NO. 08-1108

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR GEAUGA COUNTY, OHIO
NO. 2007-G-2797

TOWNSHIP OF BAINBRIDGE,

Plaintiff-Appellee

-vs-

NOREEN T. KASEDA,

Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION

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SUPREME COURT OF OHIO

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PROPOSITION OF LAW: THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 14, ARTICLE 1 OF THE OHIO CONSTITUTION DO NOT SUPPORT A HOLDING THAT "STEPPING ASIDE" AND FAILING TO VERBALLY OBJECT OR PHYSICALLY ATTEMPT TO PREVENT POLICE OFFICERS FROM ENTERING A RESIDENTIAL DWELLING CONSTITUTES GROUNDS TO FIND EXPRESS OR IMPLIED CONSENT TO ENTER THE RESIDENCE WITHOUT A WARRANT. 9

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Township of Bainbridge v. Kaseda, Geauga County App. No. 2007-G-2797

I. EXPLANATION OF WHY THIS MISDEMEANOR CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

Defendant-Appellant respectfully submits that it is a fundamental principal of constitutional law that a citizen is protected from unlawful and warrantless intrusion into his/her residence by law enforcement officials. A pointed and succinct statement of the importance of the sole issue on appeal in this case can be found in the following quotation:

> **Freedom from indiscriminate searches and seizures is protected by the Fourth Amendment to the United States Constitution, which guarantees "*** the right of the people to be secure in their *** houses *** against unreasonable searches and seizures ***. The amendment further provides that "no Warrants shall issue, but upon probable cause *** Invasion of the sanctity of the home has thus been recognized as *** 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, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752, 764 (1972).**

In the present case police officers from the Township of Bainbridge did exactly what the Fourth Amendment applies to; they effected an intrusion into the Kaseda home without a warrant and began to pepper Noreen Kaseda with questions. (i.e. conversation/interrogation). There is no greater place where Mr. and Mrs. Kaseda held an expectation and right of privacy than inside of their home. The historical interpretation of the amendment by our Country's judiciary established that there exists a presumption of unreasonableness that attaches to all warrantless home entries. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). It is upon the government that the burden is placed to demonstrate the existence of probable cause, which is necessary for all arrests, and also exigent circumstances. Payton and Welsh, supra.

In the present case the Officers did not demand entry into the home. They didn't bother. They didn't even ask. They just walked on in. Officer Chickos testified that he told Mr. Kaseda...."*I asked him if Noreen was at the house – I needed to speak with her*". The State argued, and the Eleventh District Court of Appeals has held, that Mr. Kaseda consented by remaining silent, not verbally objecting and not taking any physical action to try and prevent the officers from entering. The Eleventh District has held that Mr. Kaseda's act of stepping aside as the officers stepped in was the equivalent of "consent" to enter. In fact, the Eleventh District specifically sites to State v. Robinson, 103 Ohio App.3d 490, 205 N.E.2d 388 (1995), where the defendant actively tried to close the door on the officers.

The burden of proving consent lies with the prosecution and must be made with clear and convincing evidence that the consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); State v. Comen, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990). A mere failure to resist will not turn into a valid consent when the claim of authority upon which the search originally rested fails to pass muster. Bender v. Addams, 28 Ohio App.75, 162 N.E.2d 604 (8th Dist. Cuyahoga County 1928). Furthermore, the Ohio Supreme Court has stated that the focus must be on the behavior of the police (not the homeowner) and the effect that behavior had upon the alleged consenting party. A "submission to authority" does not equate to an understanding and intentional waiver of one's constitutional right. City of Lakewood v. Smith, 1 Ohio St.2d 128, 205 N.E.2d 388 (1965). Mere acquiescence does not equate to consent. State v. Zax-Harris, 166 Ohio App.3d. 501, 506-507, 851 N.E.2d 539 (2006). Coercion is also a consideration that has caused courts to strike down an alleged consent

search. U.S. v. Worley, 193 F.3d 380, 388 (6th Cir. 1999). In addition, an individual who actively resists overt police conduct of coming into a home does so at great risk of being charged and convicted of a crime (obstruction of official business, or worse) if they turn out to be wrong and do not have a valid objection to the home entry. See, State v. Earl W. May, Jr., 2007 Ohio 1428 (Ohio App. March 23, 2007). The failure of Mr. Kaseda to engage in exactly that type of action towards the police is precisely the fact that the Eleventh District relies upon to find "consent" on his part. In the present case, the Eleventh District's conclusion that Mr. Kaseda consented is unsupported by constitutional law or case decision and is directly contrary to current American and Ohio law. Nor is the Eleventh District's reliance upon State v. Asworth, unreported, 10th Dist. No. 90 AP-916 (1991) (citing United States v. Turbyfill, 525 F.2d 57, 59 (C.A.8, 1975)) a proper comparison to turn Mr. Kaseda's movement aside into an invitation and consent to enter, as is discussion later in the Law and Argument portion of the Memorandum.

