

**FILED**  
JUL 13 2012  
CLERK  
SUPREME COURT

**COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE NO.: 2011-SC-000403**

COMMONWEALTH OF KENTUCKY

MOVANT

v. APPEAL FROM THE FAYETTE CIRCUIT COURT  
Hon. James D. Ishmael, Jr., Judge  
Indictment No.: 10-CR-0287

DANNY LEE OUSLEY

RESPONDENT

\*\*\*\*\*

**BRIEF FOR RESPONDENT**

Respectfully submitted,


LOUIS W. ROM  
175 East Main Street, Suite 600  
Lexington, KY 40507  
Telephone: (859) 255-0395

**RECEIVED**  
JUL 13 2012  
CLERK  
SUPREME COURT

**CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing was served by mailing via same to the Clerk, KY Supreme Court, and that true copies were mailed to Honorable Jack Conway, Attorney General, 118 State Capitol, 700 Capital Avenue, Frankfort, KY 40601 Hon. Ray Larson, Commonwealth Attorney, Suite 300, 116 N. Upper Street, Lexington, KY 40507, and to Hon. James D. Ishmael, Jr., Judge, Fayette Circuit Court, Third Division, 120 N. Limestone, Room 534, Lexington, KY 40507. I further certify that the record on appeal has been returned to the Clerk of this Court.

This the 12<sup>th</sup> day of July, 2012.

  
\_\_\_\_\_  
COUNSEL FOR RESPONDENT

## INTRODUCTION

This is a criminal case before the Court upon its granting of the Commonwealth's Motion for Discretionary Review following the Kentucky Court of Appeals Opinion of June 24, 2011 reversing the trial court's denial of Respondent's suppression motion. It is the position of the Respondent that the Court of Appeals followed the applicable standard of review when it found: 1) that the material facts before the trial court were undisputed, and 2) upon its denovo review of the application of the law to the facts, the trial court erred by finding that Appellee's trash container was not within the curtilage of his home. It is further Respondent's position that the Court of Appeal's ruling that he had a reasonable expectation of privacy in the trash container subjected to two warrantless searches is in accord with applicable case law as well the Constitutions of the United States and Kentucky.

**STATEMENT REGARDING ORAL ARGUMENT**

Respondent requests oral argument on the grounds that it will be beneficial to the Court in this unique case involving fundamental Constitutional rights regarding searches without a warrant; more particularly, multiple searches of a trash container positioned in the curtilage of a private residence.

**STATEMENT OF POINTS AND AUTHORITIES**

|  | <u>PAGE</u> |
|--|-------------|
| <b>INTRODUCTION</b>  | i           |
| <b>STATEMENT REGARDING ORAL ARGUMENT</b>   | ii          |
| <b>STATEMENT OF POINTS AND AUTHORITIES</b>   | iii         |
| <b>STATEMENT OF THE CASE</b>   | 1           |
| <b>ARGUMENT</b>  | 5           |
| <b>I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW</b>   | 5           |
| <u>Adcock v. Com.</u> , 967 S.W.2d 6 (Ky. 1998)  | 5           |
| <u>Quintana v. Commonwealth</u> , 276 S.W.3d 753 (Ky. 2008) citing <u>United States v. Smith</u> , 783 F.2d 648 (6 <sup>th</sup> Cir. 1986), and <u>United States v. Jenkins</u> , 124 F.3d 768 (6 <sup>th</sup> Cir. 1997). | 6           |
| <b>II. RESPONDENT HAD A REASONALBE EXPECTATION OF PRIVACY</b>  |             |
| <u>California v. Greenwood</u> , 486 U.S. 35, 39, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988)  | 6, 7        |
| <u>U. S. v. Williams</u> , 581 F.2d 451 (5 <sup>th</sup> Cir. 1978)  | 7           |
| <b>CONCLUSION</b> .....  | 7           |
| <b>APPENDIX</b> .....  | 8           |

## STATEMENT OF THE CASE

### A. INTRODUCTION

This is a criminal case in which the Respondent, Danny Lee Ousley, sought relief with the Court of Appeals following the Fayette Circuit Court's ruling denying his Motion for Suppression of Evidence. In his motion, Respondent sought to exclude certain evidence obtained during two warrantless searches of his trash container while it was stored on the side of his residence. The Court of Appeals agreed with Respondent that he had a reasonable expectation of privacy in the contents of his trash container, finding that it was stored inside the protected curtilage of his home. The Appellate Court's opinion was supported by evidence in the record from the suppression hearing including but not limited to testimony from Mr. Ousley and Detective Ford, as well as exhibits consisting of photographs of Mr. Ousley's residence, his driveway, and the area where he stored his trash container.

