[Cite as *State v. Lake*, 2009-Ohio-3057.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NOS. 08 CO 26
PLAINTIFF-APPELLEE,	)	08 CO 27
	)	
- VS -	)	O P I N I O N
	)	
JOHN LAKE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Columbiana County Municipal Court, Case Nos. 06CRB890 and 06TRC4394.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 8, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant John Lake appeals from the decision of the Columbiana County Municipal Court denying his pretrial motions to suppress and to dismiss. Appellant argues that the officers who witnessed his minor misdemeanor traffic violations were incompetent to testify under R.C. 4549.14 because they were in an unmarked vehicle. This argument fails because the officers were not on duty for the main purpose of enforcing traffic laws at the time they witnessed the violations.

¶{2} Appellant also contends that his subsequent arrest for OVI was the product of an unlawful entry into his garage. He then urges that, if his arrest was unlawful, then he could not have committed the offense of resisting arrest. To the contrary, the officer was permitted to enter appellant's garage to issue citations for traffic violations where appellant failed to respond to the officer's commands to stop while appellant was still in his driveway. Since the arrest was lawful, his argument regarding resisting arrest is without merit. In accordance, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{3} On August 9, 2006, East Palestine Police Officer Moore finished his shift at 5:00 p.m. and was still in uniform when the Chief of Police offered to drive him home in his unmarked city SUV. (1st Tr. 11-12). As they drove down North Market Street, appellant pulled close behind them on his motorcycle at least twice and revved his engine. (1st Tr. 14). As the Chief approached the intersection at West North Avenue with the intent to turn left, the light turned red. Appellant stopped behind them and revved his engine several times.

¶{4} Although it was a single lane of traffic, appellant then drove around the right side of the Chief's vehicle, yelled something indiscernible over the noise of his engine, and drove through a red light going fifteen to twenty miles per hour. (1st Tr. 13-14, 16). They decided to cite appellant for passing on the right and failing to stop at the red light.

¶{5} Appellant was not wearing a helmet, so Officer Moore recognized him from prior interactions. (1st Tr. 15). He also knew that appellant lived just down the street. (1st Tr. 26). Since the unmarked car had no lights or siren, the Chief

proceeded to appellant's residence instead of attempting to stop him while moving. (1st Tr. 17).

¶{6} After they parked in the street, Officer Moore exited the vehicle. (1st Tr. 17; 2d Tr. 13). Appellant was straddling the motorcycle with the engine off and walking it to his detached garage. (1st Tr. 17). The driveway was fifteen to twenty feet long. When appellant was approximately ten feet from his open garage, Officer Moore ordered appellant to stop several times and called him by name. (1st Tr. 17, 29-30; 2d Tr. 18-19). He told appellant that he needed to talk to him. Appellant continued to walk his motorcycle into his garage without acknowledging the officer. (1st Tr. 18).

¶{7} Officer Moore thus caught up with appellant and entered the garage with him though the overhead door. (2d Tr. 36, 45). The officer stood just inside the opening. (2d Tr. 21). Upon the officer further explaining his purpose, appellant stated that the light had turned green but they "were fucking around making a left-turn". (1st Tr. 18). The officer noticed slurred speech and a strong odor of alcohol emanating from appellant. (1st Tr. 19; 2d Tr. 29). He also observed that appellant's eyes were glassy and bloodshot. Appellant's balance was unsteady as he walked across the garage. (1st Tr. 19).

¶{8} The officer asked how much appellant had to drink, and appellant responded that he had "a couple beers." (1st Tr. 19; 2d Tr. 24). The officer noted that he had encountered appellant in the past both intoxicated and sober and concluded that his loud and condescending behavior was consistent with his demeanor when he had been intoxicated in the past. (1st Tr. 21-22; 2d Tr. 29).

¶{9} Officer Moore then asked appellant to exit the garage for field sobriety testing. Appellant refused more than once. When appellant asked what would happen if he did not take the tests, he was advised that he would be arrested for OVI. (1st Tr. 20). Two other uniformed officers arrived. While they were trying to handcuff appellant, he resisted and said he would punch one of the officers in the face. (1st Tr. 21). As he was led to one of the police cruisers, he told an officer that he was reaching for a gun so he could shoot him in the head. (1st Tr. 32-33, 38; 2d Tr. 28).