Appellant respectfully submits that as a result of this appellate decision, the expectation of privacy by citizens in their own homes and the questions of (1) what verbal or physical act is required to prevent the granting of consent to the police to enter a residence without a warrant and (2) what action or inaction by a homeowner will properly be interpreted as permission to enter the residence, have been significantly muddied. Although other appellate districts have not required objective verbal or physical action by the homeowner to indicate "non-consent" or "objection" to a warrantless entry, the Eleventh District has now set a standard conflicting with other Districts as well as with the Ohio Supreme Court. Defendant-Appellant respectfully submits that this is an issue of substantial constitutional question and an issue of great public concern that is worthy of

clarification by the Ohio Supreme Court. Citizens of the State of Ohio will be well served if this Honorable Court clarifies what does or does not constitute and invitation and/or their consent for the police to enter their homes without a warrant.

Appellant respectfully submits that this Honorable Court should determine that this case is appropriate for review and accept jurisdiction to hear this case on its merits.

II. STATEMENT OF CASE AND RELEVANT FACTS

On January 13, 2007, Appellant Noreen T. Kaseda was charged by the Bainbridge Township Police in the Chardon Municipal Court with one (1) count of OMVI in violation of ORC. 4511.19(A)(1)(a), one (1) count of OMVI in violation of ORC. 4511.19(A)(1)(b), and one (1) count of Failure to Stop after Accident in violation of ORC 4549.03. At her arraignment on January 17, 2007, the Appellant entered a plea of Not Guilty. Appellant subsequently filed several motions to suppress and the trial court conducted an oral Hearing on those motions on April 10, 2007. As a result of that Hearing, and the submission of post hearing briefs by counsel for Appellant and Appellee the trial court journalized a decision on June 27, 2007 overruling Appellant's motions to suppress as they pertained to evidence obtained as a result of the police officers' warrantless entry into Appellant's home, including subsequent oral and written statements, field sobriety tests, BAC test, and all other evidence pertaining to the issue of Appellant's charges. The trial court granted Appellant's motion to suppress as it pertained to photographs taken by the police as a result of a warrantless entry into Appellant's garage. Subsequent to the trial court's decision and on August 14, 2007, Appellant entered a plea of "no contest" to the charge of OMVI in violation of ORC.

4511.19(A)(1)(a), and the remaining counts were dismissed. The trial court also issued a stay of execution of sentence pending appeal on that same date.

Appellant filed her Notice of Appeal on August 28, 2007, and prosecuted an appeal from the trial court's decision to overrule Appellant's motions to suppress and the finding of guilt following her no contest plea. Oral arguments were heard on April 8, 2008. On May 5, 2008, the Eleventh District Court of Appeals filed its Decision affirming the trial court's denial of the motion to suppress. Specifically, the Court of Appeals affirmed the trial court's determination that the Husband of the Defendant-Appellant had consented to the entry by police into the home. **(See Opinion, attached at Appendix 1).**

Defendant-Appellant Noreen T. Kaseda now seeks review of the Eleventh District's decision on the issue of "consent" to a warrantless search of her residence by police officers.

On January 13, 2007, at approximately 1:15 a.m., Appellant, Noreen T. Kaseda was subjected to an unlawful arrest and entry into her home and property by law enforcement officers, in violation of the rights guaranteed the Appellant by the Fourth Amendment of the United States Constitution, and Article I, Section 14 of the Ohio Constitution. Appellant's rights were violated because the law enforcement officers did not have probable cause to make a warrantless entry into her home where she was present, to arrest her, question her, and obtain evidence therefrom, without a warrant. As a part of their actions that morning, the law enforcement officers also made an illegal warrantless entry and search of her garage located and attached to the same premises. Neither Appellant nor her husband consented to the entry by police into their home.

On January 13, 2007, at approximately 12:53 a.m., Bainbridge Township Police received a dispatch call to assist a Chagrin Falls Officer who was investigating a reported hit-skip accident in the parking lot of a bar/restaurant known as the Greenville Tavern. After speaking with several individuals and running Appellant's name into their system, the Bainbridge Police located an address for the Appellant on Pine Street. The officers proceeded to drive to that address at approximately 1:15.a.m. At this moment in time the police were only investigating a report of a hit-skip accident and had been given no information regarding any claim that the driver of the alleged hit-skip vehicle was OVI or had even been drinking that evening.

Officers Chickos and Weiscoff walked up to the front door and knocked. In response, Mario Kaseda, the Appellant's husband, answered the door by opening the inside solid door. There was also an outside screen door. The screen door had been opened by Officer Chickos (his testimony was that he opened it so he could knock on the inside door) and, when Mr. Kaseda opened the door they asked him "*if Noreen was at the house – I needed to speak to her*" <u>and proceeded to walk into the home</u>. When Officer Chickos made this statement to Mr. Kaseda, Mrs. Kaseda came out of the bedroom behind Mr. Kaseda as Officer Chickos was finishing his statement. Mrs. Kaseda had been in bed, inside the bedroom, and was not at the door with Mr. Kaseda when the police first arrived. At this moment in time the police <u>did not do any of the following</u> : **(1)** ask Mr. Kaseda's permission to come inside, **(2)** indicate to Mr. Kaseda that they had a warrant or could try and get one if he did not allow them to enter, **(3)** indicate to Mr. Kaseda that he had a right not to let them come inside, **(4)** indicate to Mr. Kaseda <u>why</u> they wanted to know if Noreen was home, talk to her, or <u>why</u> they wanted to come inside, **(5)** ask Mrs.