### B. EVIDENCE FROM THE SUPPRESSION HEARING

A summary of the evidence presented is:

- An anonymous tipster first brought Respondent to the attention of the Lexington Police Department in March of 2009 by contacting crime stoppers, but the information was dismissed by Detective Ford as unreliable due to incorrect address for Respondent. [VR 5-19-10, 9:06:00, 10:16:45, 10:26:50]
- On December 20, 2009, a suspect being charged with

possession of drug paraphernalia brought up Respondent's name to a Lexington patrol officer and provided a correct address for defendant but inaccurate information about Respondent's car. The suspect had never purchased any narcotics from Respondent but only heard rumors that he was trafficking in methamphetamine. [VR 5-19-10, 9:18:50, 10:19:10, 10:27:20]

- Detective Ford conducted surveillance on Respondent's residence from December of 2009 to early January of 2010. Detective Ford estimated that he watched Respondent's house 10 times and never saw any activity that he related to drug trafficking. [VR 5-19-10, 10:19:30, 10:27:54]
- As a last resort, Detective Ford performed trash pulls at Respondent's residence. [VR 5-19-10, 9:21:30] His first trash pull was on January 18, 2010 at 11:30 pm while the trash container was positioned on the section of Respondent's driveway on the side of his residence, between his automobile and storage unit.<sup>1</sup> [VR 5-19-10, 9:25:00, 9:50:30, 10:20:25, 10:31:40-10:32:10] The location is approximately 25 feet from the curb in close proximity to the side of Respondent's house. [VR 5-19-10, 9:11:38- 9:12:45,

1

There is conflicting testimony about the exact location of the trash container with Detective Ford placing it nearly resting on defendant's neighbor's house while defendant placed his trash container near his storage unit out of view from his front door. [VR 5-19-2010, 9:50:30]

10:3130- 10:34:20]

- Respondent's residence does not have a door way or first floor window on the driveway side. <sup>2</sup> [VR 5-19-10, 9:29:40, 10:29:30] Respondent used this area of his driveway for a storage shed, his trash container, and to pile up yard waste. [VR 5-19-10, 9:46:30, 10:33:40]
- Detective Ford recovered mail matter from Respondent and an empty digital scale box during this trash pull. [VR 5-19-10, 10:21:45]. He agreed that the evidence and information he had gathered up to and including the first trash pull did not rise to the level of probable cause. [VR 5-19-10, 9:13:43. 10:22:00]
- Detective Ford executed his second trash pull at Respondent's residence on January 22, 2010 at 12:30 am while the trash container was placed in the very same location on the side of Respondent's residence. [VR 5-19-10, 9:14:00, 10:25] He recovered mail matter and four plastic baggies, one of which contained a residue substance which field tested positive for methamphetamine. [Id.]
- To gain access to Respondent's residence a person would proceed up the driveway, turn right onto the sidewalk and walk to the front door.<sup>3</sup> [VR 5-19-10, 10:30:20, 10:53:10]. It is

---

2 See photographs entered as Exhibits 1, 2 and 3. (TR 12)

3 See photograph of side walk and the front of Respondent's residence

possible under the hypothetical of someone walking between his house and his neighbor's house, that person would be cutting through the area used for private storage. [VR 5-19-10, VR 5-19-10, 10:30:20, 10:53:10].

- Pickup day for Respondent's trash was Friday morning. [VR 5-19-10, 9:54:30, 10:30:40] Respondent placed his trash container for collection on Friday mornings around 7 am [VR 5-19-10, 9:54:00]. Respondent's Neighborhood Association Rules prohibited him from placing his trash container in front of the house except on collection day. [VR 5-19-10, 9:49:10]
- Respondent also testified that he kept his trash container on the side of his house until collection morning because he did not want dumpster divers rummaging through his trash. [VR 5-19-10, 9:54:00].

