[Cite as *State v. Liscoe*, 2011-Ohio-1054.]

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

STATE OF OHIO/ VILLAGE OF RICHFIELD Appellant v. RACHAEL LISCOE Appellee	C.A. No. 25441 APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE No. 09 TRC 15143

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

WHITMORE, Judge.

{¶1} Appellant, the State of Ohio, appeals from the judgment of the Akron Municipal Court, granting suppression in favor of Defendant-Appellee, Rachael Liscoe. This Court reverses.

I

{¶2} On June 23, 2009, the Rapid Transit Authority ("RTA") contacted the Brecksville Police Department to notify them that one of its drivers had seen a vehicle "swerving outside of [its] lane of travel." RTA supplied the police with the vehicle's description and license plate number, as well as its direction of travel. Because the vehicle was leaving Brecksville's jurisdiction, the Brecksville Police Department contacted the Richfield Police Department. Richfield's officers were dispatched both to Route 21, where the vehicle had been spotted, and to Liscoe's residence on Brush Road, the registered address for the vehicle. Officer Robert Gilbert drove directly to the residence as he was familiar with Liscoe and her family. Specifically,

Officer Gilbert testified that he had several prior dealings with Liscoe, "involving problems with [her] parents and alcohol."

{¶3} When Officer Gilbert arrived at Liscoe's home, the vehicle in question was already there. Officer Gilbert observed that the vehicle was parked partially on the grass and the driver's door was open. Liscoe's father, Raymond Liscoe, met Officer Gilbert outside and ultimately led him and several other officers inside the house to his daughter's bedroom. Officer Gilbert observed that Liscoe appeared to be intoxicated and attempted to perform several sobriety tests. Liscoe refused to comply and was taken to the Richfield Police Department. A breathalyzer test performed at the police department yielded a blood alcohol content result of .276.

{¶4} Liscoe was charged with violating two Richfield ordinances, pertaining to operating a motor vehicle while having a blood alcohol level equal to or in excess of .17. Liscoe's case was transferred to the Akron Municipal Court on July 17, 2009, and, on August 5, 2009, she filed a motion to suppress. The court held a hearing on the motion on September 1, 2009. On June 1, 2010, the trial court granted Liscoe's motion.

{¶5} The State now appeals from the trial court's judgment and raises one assignment of error for our review.

II

Assignment of Error

"THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE-LISCOE'S MOTION TO SUPPRESS."

{¶6} In its sole assignment of error, the State argues that the trial court erred by granting Liscoe's motion to suppress. We agree.

{¶7} The Ohio Supreme Court has held that:

> "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. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. No. 08CA009454, 2009-Ohio-910, at ¶6, citing *Burnside* at ¶8.

{¶8} Liscoe moved to suppress the evidence below on the following basis:

> "Not having observed [her] committing any traffic violations or otherwise being involved in any criminal activity within the jurisdiction of the Village of Richfield, Ohio, or elsewhere, the arresting officers lacked the necessary reasonable suspicion and probable cause to justify a warrantless home entry and to investigate, detain and arrest [her] in the instant case."

Consequently, Liscoe challenged Officer Gilbride's warrantless entry into her home and her warrantless arrest, both of which occurred after Liscoe exited the vehicle she had been driving, entered her home, and retired to her bedroom.

{¶9} 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 nearly identical to that of the Fourth Amendment, and similarly prohibits unreasonable searches and seizures. "[B]oth probable cause and exigent circumstances are required to effectuate a warrantless entry of a home," *State v. Sandor*, 9th Dist. No. 23353, 2007-Ohio-1482, at ¶7, because, "[a]bsent exigent circumstances, a

warrantless search or seizure effected in a home is per se unreasonable." *State v. Carrigan*, 9th Dist. No. 21612, 2004-Ohio-827, at ¶10, citing *Payton v. New York* (1980), 445 U.S. 573, 590. The State bears the heavy burden of "overcom[ing] the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin* (1984), 466 U.S. 740, 750-53 (rejecting State's exigent circumstances argument where suspect "had already arrived home, [] had abandoned his car at the scene of the accident, [and] there was little remaining threat to the public safety"). But, see, *Middletown v. Flinchum* (2002), 95 Ohio St.3d 43, 45 (affirming warrantless, misdemeanor arrest of DUI suspect who ran from vehicle into his home and holding that "when officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor").

{¶10} Officer Gilbert testified at the suppression hearing that the police were dispatched as the result of an observation made by an RTA bus driver named Patrick Muller. Officer Gilbert's specific testimony was that Muller "reported a vehicle that was swerving outside of [its] lane of travel." Muller provided the police with the vehicle's license plate number and direction of travel. Officer Gilbert testified that the Brecksville Police Department received Muller's call at 2:46 p.m., the Richfield Police Department received the dispatch at 2:48 p.m., and Officer Gilbert arrived at Liscoe's home at 2:53 p.m., where he observed the vehicle in question with its driver's door open.

