

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001673-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 09-CR-01739

RORY SNOWDEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

TAYLOR, CHIEF JUDGE: The Commonwealth of Kentucky brings this appeal from an August 12, 2010, order of the Fayette Circuit Court granting a motion to suppress evidence filed by Rory Snowden. We affirm.

In October 2009, detectives with the Lexington Police Department received a tip from an informant that he had delivered marijuana to an individual whose nickname was “Rizzo” and who lived “about half way down” Wintergarden

Drive. The informant did not know the individual's proper name or exact street address but relayed that Rizzo drove a green Pontiac motor vehicle. Detectives then went to Wintergarden Drive and observed a green Pontiac vehicle parked in front of 2925 Wintergarden Drive. The Pontiac vehicle was registered to a Rory Snowden, and it was determined that Snowden had previously reported residing at 2925 Wintergarden Drive, Apartment D.

Based upon this information, detectives decided to conduct a "knock and talk" at 2925 Wintergarden Drive, Apartment D. Snowden was living in Apartment D, identified himself, and talked with the detectives. Snowden gave detectives permission to search his Pontiac vehicle but refused permission to search his apartment. The search of Snowden's vehicle revealed a small amount of suspected marijuana residue on the floorboard and a torn corner of a sandwich baggie. After searching Snowden's vehicle, one of the detectives searched Snowden's trash toter. The search of the trash toter revealed marijuana seeds, a marijuana roach, and a torn corner of a plastic baggie. Based upon the evidence seized during the search of Snowden's vehicle and trash toter, a search warrant was secured for Snowden's apartment. A search of Snowden's apartment produced a large quantity of marijuana.

Snowden was subsequently indicted by a Fayette County Grand Jury upon the offenses of trafficking in marijuana (eight ounces to less than five pounds) and possession of drug paraphernalia. Thereafter, Snowden filed a motion to suppress evidence seized during the search of his trash toter. Kentucky Rules of

Criminal Procedure (RCr) 9.78. Following an evidentiary hearing, the circuit court granted Snowden's motion to suppress evidence seized from the trash toter. The circuit court reasoned:

That [Snowden]'s apartment building contained four (4) separate units. The trash cans were in the rear of the building, were on private property, and were not set out for collection. The trash cans can also only be seen from the street if a [sic] one stands at the far right side of the driveway. This location is far from the sidewalk, the site for collection.

.....

The parking area where the trash can was located was directly behind [Snowden]'s apartment building. [Snowden]'s parking area is partially fenced in and is clearly separated from the parking areas of the neighboring apartment buildings. The rear of [Snowden]'s building has a "Tenant Parking Only" sign to further protect the property. Furthermore, the trash can was only visible from the street when one stood at the far right side of the driveway. Based on these factors, the Court finds the trash can was located within the curtilage of [Snowden]'s home and any evidence gathered from his trash can was seized in violation of his Fourth [A]mendment right against unreasonable searches and seizures. Such evidence may not be used by the police to obtain a search warrant.

The Court next turns its attention to whether the affidavit, minus the improperly seized evidence [from the trash toter], is sufficient to establish probable cause.

.....

Absent this information [evidence from the trash toter], there is very little contained in the affidavit to connect any alleged narcotics activity to [Snowden]'s residence. Therefore, the Court finds that if the affidavit had contained only properly obtained information, it

would have been insufficient to establish probable cause to search [Snowden]’s apartment. Wherefore, the evidence seized as a result of the search warrant is suppressed.

This appeal follows.

The Commonwealth contends that the circuit court erred by granting Snowden’s motion to suppress evidence. The Commonwealth maintains that the trash totter was not within the curtilage of Snowden’s apartment and, thus, not entitled to the Fourth Amendment’s protection against unreasonable search and seizure.

To begin, our review of a circuit court’s decision upon 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. 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*.