**C. THE TRIAL COURT'S SUPPRESSION RULING**

The trial court denied Respondent's motion for suppression based upon the determination that his trash container was not in the protected curtilage of his home and therefore he did not have a reasonable expectation of privacy in his trash. In arriving at its decision, the trial court used the nonexclusive factors set forth in Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2009).

---

introduced during the suppression hearing.



#### **D. THE OPINION OF THE COURT OF APPEALS**

Despite argument to the contrary, the Appellate Court did not ignore the trial court's finding of facts or improperly substitute its own finding of facts. Rather, the Court used the undisputed material facts of the trial court in conducting its denovo review of the trial courts application of law to the facts. In doing so, the Court of Appeals did determine that the trial court erred by finding, as a matter of law, that Respondent's trash container was not stored in the curtilage of his residence during the warrantless searches by Lexington Police. As the Court of Appeals pointed out in its opinion, once factual issues are resolved, "the question of whether an area constitutes curtilage is one of law." See Opinion at p. 7, footnote 3.

#### **ARGUMENT**

##### **I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW**

In reviewing the trial courts denial of Appellee's motion to suppress, the Court of Appeals used the two prong analysis set forth in Adcock v. Com., 967 S.W.2d 6 (Ky. 1998). First, it examined the findings of fact of the trial court as outlined by the parties in their briefs and during oral argument, and determined that the material issues of fact were undisputed. Although the testimony of Mr. Ousley and Detective Ford differed slightly on the exact location of the trash container, the trial court made a factual finding that Mr. Ousley stored his trash container on the side of his home in the area near the storage shed. Photographic

evidence introduced at the suppression hearing (and reviewed by the Appellate Court during oral argument) showed this area was only a few feet from Mr. Ousley's home in a location near the end of the driveway utilized for storage. Next, the Court of Appeals conducted its denovo review of the trial courts application of aforementioned facts to law. In this part of its analysis, the Court found the trial court erred by ruling that the area was not within the curtilage of Mr. Ousley's home. In arriving at its decision, the Appellate Court used the nonexclusive factors listed in Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2008). The salient facts in the Courts Opinion to support its finding that the trash container was within the curtilage were: Respondent normally parked his vehicle in the driveway, the vehicle would obstruct the public view of the storage area, the location of Respondent's trash container on a private driveway in close proximity to the residence and storage shed, Respondent's designation of this area for private storage, and the configuration of the homes in Respondent's neighborhood. See Opinion at p.4 & 9.

## **II. RESPONDENT HAD A REASONALBE EXPECTATION OF PRIVACY**

Once it determined that the trash container was within the curtilage of the home, the Appellate Court proceeded to the question of whether Mr. Ousley had a reasonable expectation of privacy in the contents of his trash container which society would accept as objectively reasonable. See Opinion at p. 5-7, citing California v. Greenwood, 486 U.S. 35, 39, 108

S.Ct. 1625, 100 L.Ed.2d 30 (1988); U. S. v. Williams, 581 F.2d 451 (5<sup>th</sup> Cir. 1978). The Appellate Court found that members of the public would not believe they were free to enter into the area where Respondent stored his trash container to rummage through the trash. The Court found Respondent had overtly designated that portion of his driveway as a private storage area. See Opinion p. 9, citing Greenwood, 486 U.S. 35. This would hold even more significance if you factor in the late night/early morning hours of the searches conducted of Respondent's trash.

Based upon those findings, the Appellate Court ruled that the trial court should have ruled that the two warrantless searches of the trash container by Detective Ford violated the rights afforded Mr. Ousley under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. Accordingly, the trial court committed reversible error when it denied Respondent's motion to suppress evidence seized by police during warrantless searches of his trash container.

**CONCLUSION**

WHEREFORE, the Respondent asks that the Opinion of the Court of Appeals of June 24, 2011 be AFFIRMED.

Respectfully submitted,

LOUIS W. ROM  
175 East Main Street, Suite 600  
Lexington, KY 40507  
Telephone: (859) 255-0395

  
\_\_\_\_\_  
COUNSEL FOR RESPONDENT

APPENDIX

| <u>DESCRIPTION</u>  | <u>NUMBER</u> |
|---|---------------|
| Final Judgment  | 1             |
| Court of Appeals Opinion, Ousley v. Commonwealth, June 24, 2011 | 2             |