¶{10} At the police station, appellant's breath registered a reading of .311g/210L. Appellant was cited for passing on the right in violation of R.C. 4511.28 and failure to stop at a red light in violation of R.C. 4511.13, both minor misdemeanors. He was also cited for OVI, in violation of R.C. 4511.19, his third in six

years. These offenses were encompassed in case number 2006TRC4394. In case number 2006CRB890, appellant was charged with resisting arrest in violation of R.C. 2921.33 and aggravated menacing in violation of R.C. 2903.21.

¶{11} On April 2, 2007, appellant filed a motion to suppress alleging a lack of reasonable suspicion to effect a traffic stop and a lack of probable cause to arrest for OVI. After two continuances were granted at appellant's request, the court set a suppression hearing for August 14, 2007 and specified that any further motions on the subject had to be filed fourteen days before the hearing.

¶{12} Still, one day before the hearing, a different attorney, who was a member of the same firm as the first attorney, filed a motion to suppress and to dismiss on appellant's behalf. In the suppression portion of the motion, appellant raised R.C. 4549.14, which precludes an arresting officer from testifying where he was in an unmarked car while on duty for the main purpose of enforcing traffic laws. The motion also claimed that the warrantless entry into appellant's garage was improper and that the evidence leading to the OVI charge should be suppressed as a result.

¶{13} In the dismissal portion of the motion, appellant argued that dismissal of the resisting arrest charge was warranted because his arrest was unlawful. He also claimed that the aggravated menacing charge should be dismissed because the officer did not have a sufficient belief that appellant would cause him serious physical harm and thus lacked probable cause to arrest him for this offense.

¶{14} At the hearing, the court and the prosecutor noted that this motion was untimely. The court only agreed to address the reasonable suspicion, probable cause and competency arguments at that time. In a November 13, 2007 entry, the court found reasonable suspicion for the stop and probable cause to arrest appellant for OVI. As to competency, the court found that neither Officer Moore nor the Chief were on duty for the main purpose of enforcing traffic laws at the time they witnessed the offenses for which they stopped appellant.

¶{15} The court then announced that a further hearing would be held on the lawfulness of the officer's entry into the garage. This hearing was held on February 5, 2008. The trial court then overruled appellant's arguments in its April 28, 2008 entry. In pertinent part, the court found that the officer was permitted to enter the garage to issue the traffic citations as he was in hot pursuit.

¶{16} On June 26, 2008, appellant entered into no contest pleas on all offenses except aggravating menacing which was dismissed. He was found guilty and immediately sentenced. Appellant filed timely notice of appeal. His first assignment contains two distinct and unrelated arguments that will be discussed separately.

ASSIGNMENT OF ERROR NUMBER ONE: PART I

¶{17} Appellant's first assignment of error initially argues:

¶{18} "IT IS AN ERROR OF LAW AND AN ABUSE OF THE TRIAL COURT'S DISCRETION IN: (1) PERMITTING THE TESTIMONY OF THE ARRESTING POLICE OFFICERS, WHO WERE NOT COMPETENT TO TESTIFY AFTER EFFECTUATING THE TRAFFIC STOP IN AN UNMARKED VEHICLE * * * [remaining arguments discussed in Part II below]."

¶{19} This argument revolves around the application of the following statutes:

¶{20} "Any motor vehicle used by a member of the state highway patrol or by any other peace officer, while said officer is on duty for the exclusive or main purpose of enforcing the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, shall be marked in some distinctive manner or color and shall be equipped with, but need not necessarily have in operation at all times, at least one flashing, oscillating, or rotating colored light mounted outside on top of the vehicle. The superintendent of the state highway patrol shall specify what constitutes such a distinctive marking or color for the state highway patrol." R.C. 4549.13.

¶{21} "Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws, is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was using a motor vehicle not marked in accordance with section 4549.13 of the Revised Code." R.C. 4549.14.

¶{22} Likewise, Evid.R. 601(C), provides:

¶{23} "Every person is competent to be a witness except: * * * An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly

marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute."

¶{24} Here, it is undisputed that the Chief's SUV did not meet the requirements of a marked car. Appellant thus contends that neither Officer Moore nor the Chief were competent to testify as to what they witnessed because once they witnessed the traffic violations and decided to stop him, they transformed from being off duty to being on duty for the main purpose of enforcing traffic laws. However, this argument is without merit under the following analysis.

¶{25} We begin by noting that one purpose of the statute and the corresponding rule is to avoid "speed traps" where officers sit in unmarked cars in order to find traffic violators without being spotted. *State v. Huth* (1986), 24 Ohio St.3d 114, 115. Another purpose is to avoid the situation where a driver has to debate whether to stop on the side of the road for an unmarked car, containing an unknown occupant, that seems to be trying to get his attention. *City of Columbus v. Murchison* (1984) 21 Ohio App.3d 75, 77. None of these concerns were implicated here.