Snowden’s apartment at 2925 Wintergarden Drive is located in a two-story apartment building. The building contains four separate apartment units – two on the top floor and two on the bottom floor. The apartment building has one

front door located in the center of the building and a sidewalk leading directly to the door. Just to the right of Snowden's building is a driveway. The driveway runs alongside the building and leads to a parking area directly behind the building. The parking area is for residents of 2925 Wintergarden Drive and is marked with a sign that reads "Tenant Parking Only." The parking area is also partially fenced and is separate from the parking areas of the neighboring buildings. Along the back edge of Snowden's parking area there are four separate trash toters – one for each apartment unit. The trash toters are clearly marked with its respective apartment number – A, B, C or D. When Snowden's toter was searched, it was located in its normal location – in the grass behind the parking area – and had not been pushed around to the front of the building for collection.

The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution protect individuals from unreasonable search and seizure. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Relevant to the case *sub judice*, the constitutional guarantee against unreasonable search and seizure prohibits warrantless searches where there exists a reasonable expectation of privacy in the object searched. *Katz*, 389 U.S. 347. An expectation of privacy is recognized as reasonable if "(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)).

The United States Supreme Court has addressed the warrantless search of garbage and stated that “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 the 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). When an individual leaves trash outside the curtilage of his home for collection, he generally has no reasonable expectation of privacy in such trash. The reason for this rule is that any expectation of privacy that the individual has in such trash is not considered reasonable by society. *Greenwood*, 486 U.S. 35. The *Greenwood* Court explained its rationale as follows:

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 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). Simply put, the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky

Constitution do not prohibit a warrantless search of garbage deposited outside the home's curtilage in the location designated for garbage collection.

A more difficult issue is presented when police search garbage located within the curtilage of the home that has not been placed in the location designated for garbage collection. These cases require a decision based upon their respective facts to determine whether a reasonable expectation of privacy exists. As previously stated, the expectation of privacy is reasonable 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 to grant Snowden's motion to suppress evidence, the circuit court concluded that the trash toter was located within the curtilage of Snowden's home. The circuit court focused upon the factors identified by the Kentucky Supreme Court in *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008). These factors include (1) proximity of area to the home, (2) whether area is enclosed, (3) how the area is used, and (4) steps taken to prevent observation by passerbys. The circuit court noted that the area is located "directly behind [Snowden's] apartment building . . . is partially fenced . . . is clearly separated from the parking areas of the neighboring apartment buildings . . . has a 'Tenant Parking Only' sign to further protect the property . . . [and] was only visible from the street when one stood at the far right side of the driveway."

While the circuit court's determination that the trash toter was located within the curtilage of Snowden's home is relevant to the disposition of this

appeal, it is not dispositive. The constitutional protection against unreasonable search and seizure of garbage is not based upon property concepts; rather, it is based upon an individual's reasonable expectation of privacy in such trash. Thus, the pivotal question becomes whether Snowden's subjective expectation of privacy is viewed as objectively reasonable by society.

In this case, Snowden's trash was located in an area directly behind the apartment building. Each of the four tenants was provided with a separate toter, and each toter was clearly identified as belonging to a particular tenant. It is clearly distinguishable from a communal trash receptacle that is shared by all tenants. Each building also had a clearly delineated parking area reserved for the four residents of each building.

Considering the factors delineated in *Quintana* along with the factors of this case, we conclude that Snowden's trash toter was located within the curtilage of his house. *See Quintana*, 276 S.W.3d 753. And, considering the unique circumstances herein, it cannot be said that a member of the public would reasonably believe he was free to enter the private parking area behind Snowden's building and rummage through his trash toter. *See Greenwood*, 486 U.S. 35. Simply put, the public would recognize Snowden's expectation of privacy as reasonable. As such, we believe Snowden possessed a constitutionally cognizable expectation of privacy in the trash toter.

In sum, we hold that Snowden possessed a reasonable expectation of privacy in his trash toter and the warrantless search of his trash toter violated the

Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. As such, we conclude that the circuit court properly granted Snowden's motion to suppress evidence.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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