Kaseda if they could come inside, (6) indicate to either Mr. or Mrs. Kaseda that they were coming into the house without a warrant for any reason other than to search for Mrs. Kaseda and question her.

The police have justified their entry into the Kaseda home without any express permission on the grounds that "...it was January; it was raining, to be able to speak with her in a more comfortable manner, essentially."

At the point in time that the officers walked into the house and Mrs. Kaseda walked out of the bedroom, Officer Chickos proceeded to question her about the Greenville Tavern incident. He did not read her the Miranda Warnings at this time. Officer Chickos alleges that Mrs. Kaseda made incriminating statements regarding the hit-skip in response to his interrogation. Officer Chickos' continued interrogation then included questions about whether Mrs. Kaseda had been drinking. In response to these alleged statements Officer Chickos then informed Mrs. Kaseda that she had to go with them to the Bainbridge Police Department. She was not given a choice and this amounted to an arrest, if one had not already occurred. Mrs. Kaseda, dressed in her nightclothes, went back into the bedroom with Mr. Kaseda to get dressed. As Mrs. Kaseda was changing and was in a state of partial undress with a tank top and only her underwear on, the officers opened the bedroom door and entered without warning or permission. Mrs. Kaseda was quite embarrassed by this.

Mrs. Kaseda was handcuffed and taken outside. While outside she was mirandized for the first time, placed in a patrol car, and taken to the Bainbridge Police Department.

At the point in time where the police first stepped into the home, Mr. Kaseda did not verbally or physically interfere with what the officers were doing. He simply moved aside as they moved forward. He testified that he had not given them permission and did not wish to engage in any altercation with the police at 1:30 a.m. over what they were doing. The officers testified that they did not recall any specific invitation by Mr. Kaseda to come inside and acknowledge that they did not ask permission to come inside.

While Mrs. Kaseda was being transported, Officer Chris Smith proceeded to go into the garage that is attached to the home to take photographs of a vehicle at the instruction of Officer Chickos. The garage was attached to the home, but was secured by a closed door on the outside and a closed door on the inside of the house. The inside of the garage was not visible through any windows, cracks or other openings either from the outside of the house or from inside the home. Officer Smith testified that he informed Mr. Kaseda that he was going to go into the garage to photograph the vehicle and that Mr. Kaseda was at first apprehensive. He claims that Mr. Kaseda eventually let him enter after Officer Smith told him that *they would tow and impound the vehicle if he did not comply with the request*. In response to this threat, Mr. Kaseda relented. While inside the garage, Officer Smith took photographs of a vehicle.

Back at the police station, Officers Chickos and Smith continued to interrogate Mrs. Kaseda, requested that she perform field sobriety tests, and ultimately requested that she submit to a breath test. All of these interrogations, field sobriety tests and the ultimate breath test were administered as a direct result of the Officers' warrantless entry into the home and the interrogation that took place inside the home. It is also clear that the initial arrest of Mrs. Kaseda inside her home was only made as a result of the entry

and interrogation that followed. Without this warrantless entry, the police would have been left standing outside on the porch, at 1:15 a.m.; at a house wherein the occupants were in bed. Without any information at the time regarding any drinking by Mrs. Kaseda, the police were only in the middle of a misdemeanor investigation of a possible minor hit-skip car accident where alleged witnesses had already identified the driver. In this regard, there was no urgency in locating Mrs. Kaseda at 1:15 a.m.; they could have easily located her the next day. They could also have attempted to obtain a warrant with so little as a telephone call.

III. LAW AND ARGUMENT

A. PROPOSITION OF LAW: THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 14, ARTICLE 1 OF THE OHIO CONSTITUTION DO NOT SUPPORT A HOLDING THAT "STEPPING ASIDE" AND FAILING TO VERBALLY OBJECT OR PHYSICALLY ATTEMPT TO PREVENT POLICE OFFICERS FROM ENTERING A RESIDENTIAL DWELLING CONSTITUTES GROUNDS TO FIND EXPRESS OR IMPLIED CONSENT TO ENTER THE RESIDENCE WITHOUT A WARRANT.

The trial court and the Eleventh District have ignored basic case law regarding this important constitutional freedom. First and foremost, the burden of proving consent lies with the prosecution and must be made with clear and convincing evidence that the consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); State v. Comen, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990). A mere failure to resist will not turn into a valid consent when the claim of authority upon which the search originally rested fails to pass muster. Bender v. Addams, 28 Ohio App.75, 162 N.E.2d 604 (8th Dist. Cuyahoga County 1928). Furthermore, the Ohio Supreme Court has stated that the focus must be on the behavior of the police (not