¶{26} In *Murchison*, a uniformed officer in an unmarked car was off duty and driving home from a special assignment of directing traffic. The officer followed an erratically driven vehicle until the driver pulled into a yard. Id. at 75-76. The officer then approached the defendant on foot and eventually arrested him for OVI. Id. at 77. The court noted that the officer did not try to pull the defendant over but waited until he stopped and then approached him on foot in a uniform. Id. The court concluded that the off-duty officer was not on duty for the main purpose of enforcing traffic laws. Id.

¶{27} Here, Officer Moore testified that he went off duty at 5:00 p.m. The traffic offenses occurred at 5:10 p.m. At the time, the Chief was driving Officer Moore home. Officer Moore was not on duty at all, and if on duty, the Chief was not on duty for the main purpose of enforcing traffic laws. They did not attempt to stop appellant's vehicle on the road. Rather, they waited until he voluntarily stopped in his driveway before Officer Moore, who was in uniform and who knew appellant from multiple prior interactions, approached appellant on foot and asked him to stop and talk about traffic violations that he had just committed.

¶{28} Contrary to appellant's argument, when officers in such a situation happen across a traffic violation and decide to make a stop for said violation, their status does not retroactively become on duty for the main purpose of enforcing traffic

laws. See, e.g., *Huth*, 24 Ohio St.3d at 116 (on duty airport security officer's decision to stop a motorist does not transform his duty into possessing a main purpose of enforcing traffic laws merely because that was his purpose at the time of the stop). If an on duty officer does not become primarily engaged in enforcing traffic laws merely by making the stop at issue, then an off duty officer would not become primarily engaged in enforcing traffic laws merely by making the stop either.

¶{29} "If we were to accept appellant's argument, the words 'on duty' as found in the rule and statutes would be mere surplusage since an officer would instantly and metaphysically always be on duty as soon as he or she undertook any law enforcement activities." *State v. Butler* (1991) 77 Ohio App.3d 143, 146 (sheriff on a personal errand late at night with his family in an unmarked car who witnessed the defendant run a stop sign and weave off the road and who followed and arrested him for driving under the influence after he stopped at a store is not barred from testifying). There is no rational purpose to be served "by requiring an off-the-clock officer to merely follow the lawbreaker until an on-the-clock officer, who is in uniform and in a properly marked vehicle, arrives." *State v. Horton*, (Dec. 26, 2000), 12th Dist. No. CA2000-04-024 (changing the court's prior position and opining that the "back on duty" theory is absurd). See, also, *State v. King*, 7th Dist. No. 05CO14, 2006-Ohio-894, ¶2, 28 (where we found that officer who was on special assignment in an unmarked car with the task force was not incompetent to testify about the traffic stop for reckless operation or the arrest for OVI, without acknowledging any "back on duty" or transformation theory). This part of this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER ONE: PART II

¶{30} The second portion of appellant's first assignment of error argues:

¶{31} "[THE POLICE OFFICERS] VIOLATED THE FOURTH AND FOURTEENTH AMENDMENT RIGHTS OF APPELLANT BY COMING ONTO HIS PROPERTY AND REMOVING HIM WITHOUT A WARRANT; AND (2) BY PERMITTING THE ADMISSION OF ALL OTHER EVIDENCE USED AGAINST APPELLANT WHICH FLOWED FROM THE ILLEGAL STOP, DETENTION AND/OR ARREST."

¶{32} Appellant argues that the officer unlawfully entered his garage as there were no exigent circumstances and urges that his detached garage was either part of his home or it constituted protected curtilage.

¶{33} The Fourth Amendment's protection of the home applies to the home's curtilage as well. *Oliver v. United States* (1984), 466 U.S. 170, 180. The extent of a home's curtilage is resolved by considering four main factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the use to which the area is put; and (4) the steps taken to protect the area from observation by passersby. *U.S. v. Dunn* (1987), 480 U.S. 294, 301.

¶{34} Here, although the garage was detached, it was in close proximity to the home, it was used to store tools and the motorcycle, and it is generally protected from observation by the doors. As such, it would likely be considered curtilage. Although the garage was open at the time, this was for purposes of pulling the motorcycle in, and the officer seemed to indicate that he could not have made the OVI observations from outside the garage. Regardless of the curtilage issue, appellant's argument is without merit as a result of precedent out of the United States Supreme Court and the Ohio Supreme Court dealing with entry into a home.

