

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

STATE OF OHIO)	CASE NO. 2008-1108
)	
Plaintiff-Appellee)	APPELLATE CASE NO. 2007-G-2797
)	
v.)	CHARDON MUNICIPAL COURT
)	CASE NO. 07 TRC 07378
NOREEN T. KASEDA)	
)	
Defendant-Appellant)	

MEMORANDUM IN OPPOSITION TO JURISDICTION

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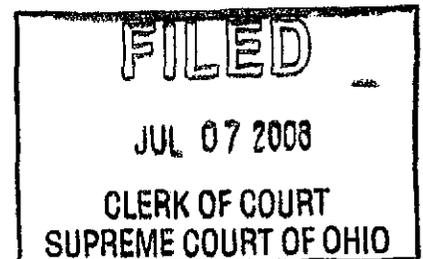


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**STATEMENT OF WHY THIS CASE IS NOT ONE OF GREAT
PUBLIC OR GENERAL INTEREST AND DOES
NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL
QUESTION**

Appellant is requesting the Court to accept jurisdiction in this case to adopt a “bright line” test for determination of whether entry into a person’s home was voluntarily given, *Memorandum in Support of Jurisdiction*, p. 3; and to adopt a test that was rejected in *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed3d 584. In *Schneckloth*, “[T]he precise question presented in this case, then, is what must the prosecution prove to demonstrate that a consent was ‘voluntarily given’”. 412 U.S. at 218, 93 S.Ct. at 2045. Before engaging in its analysis, the Court concluded that “the question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” 412 U.S. at 227, 93 S.Ct. at 2047-2048. The Court then proceeded to discuss a number of factors to be considered in deciding whether consent was voluntarily given: knowledge of the right to refuse consent, the convenience of the subject of the search, coercion by implied threat or covert force and consent granted in submission to a claim of lawful authority. The Court noted that it has never accepted any “litmus-test of voluntariness”. 412 U.S. at 231, 93 S.Ct. at 2049. Rather, “[I]t is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.” 412 U.S. at 233, 93 S.Ct. at 2050.

The Court rejected the assertion that consent to be voluntary “must meet the strict

standard of an intentional relinquishment of a 'known' right," applied to waiver of trial guarantees. 412 U.S. at 238, 241; 93 S.Ct. at 2054, 2055. Unlike the waiver of trial guarantees, there is nothing unconstitutionally suspect in permitting a voluntary consent to search. 412 U.S. at 243, 93 S.Ct. at 2056. In this regard, the Court commented upon "the informal, unstructured context of a consent search" and that a detailed type of examination was "unrealistic"; "there is no universal standard that must be applied in every situation where a person foregoes a constitutional right". 412 U.S. at 245, 93 S.Ct. at 2057.

Appellant requests the Court to adopt a standard that requires a "verbal or physical act" or "action or inaction" to determine whether consent to enter was given by a homeowner. By doing so, Appellant is seeking a "litmus test" and the detailed examination rejected in *Schneckloth*. Appellant is looking for the "bright line" test and abandonment of "the careful sifting of the unique facts and circumstances" that arise in every case. Because the trial court followed the analytical mandate of *Schneckloth* and its progeny and considered the totality of circumstances in making its decision, there is no constitutional question or issue of great public interest.

I. STATEMENT OF FACTS

Officer Frank Chickos is a 14-1/2 year veteran of the Bainbridge Police Department. T.p. 7. On January 13, 2007, at approximately 12:53 a.m., the Bainbridge Police Department received a call about a parked vehicle damaged during a traffic crash at the Greenville Inn. Officer Chickos was dispatched to that location and investigated the crash. T.p. 11-15. He learned that Noreen Kaseda may have been driving the

vehicle that struck and caused the damage to the vehicles. T.p. 15, 55.

Officer Chickos determined that Noreen Kaseda lived on Pine Street, not far from the Greenville Inn. Officer Chickos and Officer Weiskopf (Chagrin Falls P.D.) drove to her house and parked on the street. They exited their vehicles and walked up the sidewalk or walkway to the front door. They proceeded up the front steps, on to the front porch and went to the front door. T.p. 15-17.