the homeowner) and the effect that behavior had upon the alleged consenting party. A "submission to authority" does not equate to an understanding and intentional waiver of one's constitutional right. City of Lakewood v. Smith, 1 Ohio St.2d 128, 205 N.E.2d 388 (1965). Mere acquiescence does not equate to consent. State v. Zax-Harris, 166 Ohio App.3d. 501, 506-507, 851 N.E.2d 539 (2006). Coercion is also a consideration that has caused courts to strike down an alleged consent search. In U.S. v. Worley, 193 F.3d 380, 388 (6th Cir. 1999), the United States Court of Appeals held that a defendant who responded to a request for consent to search his belongings by stating "You've got the badge, I guess you can" had not consented and characterized the statement as an acquiescence to authority. In addition, an individual who actively resists overt police conduct of coming into a home does so at great risk of being charged and convicted of a crime (obstruction of official business, or worse) if they turn out to be wrong and do not have a valid objection to the home entry. See, State v. Earl W. May, Jr., 2007 Ohio 1428 (Ohio App. March 23, 2007). The failure of Mr. Kaseda to engage in active resistance to the police officers' forward movements is precisely the fact that the Eleventh District relies upon to find "consent" on his part. In the present case, the Eleventh District's conclusion that Mr. Kaseda consented through his failure to verbally object or physically interfere is unsupported by constitutional law or case decision and is directly contrary to current American and Ohio law.

In determining that Mr. Kaseda consented by remaining silent, not verbally objecting, not taking any physical action to try and prevent the officers from entering and stepping aside, the Eleventh District Court of Appeals cites to State v. Robinson, 103 Ohio App.3d 490, 205 N.E.2d 388 (1995), where the defendant actively tried to close the

door on the officers, and State v. Asworth, unreported, (Apr. 11, 1991), 10th Dist. No. 90 AP-916. The Eleventh District's reliance on Robinson and Asworth is misplaced. In Robinson, the action of the defendant in trying to close the door on the police was simply his method in that case of indicating that he was not consenting. There is nothing contained in that appellate court's opinion that purports to create a rule that some affirmative action is required to prevent consent from being granted. The Eleventh District's reliance upon State v. Asworth, unreported, 10th Dist. No. 90 AP-916 (1991) is also an improper factual comparison to turn Mr. Kaseda's movement aside into an invitation and consent to enter. The court in Asworth relied on a 1975 Court of Appeals decision from the 8th Federal Circuit, to wit: United States v. Turbyfill, 525 F.2d 57, 59 (C.A.8, 1975). In Turbyfill, the individual (Mr. Church) who "impliedly" consented to entry by law enforcement officers did so by opening an inside door and stepping back after the officers had only identified themselves, before they said anything else to him, and before the officers had even opened the outside screen door. The Court in Turbyfill held this to be an implied invitation to enter on the specific facts of that encounter. Mr. Church did not step back in response to "overt police conduct of coming into a home" (Worley, supra). This is different from the encounter that took place between the police officers and Mr. Kaseda. When Mr. Kaseda opened his inside solid door the police had already opened the screen door and simply stepped in after asking if Noreen was home. Mr. Church's action in opening the door and stepping back without any statements, movement or other overt actions by the officers could be viewed as an invitation to enter. Mr. Kaseda's door was already open and his action in stepping back was in direct response to the forward movement of the police and a reaction of non-confrontation and

non-resistance. The Eleventh District has erred and has created an improper example of what constitutes an invitation to the police to enter a residence.

IV. CONCLUSION

Defendant-Appellant respectfully requests that this Honorable Court exercise is discretionary power to grant jurisdiction and consider this appeal on its merits. Review by the Ohio Supreme Court in this case can serve to clarify that (1) homeowners who do not verbally object or physically impair the attempts by police to walk into their homes without a warrant do not impliedly invite or consent to a warrantless entry; (2) police bear the burden of making sure they have proper consent to enter a residence without a warrant absent recognized exigent circumstances or other recognized exceptions to the warrant requirement; and (3) police may not assume that an invitation to enter or consent to enter is made by a homeowner who chooses not to actively resist their warrentless entry and steps aside in direct response to the forward movement of the police. This is an important issue that is confronted by citizens and police officers alike on a regular basis throughout the State of Ohio. Clarification by the Ohio Supreme Court of exactly what a citizen must do to "consent" to an entry into the home, and exactly what police officers can rely upon as "consent" to enter a residence would serve the great interests of both sides and the public in general.

For all of these reasons, Defendant-Appellant respectfully requests that this Honorable Court accept this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served upon the following by Regular U.S. Mail, postage prepaid, on this 6th day of June 2008:

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APPENDIX

STATE OF OHIO)
)SS.
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

FILED
IN COURT OF APPEALS
MAY 05 2008
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

TOWNSHIP OF BAINBRIDGE,

Plaintiff-Appellee,

- vs -

NOREEN T. KASEDA,

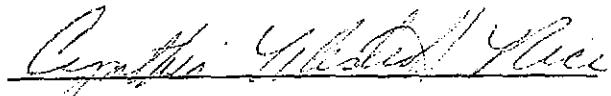
Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2007-G-2797

For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Chardon Municipal Court is affirmed.

Costs to be taxed against appellant.



JUDGE CYNTHIA WESTCOTT RICE
FOR THE COURT

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THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS
MAY 05 2008
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

TOWNSHIP OF BAINBRIDGE,	:	**OPINION**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2007-G-2797**
NOREEN T. KASEDA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Chardon Municipal Court, Case No. 2007 TRC 00378.