{¶11} According to Officer Gilbert, Liscoe's father told him that Liscoe had been driving and had "just arrived" home. Officer Gilbert testified that Liscoe's father led him upstairs to Liscoe's bedroom. Officer Gilbert stated that Liscoe was combative, slurred her speech, had the odor of alcohol, and could not stand on her own without assistance. Officer

Gilbert indicated that he was unable to effectively perform any field sobriety tests because Liscoe would not cooperate, so she was transported to the police department where a blood alcohol content test was performed. Officer Gilbert further testified that he was familiar with Liscoe and her family because he had spoken to them in the past about Liscoe's alcohol use. He indicated that, in the past, the police had responded to Liscoe's home "several times with the famil[y] in fights [] having to do with the motor vehicle, [Liscoe] leaving or wanting to leave[.]"

{¶12} The record reflects that the trial court in this case premised its judgment upon several factual inaccuracies. Of primary concern, the court determined that "an RTA driver" simply reported having seen a "drunk driver" and "[t]here was no description of actual driving that was observed." The court further found that the Brecksville Police responded to Liscoe's home and a "portable breath test" was administered at the scene. In fact, the record contains a description of the actual driving that was observed. Officer Gilbert specified that Muller, the RTA driver who telephoned the police, told the police that he observed the vehicle in question "swerving outside of [its] lane of travel." Moreover, the Brecksville police did not respond to Liscoe's home and Officer Gilbert never testified that he administered a portable breathalyzer test. Indeed, the court's written statement contradicts its own oral statements at the suppression hearing. After all of the testimony was presented at the hearing and defense counsel tried to raise an issue regarding a portable breathalyzer test, the court stated on the record:

> "There was no testimony about any portable breathalyzer. There was testimony about trying to do the field sobriety test in the bedroom and then down the stairs.
>
> "***
>
> "*** [M]y impression was it was the Horizontal Gaze and Nystagmus."

The court's oral statements comport with Officer Gilbert's testimony, in which he indicated that Liscoe had to be transported to the police department for a breathalyzer test because she refused to cooperate with the field sobriety tests he attempted to administer at the scene.

{¶13} "This Court must only accept the trial court's findings of fact if they are supported by competent, credible evidence." *State v. Figueroa*, 9th Dist. No. 09CA009612, 2010-Ohio-189, at ¶20. The critical finding upon which the trial court here based its decision was that "[t]here was no description of actual driving that was observed" other than a vague reference to "drunk driving." Yet, there is no support for this finding in the record. The record below contains an explicit description of the actual driving in this case, which was introduced at the hearing. As such, we must conclude that the trial court's factual findings are not supported by competent, credible evidence.

{¶14} While we note that the law the trial court applied here does not respond to the argument set forth in defendant's motion, we cannot address the court's application of the law, as its factual findings are not supported by competent, credible evidence. Because the evidence does not support the court's factual findings, we must conclude that the court erred by granting defendant's motion to suppress. The State's sole assignment of error is sustained on that basis.

III

{¶15} The State's sole assignment of error is sustained. The judgment of the Akron Municipal Court is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, 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 Appellee.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶16} I agree that this matter must be returned to the trial court. I disagree, however, with the reason given by the majority.

{¶17} The State has the burden of proof on a motion to suppress. *City of Xenia v. Wallace*, 37 Ohio St. 3d 216, paragraph two of the syllabus (1988). In order to attempt to carry its burden in this case, the Village of Richfield presented the testimony of one witness, Officer Robert Gilbert. Although Officer Gilbert testified that the dispatcher told him the RTA driver reported that Ms. Liscoe's vehicle had swerved outside its lane of travel, the trial court was not required to believe that testimony. It is elementary that a trier of fact may disbelieve testimony:

"The [trier of fact] was not required to accept the testimony of the sole witness simply because it was uncontradicted, unimpeached and unchallenged. The trier of fact always has the duty, in the first instance, to weigh the evidence presented and has the right to accept or reject it." *Ace Steel Baling Inc. v. Porterfield*, 19 Ohio St. 2d 137, 138 (1969). The trial court in this case specifically found that there "was no description of actual driving that was observed." By reversing that finding, the majority has turned on its head the Supreme Court's statement in *Burnside* that the trial court is 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, at ¶8 (citing *State v. Mills*, 62 Ohio St. 3d 357, 366 (1992)).

{¶18} There is no way to tell from the record before us why the trial court did not believe Officer Gilbert's testimony. All we can tell is that it did not. Not having been there to view the witness's demeanor or hear the testimony as it was given, I am unwilling to hold that the trial court had no choice but to believe everything Officer Gilbert said.

{¶19} As noted by the majority, however, "the law applied [by the trial court] does not respond to the argument set forth in defendant's motion." I concur in remanding this matter, therefore, to allow the trial court to, in the first instance, apply the correct law.

APPEARANCES:

CHERI CUNNINGHAM, Director of Law, DOUGLAS J. POWLEY, Chief City Prosecutor, and, JEREMY A. VEILLETTE, Assistant City Prosecutor, for Appellant.

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