¶{35} In one case, police sent a buyer into defendant Santana's house to buy heroin. *U.S. v. Santana* (1976), 427 U.S. 38. The buyer returned with the drugs and told police that Santana now had the buy money. Upon arriving at Santana's residence, the police spotted Santana standing in her doorway, directly on the threshold. They shouted "police", showed their identifications and approached the house. Santana retreated into her home. The police followed her in to make the arrest.

¶{36} The Court reaffirmed that a warrantless arrest in a public place is constitutional. Id. at 42, citing *U.S. v. Watson* (1976), 423 U.S. 441. They moved on to the question of whether the defendant was in a public place when the police first sought to arrest her. Id. The Court concluded that since she held herself out to the public, she was in a public place at the time the police first sought to arrest her, even though she was standing on the threshold of her front door. Id.

¶{37} The Court then addressed the question of whether Santana's entry into her home could thwart the warrantless arrest. Id. The Court noted that there was a chance for destruction of evidence. Id. The Court held that the "hot pursuit" entry exception does not require a drawn out chase throughout the public streets. Id. They

then broadly expressed that a defendant cannot defeat an arrest which has been set in motion in a public place by the escape to a private place. Id.

¶{38} The Ohio Supreme Court extended this principle to a case where the pursuit was of a mere minor misdemeanor and where there was no concern for potential destruction of evidence. *Middletown v. Flinchum* (2002), 95 Ohio St.3d 43. In that case, the police observed the defendant spin his tires when a light turned green and then "fishtail" upon turning. Id. at 43. They did not activate their lights or sirens but did attempt to follow the defendant. Id. at 47. When they reached the vehicle, it was parked and appellant was standing beside it. As he began running toward the back door of his house, which was ten to fifteen yards away, the police yelled for him to stop. Id. at 43, 47. He did not stop, and they pursued him into his house to cite him for reckless operation. Id. at 43-44. Upon questioning him, they further charged him with OVI. Id. at 44.

¶{39} The Ohio Supreme Court found no reason to distinguish *Flinchum* from *Santana*. Id. at 45. They held that where officers approach a person they have probable cause to arrest but he ignores their commands to stop and flees into his house to avoid arrest, the pursuit into the home is lawful. Id.

¶{40} Similarly, the officer here had probable cause to believe that appellant committed two minor misdemeanor traffic offenses. The circumstances surrounding the running a red light offense here are not any less serious than the circumstances surrounding the reckless operation minor misdemeanor in *Flinchum*. Appellant was in public view in a driveway (much more public than Santana standing in the doorway to her house). The officer ordered appellant to stop more than once before he entered his open, detached garage (as opposed to a house). Since the attempt to arrest was set in motion while appellant was outside in public view, the pursuit into his garage was lawful, regardless of whether the garage is considered curtilage.

¶{41} Finally, we note that the fact that an officer is generally permitted only to cite rather than arrest a minor misdemeanant does not mean that there was not probable cause to arrest for purposes of the law on entry. That is, if there is probable cause for an arrest on a minor misdemeanor, then the statute merely instructs officers to cite in lieu of making the otherwise lawful arrest. See R.C. 2935.26. Regardless, arrest on a minor misdemeanor is permissible, for instance, where the defendant refuses to sign the citation. See R.C. 2935.26(A)(3). This situation would exist when

the defendant flees into a private place after being told to stop in a place of public view such as the driveway in this case.

¶{42} In any event, the *Flinchum* Court did not discuss the issue of arrest versus citation for a minor misdemeanor, and thus, the concept is not dispositive to the issue of whether police can follow the traffic violator into his home when he refuses their oral commands to stop. For all of these reasons, this argument is overruled.

ASSIGNMENTS OF ERROR NUMBERS TWO & THREE

¶{43} Appellant's second assignment argues that the resisting arrest charge should have been dismissed because, based on his arguments above, the arrest for OVI was not lawful. Due to our resolution of assignment of error number one, finding that appellant's arrest was lawful, this assignment of error is moot because it relies upon a finding of an unlawful arrest. Appellant's third assignment of error was withdrawn at oral argument.

¶{44} For the foregoing reasons, the judgment of the trial court is hereby affirmed and counsel's motion to withdraw is granted.

Donofrio, J., concurs.
DeGenaro, J., concurs.