Judgment: Affirmed.

James M. Gillette, City of Chardon Police Prosecutor, National City Bank Building, 117 South Street, #208, Chardon, OH 44024 (For Plaintiff-Appellee).

Dennis N. LoConti, 700 Rockefeller Building, 614 West Superior Avenue, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Noreen T. Kaseda, appeals her conviction, following a no contest plea, in the Chardon Municipal Court, on one count of operating a motor vehicle under the influence of alcohol. At issue is whether the trial court erred in denying in part appellant's motions to suppress statements and other evidence against her as having been obtained in violation of her constitutional rights. For the reasons that follow, we affirm.

{¶2} On January 16, 2007, a citation was filed against appellant in the Chardon Municipal Court, charging her with operating a motor vehicle under the influence of alcohol, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(a), operating a motor vehicle with a prohibited blood alcohol level, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(b), and failure to stop after an accident, a misdemeanor of the first degree, in violation of R.C. 4549.03. On January 17, 2007, appellee entered a plea of not guilty at her arraignment. On March 2, 2007, appellant filed: (1) a "motion to suppress oral and written statements and evidence;" (2) a "motion to suppress arrest and all evidence that is fruit from the poisonous tree following from [sic] an illegal entry of the home;" and (3) a "motion to suppress and/or in limine" regarding: (a) field sobriety test results, (b) breathalyzer test results, (c) appellant's statements, and (d) police officers' observations regarding appellant's sobriety and the validity of field sobriety tests. On April 10, 2007, the trial court conducted a hearing on appellant's motions to suppress. The state filed its response to appellant's motions on May 25, 2007, after the suppression hearing was concluded.

{¶3} Bainbridge Township Police Officer Frank Chickos testified that on Saturday, January 13, 2007, at 12:53 a.m., he was dispatched to respond to a traffic crash at the Greenville Inn on Pine Street in Bainbridge Township near the border of Chagrin Falls Village. Upon arriving at the scene, Officer Chickos conferred with Chagrin Falls Police Officer Jason Weiskopf and two patrons of the bar whose vehicles had been damaged that evening by a hit-skip driver, one in the parking lot of the Greenville and the other on Pine Street.

{¶4} While the officers were on the scene, witnesses stated that appellant, a regular at the Greenville, may have been the driver of the vehicle that had crashed into these two vehicles. Officer Chickos called in appellant's name to his dispatcher in order to obtain her address. He was advised by dispatch of appellant's residence, which was down the street from the Greenville Inn.

{¶5} The officers drove to appellant's residence and arrived at 1:15 a.m. Officer Chickos knocked on the front door. At that time he and Officer Weiskopf heard a male and female arguing inside. Appellant's husband Mario Kaseda came to the front door and opened it. Officer Chickos asked him if appellant was at the house because they needed to talk to her. At that time appellant came out of the bedroom into the living room and identified herself to the officers. Officer Chickos told appellant he needed to talk to her about what happened at the Greenville Inn, and appellant's husband "stepped aside" to permit the two officers to enter the residence to question appellant. The officers then stepped into the entryway.

{¶6} Officer Chickos testified appellant was wearing a tank top and underwear. Her eyes were bloodshot and glassy. Her speech was slow and slurred. The officer asked about the argument they heard. Appellant said she and her husband were arguing about the crash. She said her husband was upset with her for crashing the vehicle.

{¶7} Officer Chickos asked appellant what had occurred at the Greenville. She said, "Yes, I know. I screwed up. I hit a couple, I hit a car in the parking lot." He then asked her why she left without stopping. She said, "I was afraid and then panicked and drove home." She said she had been driving at the time, and she realized she had

struck a car. Officer Chickos testified he could smell alcohol on the breath of both appellant and her husband. The officer asked appellant if she had been drinking and she said she had. He asked her when the crash had occurred, and she said it was 25 minutes prior to their arrival. She said she had not consumed any alcohol since the crash.

{¶8} Officer Chickos then told appellant she would need to go to the Bainbridge Township police station with him to talk further, and he asked her to get dressed. He said they would need to check her bedroom before she dressed to make sure there were no weapons within her reach. They checked her bedroom and left, and then appellant entered the bedroom to dress. The officers waited for appellant in the living room. While they were waiting, Bainbridge Township Police Officer Chris Smith arrived to provide assistance.

{¶9} Appellant came into the living room when she was done dressing, and Officer Chickos told her she was under arrest for leaving the scene of a traffic crash. He then handcuffed her, searched her for weapons, and advised her of her *Miranda* rights. Officer Chickos put appellant in his cruiser and transported her to the police station. Before leaving, Officer Chickos asked Officer Smith to photograph appellant's vehicle which was parked in the garage.

{¶10} Officer Smith testified he told appellant's husband that he needed to photograph their vehicle as part of the ongoing investigation of the accident. The garage door was down at that time. Officer Smith testified that at first, Mr. Kaseda was hesitant. The officer told him the vehicle could either be towed and impounded at his cost, or they could photograph it with the vehicle in the garage. In response, appellant

said, "okay, go ahead and do it." The garage door was then opened, and Officer Smith took photographs of the vehicle in the garage. The officer testified there was damage to the front left quarter panel.

