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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000341-MR

ERIC QUINTANA — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JAMES E. BONDURANT, JUDGE
INDICTMENT NO. 01-CR-00204

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,[1] SENIOR JUDGE.

HUDDLESTON, SENIOR JUDGE: Eric Quintana entered a conditional *Alford*[2] plea of guilty[3] in Nelson Circuit Court to cultivation of marijuana over five plants and possession of drug paraphernalia. Quintana was sentenced to one year's imprisonment on the

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), a defendant may plead guilty while insisting on his innocence where he perceives that evidence that the prosecution could produce would support a guilty verdict.

[3] With the approval of the trial court, a defendant may enter a conditional guilty plea and reserve in writing the right to seek review on appeal of an adverse determination of any specified pretrial motion. Ky. R Crim. Proc. (RCr) 8.09.

cultivation charge and to twelve months in jail for possession of drug paraphernalia, with the sentences to run concurrently. Quintana reserved the right to appeal the denial of his motion to suppress evidence seized following an attempted "knock and talk" conducted by officers of the Kentucky State Police (KSP) and the Greater Hardin County Drug Task Force. Quintana argues that his Fourth Amendment[4] protection from unreasonable searches and seizures was violated when the officers entered the curtilage of his home and detected the odor of marijuana emanating from the residence.

The KSP received tips regarding marijuana cultivation and had reason to believe Quintana might be involved. The officers acknowledged there was not enough information to secure a search warrant and decided to visit Quintana's residence for a so-called "knock and talk." Upon arriving at the residence, the officers found two cars parked in the driveway which were registered in Quintana's name. The officers knocked on the front door of the house and received no response. KSP Trooper Stroop then made his way around the side of the house to determine if there was a rear entrance. Once he was behind the house, Stroop found there was no back door, but smelled

[4] Amendment IV to the Constitution of the United States provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

marijuana emanating from a window air conditioning unit. Stroop called for Detective Clark, who was trained in narcotics. Clark agreed the odor of marijuana was coming from inside the house. The officers then left to secure a search warrant for the premises. While a search warrant was being secured, a deputy sheriff remained outside the house to preserve the scene. Once the warrant was issued, the officers returned to search Quintana's property. Upon entering the house, the officers seized 104 marijuana plants and various drug paraphernalia.

Quintana moved to suppress the evidence seized from his home. At the hearing held to consider the motion, he asserted that the officers were impermissibly within the curtilage of his home when they noticed the odor of marijuana. Quintana contended that a neighbor intercepted the police and advised that no one was inside the house; therefore, he argued, the officers should not have continued to the rear of the house. However, the officers testified that they were already in the backyard of the house when the neighbor appeared. The court denied Quintana's motion to suppress.

Commonwealth v. Neal[5] established the parameters for this Court's review of the circuit court's determination to admit the evidence sought to be suppressed:

[5] 84 S.W.3d 920 (Ky.App. 2002).

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.[6]

In this case, the circuit court heard testimony from the investigating officers. The officers stated they were in the backyard of the house legitimately, and before the neighbor advised them that no one was home, looking for a rear entrance to the dwelling when they smelled the strong odor of marijuana. Consequently, substantial evidence was adduced to support the factual findings of the court.

The backyard of a home is considered part of the curtilage, Quintana argues, and therefore encompassed by a reasonable expectation of privacy. The officers, he insists, invaded the constitutionally protected curtilage and smelled the incriminating aroma which, in turn, was used to secure a search warrant. We disagree. This situation is analogous to the "plain view" exception to the warrant requirement.[7] The officers

[6] *Id*. at 923 (citations omitted).

[7] *See Cooper v. Commonwealth*, 577 S.W.2d 34, 36 (Ky.App. 1979), *overruled on other grounds*, *Mash v. Commonwealth*, 769 S.W.2d 42 (Ky. 1989). "As long ago as 1925, this state's highest court held that a warrantless search could be based upon smelling illegal liquor. The federal courts have also recognized a 'plain smell' analogue to the 'plain view' doctrine." (Citations omitted.)

were legally entitled to enter the property to perform the "knock and talk." During the course of this duty, they found evidence of illegal activity, *i.e.*, the odor of marijuana. This Court has long-held that

> a police officer in the furtherance of a legitimate criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public use. We limit the permissible scope of this right, however, to driveways, access roads, and as much of the property's sidewalks, pathways, and other areas as are necessary to enable the officer to find and talk to the occupants of the residence.[8]

Furthermore, "[i]f the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance," issuance of a search warrant is proper.[9] The officers were not impermissibly in Quintana's backyard at the time the marijuana odor was discovered. As a result, the smell of the marijuana constituted probable cause for seeking a search warrant.

For the foregoing reasons, the judgment is affirmed.

ALL CONCUR.

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[8] *Cloar v. Commonwealth*, 679 S.W.2d 827, 831 (Ky.App. 1984).

[9] *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

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