

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2014-A-0010
TERRY W. LOWE,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula County Court, Eastern District, Case No. 2013 CRB 456.

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

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the state of Ohio, appeals the judgment of the Ashtabula County Court, Eastern District, granting the motion to suppress evidence filed by appellee, Terry W. Lowe. At issue is whether the arrest of appellee’s son without a warrant was legally authorized. For the reasons that follow, we affirm.

{¶2} On August 30, 2013, appellee, Terry W. Lowe, was charged with resisting arrest, in violation of R.C. 2921.33(A), a misdemeanor of the second degree. Appellee

pled not guilty and filed a motion to suppress all evidence obtained during the arrest of his son, Jason Lowe. A suppression hearing was held on the motion.

{¶3} Deputy Steven Murphy of the Ashtabula County Sheriff's Office testified that on August 17, 2013, at about 11:50 p.m., he was dispatched to the home of Jena Solarek on Stanhope-Kelloggsville Road in Andover Township on a call of an assault in progress.

{¶4} On arrival, Deputy Murphy interviewed Ms. Solarek. She reported that Jason Lowe came to her house to visit. She said he started "running his mouth" because he was drunk. As a result, she asked him to leave and he did. A short time later he returned and started banging on the door. He kicked the door in and entered her house. She grabbed her cell phone and started calling 911, but Jason took it from her and broke it. He then punched her in the face. He also grabbed her by the hair and pulled a large clump of hair from her scalp.

{¶5} Deputy Murphy observed injuries to Ms. Solarek's face and head. Her right eye was swollen and starting to turn black and blue. A large amount of hair was missing from her head. The deputy believed her injuries may have been serious enough to warrant a charge of felonious assault. He also believed Jason's conduct in grabbing Ms. Solarek's cell phone from her and breaking it possibly warranted a felony charge of disrupting public services.

{¶6} Deputy Murphy located Jason's address and decided to arrest him. The deputy believed he had exigent circumstances because, prior to assaulting Ms. Solarek, Jason had been at her house, left, and then returned and assaulted her. Further, during

Deputy Murphy's investigation, Jason sent a message via Facebook, which read, "Ha Ha, you can't f _ _ _ with me."

{¶7} Ms. Solarek reported that when Jason last left her home, he was driving in the opposite direction from his residence. As a result, Deputy Murphy requested assistance of the Andover Township Police. The deputy and Andover Police officers patrolled the area and went to several area bars looking for him.

{¶8} Unable to locate Jason, Deputy Murphy went to his residence on Root Road in Monroe Township two hours after initially arriving at Ms. Solarek's residence. Upon arrival at Jason's house at about 1:50 a.m. on August 18, 2013, Deputy Murphy drove up the driveway and located the main entrance of the house, which was an enclosed porch at the rear of the house. He put his spotlight on the porch and saw a male walking by the window. The deputy exited his cruiser and approached the house to make contact with the male.

{¶9} Deputy Murphy knocked on the rear door and the male came to the door. Deputy Murphy recognized him as Jason Lowe from his BMV photo. At that time, the deputy was standing at the bottom of three stairs leading to the back porch. Jason turned on an outside light by the porch, opened the door, and came outside. He walked onto the top step and asked the deputy, "what the f _ _ _ [are you] doing there," and said, "get the f _ _ _ out of here."

{¶10} Deputy Murphy told Jason he was under arrest and to come out of the house. He did not comply, but rather again told the deputy to "get the f _ _ _ out of here," went inside the house, and locked the door. Deputy Murphy called for backup. At that time he saw Jason on the porch dancing in the window and giving him the finger.

{¶11} Deputy Murphy banged on the door and shined his flashlight inside. Suddenly, Jason's father, appellee, Terry W. Lowe, came to the door. He asked the deputy to tell him why he was on their property. Deputy Murphy said he was from the Sheriff's Office and told him about Ms. Solarek's report. The deputy told appellee he needed him to help get his son outside so he could arrest him.

