RENDERED: JUNE 24, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001579-MR

DANNY LEE OUSLEY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CR-00287

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND WINE, JUDGES.

TAYLOR, CHIEF JUDGE: Danny Lee Ousley brings this appeal from a July 27, 2010, judgment of the Fayette Circuit Court sentencing appellant to five-years' imprisonment probated for a period of five years. We reverse and remand.

Appellant was indicted by a Fayette County Grand Jury upon the offense of trafficking in a controlled substance in the first degree, trafficking in

marijuana within 1000 yards of a school, and possession of drug paraphernalia. Appellant filed a motion to suppress evidence seized during two warrantless searches of his trash toter at his home. From these warrantless searches of appellant's trash toter, police seized an empty digital scale box and four plastic baggies containing methamphetamine residue. Subsequently, these items were utilized by police to form probable cause necessary for the issuance of a search warrant of appellant's residence. Upon execution of the search warrant, police seized contraband from appellant's residence, thus forming the foundation of the indictment.

Pursuant to appellant's motion to suppress, the circuit court held a suppression hearing. Officer Keith Ford of the Lexington Police Department testified that he conducted the warrantless searches of appellant's trash toter. Appellant also testified at the hearing that he believed his trash toter was on real property where he resided and that he viewed same as private. He also testified that the area where the trash toter was located was used for his private storage needs. Following the hearing, the circuit court denied appellant's motion to suppress. In support thereof, the circuit court stated that the trash toter was not within the curtilage of appellant's home and that appellant possessed no constitutionally cognizable expectation of privacy in his trash.

Pursuant to a plea agreement with the Commonwealth, appellant entered a conditional plea of guilty pursuant to *Alford v. North Carolina*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), thereby reserving for appellate review

the circuit court's denial of his motion to suppress. By judgment entered July 27, 2010, the circuit court sentenced appellant to a total of five-years' imprisonment probated for a period of five years. This appeal follows.

Appellant argues that the circuit court erred by denying his motion to suppress evidence seized as the result of the warrantless searches of his trash toter. For the reasons hereinafter stated, we agree.

To begin, our review of a circuit court's denial of a motion to suppress evidence is twofold. First, we must determine whether the circuit court's findings of fact are supported by substantial evidence. *Adcock v. Com.*, 967 S.W.2d 6 (Ky. 1998). If supported by substantial evidence, the findings of fact are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Drake v. Com.*, 222 S.W.3d 254 (Ky. App. 2007). And, substantial evidence has been defined as evidence possessing sufficient probative value to induce conviction in the minds of reasonable men. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Second, we then conduct a *de novo* review of the circuit court's application of law to the facts. *Adcock*, 967 S.W.2d 6. In this appeal, the material facts are undisputed, so our review proceeds *de novo*.

Appellant lived in a single family residence in Lexington, Kentucky. The homes in appellant's neighborhood were located only feet from each other and were merely separated by each home's respective private driveway. Appellant's private driveway directly abutted the side of his neighbor's residence and then extended beyond the front of appellant's residence parallel with his dwelling. The

width of appellant's private driveway was sufficient to accommodate one motor vehicle. At the back of this private driveway, appellant erected a storage shed which directly faced the side of his residence and was nearly situated upon the common boundary line with his neighbor's residence. The trash toter was placed directly at the side of this shed. This area was utilized by appellant for his personal and private storage needs. Appellant normally parked his motor vehicle in the driveway, and the motor vehicle obstructed the public view of the storage area, including the trash toter. However, when the motor vehicle was not parked in the driveway, the trash toter was in public view from the street.

Officer Ford searched appellant's trash toter on two separate occasions and did so without securing search warrants. To effectuate the warrantless searches of the trash toter, Officer Ford was required to transverse the private driveway to the storage area where the trash toter was located. He then seized trash from the toter and later inspected same for incriminating evidence.

The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution protect an individual from unreasonable search and seizure conducted by the state.[1] *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Relevant to our case, this constitutional guarantee against unreasonable search and seizure has been recognized as prohibiting a warrantless search where a reasonable expectation of privacy exists in the object to

[1] It has been recognized that the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution provided identical protections against unreasonable search and seizure performed by the state. *Smith v. Com.*, 323 S.W.3d 748 (Ky. 2009).

be searched. *Katz*, 389 U.S. 347. And, an expectation of privacy is considered reasonable where "(1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable." *Hause v. Com.*, 83 S.W.3d 1, 11 (Ky. App. 2001)(quoting *LaFollette v. Com.*, 915 S.W.2d 747, 749 (Ky. 1996)). As to the warrantless search of garbage or trash, the United States Supreme Court has specifically recognized that the warrantless search of "garbage bags left at the curb outside the [respondent's] house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." *California v. Greenwood*, 486 U.S. 35, 39, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988); *accord Smith v. Com.*, 323 S.W.3d 748 (Ky. 2009).

Generally, an individual who leaves trash outside the curtilage of his home for collection has no reasonable expectation of privacy in such trash. *Greenwood,* 486 U.S. 35; *Smith*, 323 S.W.3d 748.[2] The basis for this rule is that any expectation of privacy in the trash is not considered objectively reasonable by society as:

> It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. *See* *Krivda, supra,* 5 Cal.3d, at 367, 96 Cal.Rptr., at 69, 486 P.2d, at 1269. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash

[2] For example, if the trash toter had been placed at the curb on the street in front of the residence for collection, there would be no reasonable expectation of privacy.

> collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," *United States v. Reicherter*, 647 F.2d 397, 399 (CA3 1981), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

Greenwood, 486 U.S. at 40-41 (footnotes omitted).

Thus, the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution do not prohibit the warrantless search by police of trash or garbage deposited outside of the home's curtilage in a location designated for trash collection. The more difficult issue is presented where trash or garbage is directly searched by police while still located within the curtilage of the home and before being placed in the designated location for collection. These cases must be decided based upon their respective facts to determine whether a reasonable expectation of privacy exists in the garbage. As hereinbefore stated, a reasonable expectation of privacy exists when an individual possesses a subjective expectation of privacy in the garbage that society accepts as objectively reasonable. *Greenwood*, 486 U.S. 35.

In its decision denying the motion to suppress, the circuit court concluded that appellant's trash toter was located outside the curtilage of his home and that no reasonable expectation of privacy existed therein.[3] In so concluding,

[3] The question of whether an area constitutes curtilage is one of law. *See Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (Ky. 1996); *accord, United States v. Cousins*, 455 F. 3d 1116 (10th Cir. 2006); *United States v. Johnson*, 256 F. 3d 895 (9th Cir. 2001). However, any disputed factual issues are, of course, a question of fact for the circuit court.

the circuit court focused upon the factors relevant to curtilage issues as set forth in the recent Kentucky Supreme Court opinion of *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008). These nonexclusive factors are "the proximity of the area to the home, whether the area is included in an enclosure with the home, how the area is used, and the steps the resident has taken to prevent observation from the people passing by." *Id.* at 757. The circuit court viewed as determinative the fact that appellant's trash toter was in public view and located only a few feet away from the pathway the public would normally use to access the front door of appellant's residence.

While a determination of whether appellant's trash toter was within the curtilage is helpful to the disposition of this appeal, this determination is not dispositive. The constitutional protection against unreasonable search and seizure of trash is not based upon property concepts but rather upon an individual's reasonable privacy expectation in the trash.[4] Hence, the pivotal question remains – whether appellant's subjective expectation of privacy in the trash toter is accepted as objectively reasonable by society.

Often times, both issues of law and of fact are involved in ultimately determining the curtilage issue. For example, a question of fact could be presented as to the location of the trash toter when police searched same. The police officer could testify that the trash toter was located on a street curb for collection, and defendant could conversely testify that the trash toter was located beside his home. Resolution of this factual issue would be for the circuit court, and our review of such finding is under the clearly erroneous standard. Once such factual issue is resolved, the question of whether the trash is within the curtilage is strictly one of law.

[4] *United States v. Williams*, 581 F. 2d 451 (5th Cir. 1978) contains a discussion of this point of law.

In answering this question, we are mindful of the unique circumstances attendant to modern urban living. In many modern urban communities, the outside property directly appended to a single family residence is frequently diminutive and readily open to public observation. In this modern urban reality, absolute privacy in the outside area surrounding a home is often illusory in its strictest sense. However, urban residents still expect certain areas of outside property surrounding their home to be regarded as private, and the public recognizes such expectation of privacy as reasonable.

In this case, appellant's trash toter was located in an area only a few feet from his residence and was situated directly next to his storage shed. Both the trash toter and shed were located at the far end of appellant's private driveway. This driveway extended back beyond the front of appellant's residence and into an area appellant utilized for private storage needs. Considering the configuration of the homes in appellant's neighborhood, the utilization of this area for private storage by appellant was reasonable. Appellant's residence only had a small front yard and no adjacent side yard as the residence next door was built nearly upon the common boundary line and was only separated by each home's respective private driveway.

Juxtaposing the factors set forth in *Quintana* to the facts herein, we conclude that appellant's trash toter was located within the curtilage of his home. *See Quintana*, 276 S.W.3d 753. And, considering the configuration of the homes in appellant's neighborhood and particularly appellant's home, it cannot

reasonably be said that a member of the public would believe he was free to enter into the storage area where appellant's trash toter was located and rummage through the toter for trash. *See Greenwood*, 486 U.S. 35. Simply stated, the public would recognize appellant's expectation of privacy in this area as reasonable. As such, we believe appellant possessed a constitutionally cognizable expectation of privacy in the trash toter.

In sum, we hold that appellant possessed a reasonable expectation of privacy in his trash toter where located on his property and that the warrantless searches of the trash toter by the police violated the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution.[5] Accordingly, we conclude that the circuit court erred by denying appellant's motion to suppress evidence seized by police from the warrantless searches of his trash toter.

For the foregoing reasons, the judgment of the Fayette Circuit Court is reversed and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

[5] We do not perceive our decision as unduly burdensome upon police; the police may constitutionally search without a warrant the contents of a trash toter when placed outside the home's curtilage for collection. *See Smith v. Com.*, 323 S.W.3d 748 (Ky. 2009).

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Louis W. Rom
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

David W. Barr
Assistant Attorney General
Frankfort, Kentucky