As Officer Chickos approached the front door he heard a man and woman arguing inside. T.p. 21. Mrs. Kaseda later told him they were arguing about the crash because Mario was upset about the damage to their vehicle. T.p. 21, 22. The Kaseda house has two exterior doors, a screen door and a front door. The Kaseda house does not have a door bell. T.p. 112. Officer Chickos opened the screen door and knocked on the front door. Mario Kaseda opened the front door. Officer Chickos asked if Noreen was at the house, that he needed to speak to her. Officer Chickos testified that he was never invited into the house; Mr. Kaseda stepped back and moved out of the way after the door was opened, prior to Officer Chickos stepping inside to speak to Mrs. Kaseda. T.p. 24-25. Mrs. Kaseda approached the front door from the interior of the house and stood behind Mr. Kaseda. Noreen stated when Officer Chickos arrived that she was getting ready for bed. T.p. 62. When Officer Chickos addressed Noreen, Mr. Kaseda stepped aside and Officers Chickos and Weiskopf stepped inside the entryway. T.p. 17-19. Mrs. Kaseda acknowledged who she was. Officer Chickos told her he wanted to talk to her about what happened at the Greenville Inn. Officer Chickos testified that they stepped inside because it was January and raining, to speak with Mrs. Kaseda in a more

comfortable environment. T.p. 24-25. He stood approximately 10 feet away from her just inside the front door. Officer Chickos does not recall whether Mario Kaseda closed the door. T.p. 17-19.

Mrs. Kaseda admitted that she was driving, hit a car in the parking lot and left without stopping. Officer Chickos smelled the odor of alcohol on the breath of both Mr. and Mrs. Kaseda. Upon Officer Chickos arrival at the house, Mrs. Kaseda was dressed in a tank top and her underwear, disheveled, with bloodshot eyes, glassy in appearance and slow, slurred speech. T.p. 24.

After Noreen admitted she was the driver, Officer Chickos advised her that she must accompany the officers to the Bainbridge Police Department. She got dressed and then stepped outside, where she was arrested for leaving the scene of a traffic crash, handcuffed, searched and verbally Mirandized. T.p. 21-22.

Mario Kaseda testified that the officers opened the screen door, knocked on the front door and walked in when he opened it. They were already inside when they asked if Noreen was home and told him they wanted to speak to her. T.p. 104-106.

LAW AND ARGUMENT

REPLY TO DEFENDANT-APPELLANT'S PROPOSITION OF LAW.

The trial court did not err by denying Defendant-Appellant Kaseda's motion to suppress. The trial court was correct in ruling the Fourth Amendment to the U.S. and Ohio Constitutions is outside the scope of the permissible police conduct, or in the alternative, voluntary consent to enter was given by Mario Kaseda, her husband.

A. Defendant Noreen Kaseda's failure to stop after causing a property damage accident is sufficient grounds for the police to continue an investigation by going to her residence to speak to her.

Appellant-Defendant Noreen Kaseda ("Kaseda") caused damage to vehicles parked in the Greenville Inn parking lot and on Pine Street. She had a legal duty to stop and provide information after the property damage collision, as required by §4549.03. Officer Chickos also had a legal duty to investigate the "hit-skip" crash and a legitimate interest in obtaining information about the crash from the suspected driver. *State v. Lott* (December 19, 2006), Licking Ct. of App. Nos. 06 CA 627, 06 CA 628, unreported, 2006-Ohio-6796, 2006 WL 3742895, ¶15.

The court in *Lott* cited *Terry v. Ohio* (1968), 392 U.S. 1, 22, noting that *Terry* allows a police officer to "approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." The court summarized the evidence by noting that the officers were informed of a private property damage accident and responded to the scene. Upon their arrival, defendant, identified as the driver by a witness, fled the scene. The subsequent chase and stop did not become a seizure until appellant was placed under arrest. ¶23.

The investigation by Officer Chickos in the instant matter was less intrusive. He did not stop Kaseda's vehicle. He went to her house to continue his investigation. Although this case and *Lott* are not factually identical - there was not a traffic stop - both investigations involve a brief intrusion to speak to the driver who caused damage to another vehicle and then left the accident scene.

Officer Chickos had specific articulable facts to proceed to Noreen Kaseda's home to question her about her involvement in the traffic crash.

B. The entry upon the premises by Bainbridge Township police officers and their approach to the front door was not within the curtilage of defendant's home at 7025 Pine Street.

