[Cite as *State v. Gorden*, 2015-Ohio-2133.]

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

STATE OF OHIO	C.A. No. 27420
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JAMES GORDEN	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CR 13 11 3276

DECISION AND JOURNAL ENTRY

Dated: June 3, 2015

HENSAL, Judge.

{¶1} The State of Ohio appeals an order of the Summit County Court of Common Pleas that granted James Gorden's motion to suppress. For the following reasons, this Court affirms.

I.

{¶2} Around 1:00 a.m. on November 22, 2013, Barberton police officers Michael Cope and Herbert Shields responded to a complaint of loud music coming from a second-floor apartment. As they exited their cruiser near the location, the officers could already hear the music. They climbed the stairs to the apartment, and Officer Cope knocked loudly on the door. When Mr. Gorden answered, Officer Cope told him about the noise complaint. Mr. Gorden told the officers that his name was James, that the music was coming from a television, and that he would turn it down. Mr. Gorden closed the door, but the noise did not abate. After waiting three minutes, Officer Cope knocked on the door again. When Mr. Gorden answered, Officer Cope

told him that he was going to issue him a citation for violating the city's noise ordinance and requested his identification. Mr. Gorden did not comply with the officer's request. Instead, he repeated that he would turn the music down and attempted to close the door. Officer Cope stopped him by putting his foot in the doorway, and he demanded Mr. Gorden's identification again. A struggle over the door ensued with the officers eventually subduing Mr. Gorden and arresting him.

{¶3} The Grand Jury indicted Mr. Gorden for having weapons under disability, resisting arrest, disorderly conduct, and obstructing official business. Mr. Gorden moved to suppress the evidence against him, arguing that the officers violated his Fourth Amendment rights by entering his home without a warrant or exigent circumstances. Following a hearing, the trial court granted his motion, concluding that "none of the exceptions to the warrant requirement existed at the time that [Officer Cope] put his foot in the door or at the time of the ensuing struggle with [Mr. Gorden] over the door." The court noted that Officer Cope testified that he only intended to issue Mr. Gorden a citation for the noise offense, that he did not have the intention to arrest Mr. Gorden, and that he and Officer Shields were not in fear for their safety. In addition, the court found that, given the rapid series of events and the level of noise coming from the television, Officer Cope was unable to effectively convey to Mr. Gorden that he intended to issue Mr. Gorden a citation. The State has appealed the trial court's ruling, arguing that the court incorrectly granted the motion to suppress.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS.

{¶4} The State argues that the trial court erred when it granted the suppression motion. 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. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. 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.

(Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶5} The State argues that the trial court incorrectly found that Officer Cope did not effectively convey his intention to issue a citation to Mr. Gorden, noting that Mr. Gorden heard the officer the first time he answered the door. It also notes that Mr. Gorden replied to Officer Cope after he answered the door a second time, suggesting that he heard the officer inform him about the citation. According to the State, there is no evidence in the record that undermined Officer Cope's credibility about whether he communicated his intent to issue a citation to Mr. Gorden.

{¶6} "The mere fact that testimony is uncontroverted does not necessarily require [a court] to accept the evidence if [it] found that the testimony was not credible." *Bradley v. Cage*, 9th Dist. Summit No. 20713, 2002 WL 274638, *2 (Feb. 27, 2002). "The trier of facts 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). In this case, given the loud music coming from Mr. Gorden's apartment at the time of the conversation, we conclude that the trial court's finding was supported by the record. Indeed, the fact that Mr. Gorden's reply to Officer Cope's request for identification was unresponsive supports the trial court's finding that, in light of the noise, the officer was not "able to effectively convey his intent to issue a citation."

{¶7} Regarding whether Officer Cope was permitted to stick his foot in Mr. Gorden's door to prevent him from closing it, the United States Supreme Court has explained that "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*, 407 U.S. 297, 313 (1972). "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980).