{¶12} Appellee agreed to assist the deputy. He went back into the house, but left the porch door open. As appellee walked to the door leading into the house, Deputy Murphy walked in behind him and waited on the porch. Appellee also left the door leading into the house open.

{¶13} From his vantage point on the porch, Deputy Murphy saw Jason in the living room. Appellee tried to get Jason to come outside and talk to Deputy Murphy. While they were talking, Glenda Lowe, appellee's wife and Jason's mother, walked into the living room. Deputy Murphy felt that if he went in the house to arrest Jason, it might escalate the situation and be dangerous for his parents so he waited on the porch. After appellee talked to his son, the situation changed, and appellee, Glenda, and Jason started yelling across the living room, telling Deputy Murphy to leave.

{¶14} Deputy Murphy said he was not leaving and that Jason was coming with him because he was under arrest. Jason then started to come toward Deputy Murphy, who was still on the porch. Jason clenched his fist and took an aggressive posture toward the deputy. Jason tried to slam the door on the deputy, but he blocked it with his foot. The deputy tried to grab him, but was unsuccessful.

{¶15} Deputy Murphy then deployed his taser on Jason. At that time Deputy Murphy was still on the porch and Jason was in the doorway leading to the porch. As a

result of Jason being tased, he became stiff and Deputy Murphy assisted him to the ground. Appellee and Glenda then got behind Deputy Murphy and started pulling him off their son while the deputy was trying to handcuff him. After a few seconds, Deputy Murphy took his cuffs out and handcuffed Jason.

{¶16} Appellee testified on his own behalf. He said his son Jason lives with him and his wife Glenda. He said he was awakened by loud voices coming from the rear of the house. He said that when he went to the outside door, Deputy Murphy identified himself as a Sheriff's deputy and, in response to his request for information, the deputy told him that his son was under arrest for assaulting a girl.

{¶17} Contrary to Deputy Murphy's testimony, appellee said he told the deputy to wait outside while he talked to his son to see what was going on. Appellee said he went in the outside door, closed it, walked in the porch, opened the door leading into the house, walked in the house, and then closed that door as well.

{¶18} Appellee said that when he went in the living room, Jason was at the top of the stairs. Appellee said he got Jason to agree to go outside to talk to the deputy. Appellee said that while all three of the Lowes were about to go outside to talk to the deputy, Deputy Murphy opened the door and tased his son in the kitchen. He said the deputy jumped on his son, rolled him over, grabbed him, and dragged him onto the back porch. He said the deputy handcuffed his son behind his back while he was face down. He picked Jason up by his handcuffs and dragged him out of the house to his cruiser.

{¶19} Following the presentation of the evidence, the trial court entered judgment granting appellee's motion to suppress. The court found that the evidence

was insufficient to support a finding of exigent circumstances or hot pursuit. As a result, the court suppressed all evidence resulting from Jason's arrest.

{¶20} The state appeals, asserting two assignments of error. Because they are interrelated, they are considered together. They allege:

{¶21} “[1.] The trial court's decision to grant the Appellee's motion to suppress was not supported by the facts or the law.

{¶22} “[2] The trial court erred when it granted the Defendant-Appellee's Motion to Suppress.”

{¶23} Before addressing the merits of the state's case, we note that R.C. 2921.33(A), resisting arrest, provides: “No person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another.” It is well settled that a “lawful arrest” is an essential element of resisting arrest under R.C. 2921.33(A). *State v. Lamm*, 80 Ohio App.3d 510, 515 (4th Dist.1992). By challenging his son's arrest, appellee sought to establish the arrest was illegal to avoid his own conviction for resisting arrest.

{¶24} In its appeal, the state argues the trial court erred in granting appellee's motion to suppress because Jason's warrantless arrest was justified under several legal theories. First, the state argues Jason Lowe's arrest was warranted under the hot pursuit doctrine.

