agree, and emphasize, that we need only defer if those findings are supported by competent credible evidence.

{¶23} In this case, the trial court did not make express "findings of fact" but did distinguish portions of the judgment under distinct headings. Under "The Facts" heading, the trial court stated that "[Officer] Stump testified that he knocked on the door and the Defendant and a couple of relatives came to the door." He further noted that the officer testified that "they" said "come in" and opened the door and let him in the house.

{¶24} In its "Discussion," the trial court noted that the officer was not sure who said he could enter. The court reasoned, "Therefore, it is uncertain whether whoever it was had the capacity to grant such consent." It is reasonable to infer from this that the trial court believed the officer's testimony that someone in the home invited him inside.

{¶25} Officer Stump saw Angelo, along with others, through the storm door glass when he knocked, seeking entry. A person in the home not only called out for the officer to "come in," but opened the door for the officer. Even if Angelo did not call out or open the door, he was in a position to see the officer's entry into the home, yet he failed to protest or otherwise dispute any third party's authority to grant entry to the officer.

{¶26} I would conclude that Angelo, at a minimum, manifested implied consent to Officer Stump's entry by failing to object to the officer's presence in his home at the invitation of another. Furthermore, based on the totality of the circumstances, Officer Stump was reasonable in his belief that he had consent to enter the home based on the invitation to "come in," the opening of the door by another to allow him entry, Angelo's presence in sight of the

door, and Angelo's failure to indicate any objection to the officer's subsequent presence in the home. Even deferring to the trial court's factual finding that Angelo himself did not consent to Officer Stump's entry, the lower court failed to correctly apply the law to its other factual findings, specifically that someone inside the home consented to the officer's entry. In fact, the trial court failed to consider whether Officer Stump was reasonable in his belief that someone with authority consented to his entry.

{¶27} I would conclude that Angelo, by his conduct, acquiesced to the officer's entry and presence in his home. I would also conclude that Officer Stump was reasonable in believing that a person with authority to consent invited him into the home. Accordingly, I dissent and would reverse and remand the matter for further proceedings.

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellant.

PAUL F. ADAMSON, Attorney at Law, for Appellee.