{¶8} "[T]his Court has recognized several exceptions to the warrant requirement that justify a police officer's warrantless entry of a home." *State v. Cummings*, 9th Dist. Summit No. 20609, 2002 WL 57979, *4 (Jan. 16, 2002). "The first exception is an 'emergency situation,' which arises when someone in the home is in need of 'immediate aid' or there exists a situation 'threatening life or limb.'" *Id*., quoting *State v. Bowe*, 52 Ohio App.3d 112, 113-114 (9th Dist.1988). "The second exception is a search incident to a lawful arrest." *Id*. "The third exception is when the police are in 'hot pursuit' of a suspect who retreats into the confines of his home. *Id*., quoting *Bowe* at 113. "The fourth exception is for evidence that might easily be removed or destroyed if entry is delayed to obtain a warrant." *Id*. "In addition, a person may give police consent to conduct a search." *State v. Carrigan*, 9th Dist. Summit No. 21612, 2004-Ohio-827, ¶ 10. The "overarching principle" is that, "if there is a 'compelling need for official action and no time to secure a warrant,' the warrant requirement may be excused." *Missouri v. McNeely*, __ U.S. __, 133 S. Ct. 1552, 1570 (2013), quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

{¶9} The United States Supreme Court has cautioned that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the [intrusion] is being made." *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984). "[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense * * * has been committed." *Id*. Officer Cope testified that a violation of the Barberton noise ordinance is a misdemeanor of the fourth degree.

{¶10} The State has not specifically identified what exigency justified Officer Cope's physical intrusion across the threshold of Mr. Gorden's home. While the cases it has cited suggests it is making a "hot pursuit" argument, the record does not establish that exigency. Under the doctrine of "hot pursuit," "a suspect may not defeat an arrest which has been set in motion in a public place * * * by the expedient of escaping to a private place." *United States v. Santana*, 427 U.S. 38, 43 (1976). Although the doorway of a home may constitute a public place, there was no testimony or other evidence presented at the suppression hearing that Mr. Gorden stood in the doorway of his apartment when he answered the door to the officers. *Id*. at 40.

{¶11} Upon review of the record, we conclude that, even if Mr. Gorden obstructed official business by refusing to provide his identity when Officer Cope attempted to cite him for violating the noise ordinance, the State has not established that it had a compelling need to enter Mr. Gorden's apartment without a warrant. Accordingly, we conclude that the trial court correctly suppressed any evidence that it collected after Officer Cope "placed his foot in the doorway[.]" The State's assignment of error is overruled.

III.

{¶12} The trial court correctly granted Mr. Gorden's motion to suppress. 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

MOORE, J.
CONCURS.

CARR, J.
DISSENTING.

{¶13} I respectfully dissent.

{¶14} Officer Cope testified that, notwithstanding the loud music, he and Gorden engaged in conversation. In addition, Officer Cope testified that when Gorden opened the door the second time, the officer told Gorden repeatedly that he needed to see his identification because the officer intended to issue a noise citation. Gorden did not testify at the suppression hearing and, thus, did not present any evidence that he did not hear the officer state his intent to issue a citation.

{¶15} I agree with the majority's statement of law that "[t]he mere fact that testimony is uncontroverted does not necessarily require the [trier of fact] to accept the evidence if [it] found that the testimony was not credible." *Bradley v. Cage*, 9th Dist. Summit No. 20713, 2002 WL 274638, *2 (Feb. 27, 2002). In this case, however, the trial court asserted on the record: "I'm certainly not indicating that I do not believe Officer Cope * * *." Accordingly, the trial court did not find that the officer's testimony was not credible. Moreover, the trial court had no evidence by way of Gorden's testimony that he did not hear the officer assert his intention to issue a citation. Nevertheless, even though it found the officer to be credible and had no contradictory evidence, the trial court wrote that it was "not convinced * * * that the officer was able to effectively convey his intent to issue a citation." Because the trial court found Officer Cope to be a credible witness, I would reverse and remand the matter for the trial court to consider the motion to suppress in light of its credibility finding.

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellant.

JENNIFER A. CUNDIFF, Attorney at Law, for Appellee.