{¶25} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. During a hearing on a motion to suppress evidence, the trial court acts as the trier of fact and, as such, is authorized to resolve factual questions and

assess the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). An appellate court reviewing a ruling on a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger*, 86 Ohio App.3d 592, 594 (4th Dist.1993). Accepting these facts as true, the appellate court independently determines, as a matter of law, without deference to the trial court's conclusion, whether the facts meet the applicable legal standard. *State v. Djisheff*, 11th Dist. Trumbull No. 2005-T-0001, 2006-Ohio-6201, ¶19.

{¶26} The Fourth Amendment of the United States Constitution 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, and no Warrants shall issue, but upon probable cause * * *.”

{¶27} “It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” *Payton v. New York*, 445 U.S. 573, 586 (1980), quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477-478 (1971). The United States Supreme Court has held that “in terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.” *Id.* at 590. “Generally, a warrantless search or seizure in a private home is per se unreasonable in the absence of exigent circumstances.” *Willoughby v. Dunham*, 11th Dist. Lake No. 2010-L-068, 2011-Ohio-2586, ¶24, citing *Payton, supra*, at 590.

{¶28} “The exigent circumstances doctrine requires * * * probable cause plus exigent circumstances * * * to effectuate a warrantless entry of a home.” *State v. Campbell*, 11th Dist. Ashtabula No. 2013-A-0035, 2013-Ohio-5823, ¶28, quoting *State*

v. Pape, 11th Dist. Ashtabula No. 2004-A-0044, 2005-Ohio-4657, ¶19, citing *Kirk v. Louisiana*, 536 U.S. 635, 637 (2002). Thus, even if the state establishes that probable cause to search the premises exists, “no amount of probable cause can justify a warrantless search or seizure absent ‘exigent circumstances.’” *Coolidge, supra*, at 468. “The burden is on the government to demonstrate exigent circumstances that overcome” the presumption of unreasonableness for warrantless home searches. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

{¶29} The United States Supreme Court has held that the hot pursuit of a fleeing suspect is among the recognized situations in which exigent circumstances exist. *Warden v. Hayden*, 387 U.S. 294, 298-299 (1967). Nine years later, the Supreme Court in *United States v. Santana*, 427 U.S. 38, 42-43 (1976), held that “hot pursuit means some sort of chase.” Eight years after *Santana*, the Supreme Court further refined the meaning of “hot pursuit” in *Welsh, supra*. In *Welsh*, the Court held that the arresting officers were *not* in hot pursuit of the suspect where the officers arrived at the scene after the suspect had left and then proceeded to arrest him at his home. *Id.* at 753. The Supreme Court held “the claim of hot pursuit is unconvincing [where] there was no immediate or continuous pursuit of the [suspect] from the scene of a crime.” *Id.* Further, the Eleventh Circuit held there was no immediate or continuous pursuit of the defendant, i.e., hot pursuit, where the officers paused their pursuit and directed their attention elsewhere by, inter alia, radioing for back-up and sending a neighbor into the house to try and convince the defendant to come outside; and approaching the house and confronting the defendant only after the neighbor’s efforts failed. *Hazleton v. Trinidad*, 488 Fed.Appx. 349, 352 (11th Cir.2012). Moreover, “a call for backup and the

wait that ensue[s] terminate[s] any ‘hot pursuit.’” *State v. Hellriegel*, 9th Dist. Summit No. 22929, 2006-Ohio-3335, ¶21 (J. Moore, Concurring).

{¶30} Based on the oral and written statements provided by Ms. Solarek, Deputy Murphy had reasonably reliable information that Jason committed an assault/felonious assault and disrupting public services, a felony. Thus, the trial court’s finding that Deputy Murphy had probable cause to arrest Jason for offenses of violence was supported by the record.

