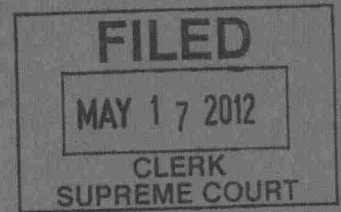


Commonwealth of Kentucky
Supreme Court
No. 2011-SC-000403



COMMONWEALTH OF KENTUCKY

MOVANT

v.

Appeal from Fayette Circuit Court
Hon. James D. Ishmael, Jr, Judge
Indictment No.2010-CR-287

DANNY LEE OUSLEY

RESPONDENT

Appellant Brief on DR

Submitted by,

JACK CONWAY

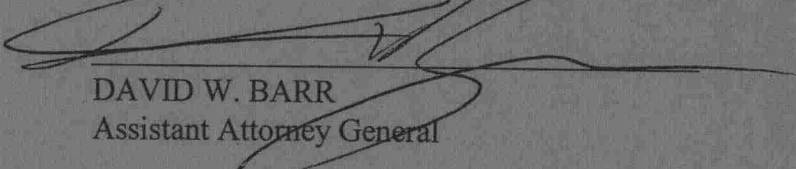
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 15th day of May, 2012, to Hon. James D. Ishmael, Jr., Fayette Circuit Court, Third Division, 120 N. Limestone, Room 534, Lexington, Kentucky 40507; sent via electronic mail to Hon. Ray Larson, Commonwealth Attorney, Suite 300, 116 N. Upper Street, Lexington, Kentucky 40507; and by U. S. mail to Hon. Louis W. Rom, Counsel for Appellant, 175 East Main Street, Suite 600, Lexington, Kentucky 40507.


DAVID W. BARR
Assistant Attorney General

INTRODUCTION

This appeal is before the Court upon grant of the Commonwealth's motion for discretionary review. The issues presented are: whether the Court of Appeals failed to follow the standard of review for warrantless searches and impermissibly substituted its findings of fact; and, whether the appellee had a reasonable expectation of privacy in the trash container that was searched without a warrant.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not request oral argument.

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STATEMENT OF THE CASE

A. Introduction. On March 1, 2010, appellee, Danny Lee Ousley, was indicted by the Fayette County Grand Jury. Appellee was charged with one (1) count, each, of first degree trafficking in a controlled substance (methamphetamine), trafficking in marijuana within 1,000 yards of a school, and possession of drug paraphernalia. TR 16 - 17. These charges arose, in part, from two (2) warrantless searches of appellee's trash container. Evidence obtained in these trash pulls was used to establish probable cause and obtain a search warrant for appellee's home. TR 8 - 10. Detective Keith Ford admitted that, without the results of the warrantless trash pulls, he lacked probable cause to obtain a search warrant. VR, 5/19/10, 9:13:08 - :48.

Appellee filed a motion to suppress. TR 24 - 26. The issues before the trial court were: where was the trash container located at the time of the search; was that location within the curtilage of the home; and, did appellee have a reasonable expectation of privacy in the trash container. The trial court found that the trash container was located on the driveway forward of appellee's home and was touching or near his neighbor's home. The trial court found that this area was readily available to the public and was outside the curtilage of the home.

Without explaining why it was rejecting the trial court's findings of fact, the Court of Appeals found that the trash container was located near the rear of appellee's home, by a storage shed. The Court of Appeals found that this area was not readily available to the public and was within the curtilage of the home.

B. Evidence from the Suppression Hearing. A suppression hearing was held on May 19, 2010. Appellee's home is a free-standing townhouse. VR, 5/19/10, 9:03:51 - 9:04:04; 10:20:35 - 10:21:40. There is a driveway between appellee's townhouse and the townhouse to the left (facing the homes from the street). The front of the townhouse on the left is closer to the

street than is appellee's home. VR, 5/19/10, 9:24:35 - 9:26:02. The side of appellee's home, near the driveway, does not contain a door. VR, 5/19/10, 9:29:30 - 59. To enter the appellee's home, one would walk up the driveway (with the trash container on the left), turn right onto a sidewalk and then proceed to the front door. VR, 5/19/10, 9:32:00 - 38; 9:34:35 - 9:36:40; 10:23:00 - 10:24:20.

Appellee's trash container was found on the driveway, forward of appellee's home. It was not at the curb. It was not touching appellee's home. Instead, it was adjacent to, or touching the neighbor's home. VR, 5/19/10, 9:09:18 - 9:10:05; 9:11:30 - 9:12:25; 9:25:35 - 9:26:02; 10:22:48 - :59. The trash container was not enclosed and could be seen from the street. VR, 5/19/10, 9:12:44 - 9:13:07; 10:24:45 - :59. The first trash pull found an envelope bearing appellee's name and address and a box for shipping digital scales. VR, 5/19/10, 9:09:18 - 9:10:05. The second pull revealed mail bearing appellee's address and four (4) Ziploc baggies with methamphetamine residue. VR, 5/19/10, 9:14:00 - 9:15:10.

