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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002238-MR

DIEREKUS EDMONDS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 06-CR-00610-1

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

STUMBO, JUDGE: This appeal arises from a conditional guilty plea by Dierekus Lamont Edmonds (Appellant) to charges of criminal attempt to tamper with physical evidence and possession of marijuana. Appellant reserved the right to appeal the trial court's denial of his motion to suppress evidence. Appellant seeks to suppress marijuana found at the scene of his arrest. He asserts that the arrest was unlawful and, therefore, the marijuana found at the scene should be suppressed as fruit of the poisonous tree. The trial court found that the issue of the marijuana was a factual question that should be

determined by a trial and not an issue for suppression. We agree with the trial court and hold that the arrest of Appellant was lawful and the issue of whether or not the marijuana belonged to Appellant is one for a trier of fact.

The facts surrounding this case are straight forward. On March 15, 2006, Officers Johnson and Blank were on foot patrol in the area of the HUD housing project on Breckenridge Street in Lexington. The officers came around the corner of an apartment at 689 Breckenridge, which was vacant, and saw several individuals in front of the apartment. Upon seeing the police, most of the individuals ran off, but Appellant remained on the porch of the apartment. Officer Johnson testified that he approached Appellant and turned on his flashlight, at which point Appellant stood up, said an obscene word, made a throwing motion, and began to walk away.

Officer Johnson stated at the suppression hearing that after Appellant made the throwing motion, he heard something soft hit the window of the adjacent apartment. Officer Johnson then requested that Appellant return to the porch, at which time he was placed under arrest for third-degree criminal trespass. This charge was later dropped in accordance with the plea agreement.

After Appellant was placed under arrest, Officer Johnson went to the area where he heard the object hit the window. On top of a bush next to the window Officer Johnson found a small plastic baggy containing approximately one gram of suspected marijuana. Officer Johnson then charged Appellant with possession of marijuana and

tampering with physical evidence. At the suppression hearing, Appellant claimed he had not thrown the marijuana, but had thrown a bottle cap.

At the close of the suppression hearing, the trial judge overruled the motion and held that the issue of whether or not the marijuana belonged to Appellant was a factual one and that the recovery of the marijuana was not connected to the arrest for criminal trespass.

Appellant argues that the issue of the marijuana was ripe for suppression because the arrest for third-degree criminal trespass was unlawful. He claims that he was unlawfully seized and arrested because to be guilty of third-degree criminal trespass, a person must knowingly enter and remain unlawfully upon premises. KRS 511.080. Appellant contends there was no reason for the officers to believe this was true because during the suppression hearing, Officer Johnson testified he could not recall whether or not there were any "No Trespassing" signs on the building at which Appellant was located. Appellant argues that without these signs, he could not have known he was unlawfully on the premises.

The Kentucky Supreme Court has held that the correct analysis is that "probable cause is proper to determine that a lawful arrest occurs when a reasonable officer could conclude from all the facts and circumstances that an offense is being committed in his presence." *Commonwealth v. Fields*, 194 S.W.3d 255, 258 (Ky. 2006). Although Officer Johnson stated during the hearing that he could not recall whether there was a "No Trespassing" sign on the specific building at which Appellant was located, he

did state that there were other "No Trespassing" signs on the property surrounding the building which was part of a housing project that was being demolished. This is coupled with the fact that the officers knew beforehand that the specific apartment was vacant because tenants were being moved out in order to tear down the buildings and build a school. Also, when the officers approached the group of people, the group quickly dispersed. When viewed together, these facts lead us to conclude that it was reasonable for the officers to believe that the offense of third-degree criminal trespassing was being committed in their presence. This being a lawful arrest, any search related to it would also be lawful.

We note that the trial court found the search was not connected to the arrest for third-degree criminal trespass. We agree. The search that revealed the marijuana was not conducted because Appellant was arrested for trespassing. It was found because Officer Johnson saw Appellant throw something upon their approach. These are two separate acts and not equated to one another. The discovery of the marijuana was not due to a search incident to the arrest of Appellant. The marijuana was not found on either Appellant's person or his property; therefore, he had no reasonable expectation of privacy to protect from unreasonable search and seizure.

The marijuana was found in a public place and had been abandoned by its previous possessor. By abandoning it, all reasonable expectations of privacy involving the marijuana were eliminated. If there is no reasonable expectation of privacy, there can

be no claim that a search was illegal. *See Adams v. Commonwealth*, 931 S.W.2d 465, 468 (Ky.App. 1996).

We hereby hold that because the underlying arrest was lawful and the search that produced the marijuana was not one incident to Appellant's arrest, the issue of the ownership of the marijuana ultimately becomes a factual question for a jury to determine. The fruit of the poisonous tree doctrine does not apply to this case, therefore the denial of the motion to suppress should be affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Herbert T. West
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BRIEF FOR APPELLEE:

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