{¶31} However, the record shows that Deputy Murphy paused his pursuit and directed his attention elsewhere on several occasions over an extended period of time. Before initiating Jason’s arrest, Deputy Murphy decided to look for him in the general area and in neighboring bars because Ms. Solarek said she had last seen him driving in a direction opposite to where he lived. However, nothing in the record suggests the deputy had any idea where Jason may have gone or what the scope of the search was going to be. Then, before attempting this search for Jason, the deputy called the Andover Police Department for assistance in locating him. Officers from that department then met with Deputy Murphy and they all searched the area. The state has not offered any idea as to the amount of time occasioned by these delays, despite its burden to show the existence of exigent circumstances. However, in light of the fact that the deputy did not show up at the Lowe residence until two hours after the initial call, the amount of time appears to have been substantial. Next, after Jason retreated into the house and locked the door, Deputy Murphy called for backup, although the record does not indicate that such backup ever arrived. Thereafter, Deputy Murphy asked Jason’s father to assist him by bringing Jason outside so he could arrest him.

Deputy Murphy decided not to enter the house and arrest Jason for fear of escalating the situation. After appellee's efforts to bring Jason outside failed and Jason tried to close the door on Deputy Murphy, he tased and apprehended Jason. This evidence supported a finding that there was no immediate or continuous pursuit of Jason from the time Deputy Murphy had probable cause and thus no hot pursuit.

{¶32} The state next argues that Jason's warrantless arrest was authorized under *Santana, supra*, because the arrest was initiated in a public place (the porch) and thwarted when Jason retreated into his home, a private place.

{¶33} It is undisputed that Jason was outside his home when Deputy Murphy initiated his arrest. Further, the trial court found that Deputy Murphy entered the porch without consent. This finding was supported by Deputy Murphy's testimony that appellee did not give him consent or invite him to enter the porch. Moreover, the trial court found that the porch was an integral part of the residence. The latter finding was supported by Deputy Murphy's testimony that the porch was completely enclosed; that it had windows and a lock on the door; and that when Jason retreated into the house, he locked the porch door.

{¶34} The state argues that under *Santana, supra*, "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." *Id.* at 43. However, *Santana* does not stand for the proposition that any time officers first identify a suspect in a public place, they thereafter have permission to enter the suspect's home. Instead, *Santana* relies on there having been "some sort of chase," i.e., a hot pursuit. *Id.* at 42-43. *Santana* simply held, "[t]he fact

that the pursuit * * * ended almost as soon as it began did not render it any less a 'hot pursuit' sufficient to justify the warrantless entry * * *." *Id.*

{¶35} Although Jason's arrest was initiated in a public area (on the steps outside the house) and completed in a private area (the porch), because there was no hot pursuit, we hold the trial court did not err in finding that Jason's arrest was not lawful.

{¶36} It is noteworthy that the state does *not* argue on appeal that exigent circumstances existed based on a need to prevent serious injury to Deputy Murphy or Ms. Solarek. Rather, the state confines its argument regarding exigent circumstances to the hot pursuit doctrine.

{¶37} Next, the state argues that Deputy Murphy was authorized to arrest Jason without a warrant pursuant to R.C. 2935.04. That section provides: "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

{¶38} However, this court has held that the Fourth Amendment requires a stricter standard than that provided by R.C. 2935.04 when a felony arrest is to occur in the accused's home. *State v. Vitanza*, 11th Dist. Lake No. 91-L-053, 1992 Ohio App. LEXIS 1553, *7-*8 (Mar. 27, 1992), citing *Steagald v. United States*, 451 U.S. 204, 212 (1981). In *Vitanza*, this court held that in order to effectuate a warrantless arrest in the accused's home, the police must have exigent circumstances. *Id.*, citing *Payton, supra*, and *Steagald, supra*. Since there was no hot pursuit and thus no exigent circumstances supporting Jason's warrantless arrest, the arrest was not warranted by R.C. 2935.04.

{¶39} We therefore hold the trial court did not err in granting appellee's motion to suppress.

{¶40} For the reasons stated in the opinion of this court, appellant's assignments of error are overruled. It is the order and judgment of this court that the judgment of the Ashtabula County Court, Eastern District, is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.