Appellee testified at the suppression hearing. Appellee testified that, contrary to the officer's assertion, his trash container was located at the rear of his home near a storage shed. VR, 5/19/10, 9:44:20 - 55. Detective Keith Ford specifically testified that the container was not near the shed. VR, 5/19/10, 9:26:03 - 9:28:55.

Appellee introduced a photograph of his home, driveway and vehicle. VR, 5/19/10, 9:27:15, et. seq. The date of the photograph is unknown. The photograph was clearly taken during daylight hours. VR, 5/19/10, 9:27:36 - 38. The trash pulls occurred at 11:30 pm and 12:15 am. VR, 5/19/10, 9:29:00 - 30. In other words, the probative value of the photograph, relative to the location of the trash container at the time of the trash pulls was nil.

Appellee introduced a second photograph. The date of the photograph is unknown. This photograph depicted the sidewalk, leading from the driveway to the appellee's front door. The trash container is shown in the photograph. Detective Ford stated clearly, repeatedly and unequivocally that the trash container was in a different location at the time of the trash pulls. VR, 5/19/10, 9:40:10 - 20; 9:40:30 - 9:41:14; 9:41:30 - 42.

At oral argument, the Court of Appeals asked several questions about the photographs and the location of the trash container in the same. The Opinion of the Court of Appeals does not mention the photographs, but it is readily apparent that the Court relied upon the photographs in making its improper, substitute findings of fact.

At the suppression hearing, the trial court made its oral findings of fact and conclusions of law on the record. The trial court rejected appellee's self-serving testimony and instead relied upon the testimony of the Detective Ford. Regarding the first trash pull, the trial court found that the trash container was resting forward of appellee's home, against the neighbor's home—not near the shed. VR, 5/19/10, 10:22:48 - 59, 10:24:24 - 40. The trial court did not make a specific finding of where the container was located at the time of the second pull. But, the trial court noted that Detective Ford testified that the trash container was in the same place both times, i.e., next to the neighbor's house. VR, 5/19/10, 10:25:25 - 35.

At the conclusion of the hearing, the trial court noted the case law controlling the issue, namely California v. Greenwood, 486 U.S. 35 (1988), Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2009), and United States v. Dunn, 480 U.S. 294 (1987). The trial court then applied the same to the facts of this case.

The trial court found that the trash container was a "very short distance" from appellee's

home. VR, 5/19/10, 10:47:45 - 10:48:19. The trial court found that the trash container was "very clearly" not enclosed. VR, 5/19/10, 10:48:20 - :45. The trial court found that the nature of the driveway, where the trash container was located, was: parking; placement of a storage building; and, ingress/egress. The trial court also found that, if somebody was walking from the next door neighbor's home to appellee's home, they would walk in close proximity to the trash container. VR, 5/19/10, 10:52:00 - 10:55:15. Lastly, the trial court found that no steps were taken to protect the trash container from observation by passers-by. In fact, the trial court noted that the trash container was "easily" seen from public areas. VR, 5/19/10, 10:49:28 - 10:50:59; 10:52:00 - 10:55:15. The trial court then concluded that the trash container was not within the curtilage of appellee's home and that appellee had no reasonable expectation of privacy in the contents of the container. VR, 5/19/10, 10:52:00 - 10:55:15.

C. The Opinion of the Court of Appeals. The Court of Appeals wholly ignored the trial court's findings of fact regarding the location of the trash container. In its Opinion of June 24, 2011, the Court of Appeals held:

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. Opinion at p. 4.

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 driveway. Opinion at p. 8.

Applying Quintana, the Court of Appeals held that the shed and trash container were within the curtilage of the home. The Court also held that appellee had a reasonable expectation of privacy in his shed and the trash container. Opinion p. 8 - 9. Because the Court found that the trash container was located within the curtilage, the Court also found that his reasonable expectation of privacy was violated by the warrantless searches. The Court then reversed the trial court's denial of the motion to suppress.

ARGUMENT

I.