{¶11} After appellant was booked, Officer Chickos conducted three field sobriety tests, and, based on the results of these tests, he determined appellant was impaired. He then read appellant her *Miranda* rights and she signed a written form acknowledging she understood and was waiving those rights.

{¶12} Appellant then agreed to take the breathalyzer test. It was administered by Officer Smith at 2:20 a.m., who had returned to the station after photographing appellant's vehicle. The breathalyzer indicated appellant had a blood alcohol concentration of .192.

{¶13} Officer Smith then interviewed appellant at 2:40 a.m. She said she had been driving; that she had crashed into a car; and then panicked and left at 12:30 a.m.

{¶14} Mario Kaseda testified on behalf of his wife, and provided a different version of events. He said when the officers knocked at the front door, he looked out the window and saw the two police officers. He said when he opened the door, the police never asked to talk to his wife and just walked in. He said his wife was in bed at that time and came out of the bedroom wearing her pajamas. He said that after Officer Chickos asked his wife to get dressed, she went into the bedroom and closed the door. He said the officer then opened the bedroom door and came in while she was dressing, and would not let him talk to his wife. On cross-examination Mr. Kaseda testified he and appellant had left the Greenville at 12:30 a.m. He said that his wife had a few drinks that night, and that she was driving their 2006 Cadillac. He said they had parked

in the parking lot of the Greenville, and, when asked if his wife hit a car when they left, he testified, "Not that I can recall." He testified that while the officers were at his house, they did not search for or take any of their property.

{¶15} Following the hearing, on June 27, 2007, the trial court entered its decision, which included findings of fact and conclusions of law. The court found the officers' entry into appellant's residence was consensual, but that their entry into the garage was not. As a result, the trial court suppressed all photographs taken of the vehicle in appellant's garage and all observations by police resulting from their entry into the garage.

{¶16} The trial court found the field sobriety tests were performed in substantial compliance with National Highway Transportation Safety Act standards, and that appellant was properly advised of and waived her *Miranda* rights. Finally, the court found that the statutory requirements of the breathalyzer test were met and that the test results were admissible. Thus, other than the evidence obtained by entry into appellant's garage, the trial court denied appellant's motions to suppress.

{¶17} Thereafter, on August 14, 2007, appellant pled no contest to OVI, in violation of R.C. 4511.19(A)(1)(a), and the remaining counts were dismissed. She was found guilty and sentenced by the trial court to 180 days in jail, 177 of which were suspended, and fined $500. On that same date, on appellant's motion, the trial court stayed the execution of appellant's sentence pending appeal. In addition, on September 27, 2007, the trial court entered an order that the Bureau of Motor Vehicles not reflect appellant's conviction until such time as a decision is rendered by this court, and stayed appellant's conviction until further order. Appellant appeals the trial court's

denial in part of her motions to suppress, asserting the following for her sole assignment of error:

{¶18} "THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTIONS TO SUPPRESS BASED UPON THE WARRANTLESS ENTRY BY POLICE INTO THE HOME OF APPELLANT AT 1:20 A.M."

{¶19} The sole argument asserted by appellant on appeal is that because all evidence obtained by the state, including appellant's statements and the results of the field sobriety tests and the breathalyzer test, resulted from the officers' warrantless entry into appellant's home, all of the state's evidence should have been suppressed. Because there was competent, credible evidence for the trial court's finding that the officers entered appellant's home with her husband's voluntary consent, we do not agree.

{¶20} On review of a trial court's ruling on a motion to suppress, an appellate court determines whether the trial court's findings are supported by some competent, credible evidence. An appellate court may not disturb a trial court's decision on a motion to suppress where some competent, credible evidence supports its decision. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. In determining a motion to suppress, the trial court serves as the trier of fact and determines the credibility of the witnesses and weight of the evidence. The appellate court is required to accept the trial court's factual findings as true, and determine, without deference to the trial court, whether the court met the appropriate legal standard. *State v. Jackson*, 11th Dist. No. 2003-A-2005, 2004-Ohio-2920, at ¶12.

{¶21} Appellant raises three issues under her assignment of error. The first issue asserted is whether the Fourth Amendment applies to conversations. Appellant argues the officers' conversations with her implicated the Fourth Amendment. Appellant cites *Berger v. New York* (1967), 388 U.S. 41 in support. In that case the Supreme Court held that The Fourth Amendment's protections include "conversation," and the use of electronic devices to capture it was a "search" within the meaning of that Amendment." Id. at s51... We note there was no electronic or any surreptitious device or method used by the police officers to secretly intercept appellant's conversations. Officer Chickos merely went to appellant's residence, and, when allowed to enter the residence by her husband, asked her questions, which she willingly answered.

{¶22} While we agree that conversations are subject to the Fourth Amendment's protections, it is the circumstances in which they are obtained by law enforcement officers that determine whether they have been obtained lawfully or in violation of a defendant's constitutional rights.

{¶23} Next, appellant argues that because the police made a warrantless entry and search of her home, the statements she made and the results of the field sobriety tests and breathalyzer test were inadmissible. We agree with appellant's argument that "a presumption of unreasonableness *** attaches to all warrantless home entries."