Officers Chickos and Weiskopf did not legally invade Kaseda's privacy when they went to her front door. In *Katz v. U.S.* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576, the Court noted as follows:

The petitioners strenuously argued that the [telephone] booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection [citations omitted]... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected [citations omitted].

389 U.S. at 351-52, 88 S.Ct. at 511. The Court also expressed concern "where police enter a home before its occupants are aware that officers are present [citations omitted] *** ... [I]nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion," [citations omitted] and "the requirements of awareness *** serves to minimize the hazards of the officers' dangerous calling" [citation omitted]. 389 at U.S. 356, 88 S.Ct. at 514. In the instant case, the police officers did not enter unannounced into the home.

The front entry to one's residence and the approach thereto are not part of

the curtilage of the premises for which there is an expectation of privacy. *State v. York* (Lake 1997), 122 Ohio App. 3d 226, 701 N.E.2d 463. Opening the front door in response to a knock on the door reduces the occupant's expectation of privacy to the entry of the house. The area which may be observed from the front door when it is opened is knowingly exposed to the public per *Katz*, supra.

The U.S. Supreme Court discussed the doctrine of curtilage and observations from public places in *U.S. v. Dunn* (1987), 480 U.S. 294, 107 S.Ct. 1134. The primary issue in *Dunn* was whether a barn near a ranch house and within a fenced area was within or without the curtilage. The property owner argued that he had an expectation of privacy separate and apart from the issue of curtilage because the barn was an essential part of his business. The Court noted that the front of the barn was essentially open, and the officers were able to use a flashlight to observe illegal objects therein. The ability of the officers to legally view the interior of the barn "did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment." 480 U.S. at 304-306, 107 S.Ct. at 1141.

The interior of a home is within the curtilage. Officer Chickos was outside the curtilage when he opened the screen door and knocked on the front door. When Mario Kaseda opened the front door, Officer Chickos' observations into the home were lawful and not an unreasonable search of the house. If the officers had observed illegal activity or contraband in the house while standing in a constitutionally unprotected area, they would be entitled to enter and investigate.

The officers did not go to Noreen Kaseda's home to arrest her or search for evidence. They went there to speak to her. When Mario Kaseda opened the front door, which he had a legal right not to do, his expectations of privacy were diminished. Considering the evidence, it was reasonable for Officers Chickos and Weiskopf to step into the home to further conduct the business for which they were present, i.e., to speak to Noreen Kaseda. If an individual does not safeguard privacy and leaves an object in plain view of the public, and the person exposes objects to others rather than concealing them, the State has not conducted an unconstitutional search. *State v. Buzzard* (2007), 112 Ohio St. 3d 451, 860 N.E.2d 1006, ¶15. Although this case does not involve the seizure of an object in plain view, Mario Kaseda's opening of the front door served to reduce the expectation of his and his wife's privacy.

C. The entry into the defendant's house was with the consent of the owner, Mario Kaseda. The surrounding facts and circumstances establish that Mario Kaseda gave his implied consent for the officers to enter the home.

The alleged offense occurred in January. It occurred after midnight. Mr. Kaseda opened the main door to the house. T.p.21-25. Mrs. Kaseda testified that she was in bed, wearing a tank top and flannel pajamas. T.p.62. The officers did not demand entry into the home. T.p. 17-19. Considering the time of the year, the hour and Mrs. Kaseda's state of dress, the officers' conclusion that Mr. Kaseda permitted them to enter the home to speak to Mrs. Kaseda was not unreasonable under all of the surrounding facts and circumstances. *Schneckloth v. Bustamonte*,

supra. A “strict waiver” of one’s constitutional rights is not necessary in order to give a valid consent. A consent to search or enter does not require a knowing, intelligent and voluntary waiver. *Johnson v. Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461. Whether consent is voluntary is to be determined from the totality of the circumstances. Knowledge of one’s rights is a factor to be considered, but a police officer is not required to advise a person of the right to refuse to consent. *Id.*