**THE COURT OF APPEALS FAILED TO FOLLOW
THE PROPER STANDARD OF REVIEW WHEN IT
IGNORED THE TRIAL COURT'S FINDINGS OF
FACT--SUPPORTED BY THE RECORD--AND MADE
ITS OWN FINDINGS OF FACT.**

This case involved two (2) warrantless searches. The standard of review before the Court of Appeals was two-fold. Under RCr 9.78, the trial court's findings of fact were **conclusive** if supported by substantial evidence. Dixon v. Commonwealth, 149 S.W.3d 426, 433 (Ky. 2004); Licklitter v. Commonwealth, 142 S.W.3d 65, 69 (Ky. 2004); Simpson v. Commonwealth, 834 S.W.2d 686 (Ky. App. 1992). The trial court's conclusions of law were to be reviewed *de novo*. Ornelas v. United States, 517 U.S. 690 (1996); Commonwealth v. Whitmore, 92 S.W.3d 76 (Ky. 2003); Commonwealth v. Banks, 68 S.W.3d 347 (Ky. 2001). The clear error standard of review applied. Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002).

In its Opinion of June 24, 2011, the Court of Appeals failed to follow Dixon, Licklitter,

and Simpson, supra. The trial court specifically found that the trash container was located forward of appellee's home and was touching, or nearly touching, the neighbor's home. This crucial finding of fact was supported by substantial evidence, namely the testimony of Detective Keith Ford. This finding of fact was **conclusive** and was binding upon the Court of Appeals. It was also completely ignored by the Court of Appeals.

Instead, the Court of Appeals made its own improper *de novo* finding of fact that the trash container was located near the rear of appellee's property, by his storage shed. The Court of Appeals did not offer any reason for ignoring the trial court's findings of facts and making its own *de novo* finding of fact. The Court of Appeals violated the well-settled standard of review. The Opinion of the Court of Appeals should be vacated and the trial court's ruling reinstated.

II.

APPELLEE HAD NO REASONABLE EXPECTATION OF PRIVACY IN A TRASH CONTAINER LOCATED FORWARD OF HIS HOME, ON A DRIVEWAY READILY ACCESSIBLE TO THE PUBLIC.

It is well-settled that the curtilage of the home enjoys Fourth Amendment protection. The warrant requirement applies to anything, within the curtilage, in which the defendant also enjoys a reasonable expectation of privacy. To determine whether an area is within the curtilage of the home, and also whether there is a reasonable expectation of privacy, there are four (4) factors the court must consider: the proximity of the disputed area to the house; whether the disputed area is within an enclosure surrounding the house; the nature of the uses to which the disputed area is put; and, the steps taken by the resident to protect the disputed area from observation by people passing by. United States v. Dunn, 480 U.S. 294 (1987). See also, Quintana v. Commonwealth,

276 S.W.3d 753 (Ky. 2009).

The trial court found that the trash container was in close proximity to appellee's home. The container was placed a "very short distance," basically the width of the driveway, away from appellee's home. This is the only factor in appellee's favor. But, this factor is not dispositive. A balance must be struck between all four (4) factors.

The trash container was "very clearly" not enclosed. The container was simply sitting on appellee's driveway. It was not behind a fence. It was not secured in any manner.

The nature of the area where the trash container was located was public. If a guest drove to appellee's home, the driver would park in the driveway and walk past the trash container to get to appellee's sidewalk. Anybody who walked to appellee's door from his next door neighbor's home would walk right past the trash container. Those people could put anything in it, or take anything from it.

Appellee took no steps to protect the trash container from passers-by. As the trial court noted, the public could "easily" see the trash container from the street. Appellee could have stored the container in his storage shed. But he did not. He could have stored it behind a fence. But he did not. Instead, he left the container where any member of the public could easily see and approach it. Appellee had no reasonable expectation of privacy in the trash container. His Fourth Amendment rights were not violated by the warrantless searches of the same. And, because the warrantless searches were proper, the subsequent warrant search of his home was not fruit of the poisonous tree. The Opinion of the Court of Appeals should be vacated and the trial court's ruling reinstated.

In summary, the Court of Appeals improperly ignored the trial court's conclusive findings

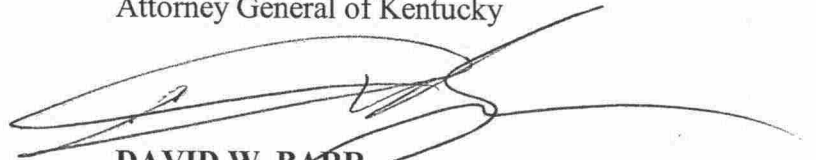
of fact. The Court of Appeals impermissibly substituted its own findings of fact. The Court of Appeals misapplied Dunn and Quintana, supra, to the facts of this case. The Opinion of the Court of Appeals must be reversed, and the trial court's ruling must be reinstated.

CONCLUSION

WHEREFORE, the Commonwealth of Kentucky asks that the Opinion of the Court of Appeals of June 24, 2011 be REVERSED and that the Final Judgment of the trial court be reinstated.

Respectfully submitted,

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Attorney General of Kentucky

A handwritten signature in black ink, appearing to read 'David W. Barr', is written over the typed name and title of the signatory.

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APPENDIX

Final Judgment, July 27, 2010	1
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