{¶24} The Fourth Amendment to the United States Constitution and Section 14, Article 1 of the Ohio Constitution require police to obtain a search warrant based on probable cause prior to conducting a search unless the search falls within an exception to this requirement. *Katz v. United States* (1967), 389 U.S. 347; see, also, *State v. Totten* (Feb. 15, 2001), 10th Dist. No. 00AP-535, 2001 Ohio App. LEXIS 524, *5-*6.

{¶25} Appellant's reliance on *Payton v. New York* (1980), 445 U.S. 573 and *Welsh v. Wisconsin* (1984), 466 U.S. 740 in support of her argument that the officers' entry into her home was unreasonable is misplaced because in both cases, the police entered the defendant's home to arrest him without a warrant and without consent. Here, Officer Chickos testified that while he suspected that appellant was the hit-skip driver because her name had come up at the scene, he was still in the process of investigating the crash when he went to her home. His purpose was to question, not to arrest, appellant. Further, as discussed infra, prior to entering appellant's home, the officers had secured her husband's voluntary consent. Thus, because the officers did not go to appellant's residence to arrest her or to search her home and further because they obtained her husband's consent before entering, appellant's argument that Officer Chickos needed a search warrant is not well taken

{¶26} Finally, as appellant's third issue, she argues that neither she nor her husband consented to the officers' entry into their residence. We do not agree.

{¶27} Appellate review of the voluntariness of consent to search is "limited to a determination of whether the trial court's decision was 'clearly erroneous,'" and an appellate court must "accept the trial court's findings of facts and determinations regarding credibility if they are supported by competent, credible evidence." *State v. Samples* (June 24, 1994), 11th Dist. No. 93-G-1787, 1994 Ohio App. LEXIS 2752, *6.

{¶28} An established exception to the rule that entry of a home requires a warrant or exigent circumstances is where the entry is pursuant to a voluntary consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219. Police do not need a warrant, probable cause, or even a reasonable, articulable suspicion to conduct a search when a

suspect voluntarily consents to the search. Id. A search conducted pursuant to a valid consent is constitutionally permissible. Id. Moreover, a voluntary consent need not amount to a waiver. Consent can be voluntary without being an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst* (1938), 304 U.S. 458, 464. Rather, the proper test is whether the totality of the circumstances demonstrates that the consent was voluntary. *State v. McConnell*, 5th Dist. No. 2002CA00048, 2002-Ohio-5300, at ¶8. The state has the burden to prove consent was freely and voluntarily given by clear and convincing evidence. *State v. Robinette*, 80 Ohio St.3d 234, 243, 1997-Ohio-343. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect? *Florida v. Jimeno* (1991), 500 U.S. 248, 251.

{¶29} The First Appellate District addressed the issue of what constitutes consent for police to enter a home in *State v. Robinson* (1995), 103 Ohio App.3d 490, appeal not allowed, (1995), 74 Ohio St.3d 1418, reconsideration denied, (1995), 74 Ohio St.3d 1465. In that case two police officers knocked on the defendant's door. When he opened the door, the officers smelled marijuana coming from inside. As soon as the defendant realized they were police officers, he tried to close the door, but the officers forced their way inside and found marijuana, which formed the basis for the drug abuse charge subsequently brought against the defendant. The trial court granted the defendant's motion to suppress and the state appealed. The appellate court affirmed, holding:

{¶30} "Robinson consented to the officers' initial breach of the threshold of his apartment. When Robinson opened the door following Officer Sneed's identification of herself by name only, he did so freely and voluntarily, under neither duress nor coercion, see *Schneckloth,* [supra], and not upon an express misrepresentation by the officers. See *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141 ***. The act of opening the door was not rendered involuntary, and thus nonconsensual, by the fact that Robinson would not have opened the door but for Officer Sneed's failure to identify herself as a police officer. See *State v. Posey* (1988), 40 Ohio St.3d 420 ***, paragraph three of the syllabus. Therefore, the officers did not violate the Fourth Amendment in attaining their initial vantage point.

{¶31} "The officers' progress into the apartment was not, however, made in conformity with the Fourth Amendment consent doctrine. Robinson communicated to the officers the limited scope of his consent to the initial intrusion when he attempted to bar the officers' entry into the apartment by closing the door, and the officers exceeded the scope of Robinson's voluntary consent when they forced their way over the threshold and into the apartment. ***" Id. at 495.

{¶32} The holding in *Robinson,* supra, has been followed by numerous other Ohio appellate districts. In *State v. Damron*, 5th Dist. No. 06CA-150, 2007-Ohio-5808, the Fifth Appellate District held:

{¶33} "Whether a search is authorized by warrant or by consent, the scope of the search is limited by the terms of its authorization. *** Where a suspect voluntarily opens his door to the police but then closes the door, barring the officers' progress into

his apartment, he has communicated the withdrawal of his consent to the initial intrusion." Id. at ¶22, citing *Robinson*, supra.