The issue of voluntariness is a question of fact to be determined by considering the totality of the circumstances. *State of Ohio v. Townsend* (August 27, 1999), Lake Ct. of App. No. 98 L 036, unreported, 1999 WL 689934. “The existence of a knowing and voluntary consent is a finding of fact, and only where that finding is clearly erroneous may a reviewing court set it aside. *U.S. v. Griffin* (C.A. 7, 1976) 530 F2d 739.” *State v. Daniel* (Dec. 31, 1990), Trumbull Ct. of App. No. 89-T-4214, unreported, at 11-12, cited in *State v. Rudge* (Dec. 20, 1996), Portage Ct. of App. No. 95-P-005, 1996 WL 761161 at 5. One court has distinguished consent in two situations: One is the officer’s initial entry into the home and the second is the search for evidence or a person. The court noted that consent to enter a home does not equate to consent to search. *Akron v. Harris* (Summit 1994), 93 Ohio App. 3d 378, 381-382, 638 N.E.2d 633, 635. The court also noted that when the consent of the officers upon approaching a house was not to conduct a search the purpose was to question the resident, but consent to enter the house should not be held to the same standard as the consent to search

[citations omitted]. Id.

In the instant case, the officers had a reasonable belief that their entry into the house was authorized. This conclusion is reasonable under the facts and circumstances in evidence. If the officers' belief was mistaken and Kaseda objected to their entry into the home, he had the right to bar their entry or demand that they leave. The instant case can be distinguished from *City of Lakewood v. Smith* (1965), 1 Ohio St.2d 128, 30 Ohio Op. 2d 482, 205 N.E.2d 388, in which the officers told the defendant they wanted to come in and ask some questions. In the instant case, the officers only stated that they wanted to speak to Mrs. Kaseda. They never mentioned an intention to enter. Justice Brown in the opinion noted that "this entrance was the beginning of the search [for evidence of gambling] and was acquiesced only because the persons requesting entrance were police officers acting under color of office." 1 Ohio St.2d 128, 129-130, 205 N.E.2d 390.

The trial court limited the implied consent to entry into the home and properly excluded the photographs taken by Officer Smith during his search of Kaseda's garage, consistent with the holding of *Lakewood v. Smith*. Police may not expand the search to include areas beyond the scope of a person's consent and must comply with any express or implied conditions attached to the consent. *State v. Chapman* (1994), 97 Ohio App. 3d 687, 690-691, 647 N.E.2d 504. Once police are invited into a house, they are not free to move about one's home without the owner's consent. 97 Ohio App.3d at 691, 647 N.E.2d 504.

D. The trial court may evaluate the credibility of witnesses and resolve questions of fact.

Officers Chickos and Smith testified on behalf of the State of Ohio. Mario Kaseda testified on behalf of his wife, and Noreen testified on her own behalf. There is a conflict between the testimony of the States's and defense witnesses. The trial court has the authority to resolve the conflict. At a hearing on a motion to suppress, the trial court assumes the role of a trier of fact and, therefore, is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. When reviewing a motion to suppress, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these findings of fact as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard. *State v. Curry* (1994), 95 Ohio App.3d 93, 96.

In the instant matter, the trial court determined that the testimony of the police officers was more credible than that of Mr. and Mrs. Kaseda.

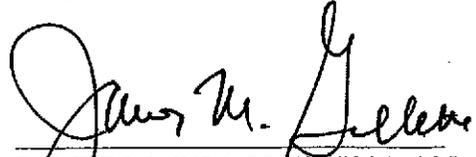
CONCLUSION

The officers had a reasonable and articulable suspicion that Noreen Kaseda was involved in the traffic crash they were investigating. They had the right to approach her and ask her about her involvement. When Mario Kaseda opened the door, the officers had a reasonable belief that he was permitting them to enter the

house. This permission did not extend to the right to search, but only to stand in the entryway and speak to Mrs. Kaseda. The court properly granted the motion to suppress the photographs of the vehicle.

The Court is not presented with a substantial constitutional question or an issue of great public or general interest.

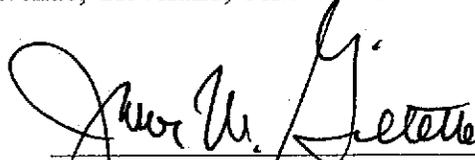
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction was mailed USPS, postage prepaid, to: Dennis N. LoConti, Esq., 700 Rockefeller Building, 614 W. Superior Avenue, Cleveland, Ohio 44113-1318 this 3rd day of July, 2008.



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appals kaseda memorandum in opposition to jurisdiction