{¶34} The Ninth Appellate District also followed the holding in *Robinson,* supra, in *State v. Cooper*, 9th Dist. No. 21494, 2003-Ohio-5161. In that case the court held:

{¶35} "*** A person can demonstrate consent to enter either expressly or impliedly. *State v. Schroeder* (Oct. 26, 2001), 6th Dist. No. WD-00-076, 2001 Ohio App. LEXIS 4786; *State v. Asworth* (Apr. 11, 1991), 10th Dist. No. 90 AP-916, 1991 Ohio App. LEXIS 1623. Courts have found such actions as *opening a door and stepping back*, or leading an officer through an open door without expressing an intent that he should not follow constitute implied consent. *Schroeder*, supra[;] *Asworth*, supra. Further, voluntarily opening a door constitutes voluntary consent to step into the threshold of an apartment. *State v. Robinson*[, supra]. Additionally, 'there is a recognized difference between consent granted to the police to enter [an apartment] to conduct an interview and consent granted to conduct a search.' *Schroeder,* supra, citing *Lakewood v. Smith* (1965), 1 Ohio St.2d 128, ***, paragraph one of the syllabus." Id. at ¶9. (Emphasis added.)

{¶36} Appellant's reliance on *Lakewood,* supra, is therefore misplaced. The Supreme Court of Ohio held in that case: "A person who admits a police officer to his premises in compliance with the officer's request for an interview does not thereby *** consent to a search of the premises." Id. at paragraph one of the syllabus. This court cited *Lakewood*, supra, in *State v. Townsend* (Aug. 27, 1999), 11th Dist. No. 98-L-036, 1999 Ohio App. LEXIS 3986, in holding: "[W]hen a homeowner merely permits police to

enter his residence, there is no consent given for them to search the premises. Id. at *10.

{¶37} While appellant does not challenge the authority of her husband to give consent, and thus waived the issue on appeal, see *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus, we note a spouse is presumed to have authority to consent to a search of all areas of the residence. *United States v. Duran* (C.A. 7, 1992), 957 F.2d 499, 505. Further, the Ohio Supreme Court in *State v. McCarthy* (1971), 26 Ohio St.2d 87, held: "[A] wife's voluntary consent to a search of her and her husband's mutual residence is sufficient to constitutionally permit an otherwise reasonable search of the common areas thereof, even though the search may produce incriminating evidence against the husband." Id. at 93.

{¶38} Here, we cannot say the trial court erred in finding that Mr. Kaseda had voluntarily consented to the entry of appellant's home by the two officers for the purpose of questioning appellant. Mr. Kaseda testified that after the officers knocked at the door, he looked out the window and saw them, so he knew police officers were at the door when he opened it. Officer Chickos testified that Mr. Kaseda opened the door for the officers, and, after they stated their purpose for being there, he stepped aside to allow the officers to enter the residence to question his wife. Neither Mr. Kaseda nor appellant ever objected to the officers' presence in their home at any time during this questioning. On the other hand, Mr. Kaseda testified the officers "didn't even ask" to enter the residence, and that "they just walked in." In finding the officers' entry to be consensual, the trial court obviously found Officer Chickos' testimony to be credible and found Mr. Kaseda's testimony not believable. It is the province of the trial court to

determine the credibility of the witnesses, see *Jackson*, supra, and we cannot say the trial court's finding was against the weight of the evidence.

{¶39} Appellant argues that her husband was not required to object to the officers' request because "the police *** didn't give notice of their intentions." We do not agree. Officer Chickos gave appellant's husband the reason for their call: he said they needed to question appellant.

{¶40} Contrary to appellant's argument, this case does not involve a mere "submission to authority." The trial court did not find, as appellant argues, that "Mr. Kaseda consented through his passive non-resistance." Unlike the case cited by appellant, *United States v. Worley* (6 C.A., 1999), 193 F.3d 380, this is not a case where the defendant stated, "You've got the badge, I guess you can." Rather, after Officer Chickos informed Mr. Kaseda that they needed to question his wife, Mr. Kaseda stepped aside to allow the officers into the residence to question her.

{¶41} Finally, we note appellant does not assign as error the admissibility of her statements under *Miranda*, and thus waived any claimed *Miranda* violation on appeal. *Awan,* supra. However, we observe appellant's *Miranda* rights were not violated. *Beckwith v. United States* (1976), 425 U.S. 341, (holding that incriminating statements made to government agents during an interview in a private home were not subject to suppression for lack of *Miranda* warnings.) Here, when Officer Chickos questioned appellant, she was in the living room of her home and her husband was present. She had not been told she would be arrested, nor was she handcuffed or told she could not leave. Based on Officer Chickos' testimony, appellant was free to leave the room, decline to respond to any questions, or to ask the officers to leave. Instead, she readily

responded to the officer's questions. Further, Officer Chickos testified that, prior to further questioning at the police station, he had advised appellant of her *Miranda* rights after arresting her at her home. In addition, at the station, Officer Chickos read to appellant her *Miranda* rights from a written form, and, after doing so, appellant signed the form, indicating she understood her rights and was waiving them, before Officer Smith further questioned her.

{¶42} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Chardon Municipal Court finding the officers' entry into appellant's residence was consensual is supported by some competent, credible evidence and is therefore affirmed.

DIANE V. GRENDELL, P.J.,

TIMOTHY P. CANNON, J.,

concur.