[Cite as *State v. Bradford*, 2010-Ohio-1784.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

State of Ohio,	:	
Plaintiff-Appellant,	:	Case No. 09CA880
v.	:	
David L. Bradford,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	**Released 4/19/10**

APPEARANCES:

Aaron E. Haslam, Adams County Prosecutor, and David Kelley, Adams County Assistant Prosecutor, West Union, Ohio, for appellant.

Douglas McIlwain, West Union, Ohio, for appellee.

Harsha, J.

{¶1} The State of Ohio appeals from an order suppressing marijuana, which law enforcement officers discovered during an investigation of a deer poaching complaint. That investigation led wildlife officers to David Bradford's residence where they ultimately discovered marijuana hanging from the ceiling of an outbuilding. The trial court suppressed the marijuana because the officers discovered it during a warrantless search of Bradford's premises. The State supports its contention that the warrantless search and seizure did not violate the Fourth Amendment with four separate arguments.

{¶2} The State contends the trial court erred in concluding the outbuilding was part of the curtilage of Bradford's residence, and thus, entitled to Fourth Amendment protection. Because the outbuilding was located within twenty yards of the residence, connected to the residence by a pathway, used as part of Bradford's yard, and Bradford

took steps to protect the inside from observations by passersby, the trial court correctly found it was part of the curtilage.

{¶3} The State also contends it did not violate the Fourth Amendment as the marijuana was in "plain view." We construe this argument to be more properly characterized as "open view" but reject it in any event. The outbuilding was not implicitly open to the public. Because Bradford maintained a reasonable expectation of privacy over it, the officer had no right to walk behind the trailer and peer into it with a flashlight. Thus, the open view rule does not apply.

{¶4} Next, the State contends the marijuana was admissible under the inevitable discovery rule, i.e., they were actively pursuing a search warrant. However, because the State did not proceed with its effort to obtain a warrant until after the warrantless search revealed the contraband, the rule does not apply. Moreover, the officers abandoned their efforts to obtain a warrant.

{¶5} Finally, the State argues that it obtained a valid consent to search the premises from Bradford. However, some evidence supports the trial court's factual finding that Bradford's consent was involuntary due to the coercive atmosphere at the scene. Therefore, we cannot substitute our judgment on this issue for that of the trial court.

I. FACTS

{¶6} In the early evening hours in late October 2006, Wildlife Officer Gilkey received a report from a bow hunter concerning individuals shooting deer with guns during bow season in Adams County. The bow hunter heard gun shots and observed

two people dragging a deer out of the woods. Gilkey contacted Wildlife Investigator Buddelmeyer and requested that he meet him at the scene.

{¶7} Gilkey arrived first and made contact with the bow hunter. Buddelmeyer arrived at around 8:00 p.m. and joined in the investigation. Gilkey and Buddelmeyer discovered deer entrails near the area where the bow hunter observed the individuals dragging the deer. The two observed drag marks and a blood trail leading from the entrails. They followed this “trail” until they came upon a set of tire tracks leading out of a field and into a road.

{¶8} Buddelmeyer left the field to get his truck and meet up with Gilkey, who was following the tire tracks. As Gilkey came out of the field, he observed a house-trailer with a red pickup truck sitting in the driveway. Gilkey believed that the tire tracks led into the driveway and indicated to Buddelmeyer that this was probably where the suspects had gone. It was approximately 10:30 p.m. by this point.

{¶9} After the two officers entered the driveway, they shined their flashlights in the bed of the pick-up truck and observed rope with fresh hair and blood on it. They also observed a spotlight or flashlight and a saw.

{¶10} Gilkey saw the door of the trailer open and watched an individual let a dog in. The officers walked up to the trailer and knocked on the door but no one answered. Buddelmeyer suggested that they contact the Adams County Sheriff’s Department for assistance. They requested back up from Adams County and also contacted the Division of Wildlife for additional wildlife officers.

{¶11} Around 11:00 p.m., Adams County Sheriff's deputies Copas and Mingee arrived. Copas apparently was familiar with Bradford and knew that this was his residence. Two additional wildlife officers also arrived at some point later in the night.

{¶12} The Sherriff's deputies and wildlife officers used loudspeakers to announce their presence and to demand that Bradford come out to speak with them. After using spotlights from their vehicles to illuminate the trailer doors and windows, the deputies and wildlife officers knocked on the door and walked around the trailer. They banged on the windows and doors for a couple of hours in an attempt to get the occupant to come out. Later, Mingee made contact with Bradford's brother, who came over and knocked on the door. Still, Bradford did not respond.

{¶13} At some point later, Gilkey commented to Mingee or Copas that he had observed an outbuilding behind the trailer and that Bradford may have hidden deer parts in the outbuilding. Mingee proceeded to the back of the trailer where he saw a building with a big glass window. Upon shining his flashlight through the window, Mingee was able to see through a white curtain and noticed green plants hanging upside down from the ceiling. He believed these plants to be marijuana.

{¶14} After Mingee told Copas and Gilkey that he thought there was marijuana in the outbuilding, both men went to the outbuilding and observed what they also believed to be marijuana. By this time it was approximately 1:30 to 2:00 a.m.

{¶15} While Gilkey and Buddelmeyer went to obtain a search warrant, Mingee continued to beat on Bradford's door. He stated loudly "you might as well answer your door, cause we found your marijuana." Mingee also stated that other officers had gone to obtain a search warrant. This occurred at approximately 3:00 a.m.

{¶16} Bradford finally opened the door and allowed the law enforcement officers to enter. One of the wildlife officers who was still on scene contacted Gilkey and Buddelmeyer to tell them to come back to the trailer because Bradford had come out. Gilkey and Buddelmeyer turned around to return to the trailer without obtaining a search warrant.

{¶17} Apparently, the situation inside the trailer was relatively relaxed compared to prior efforts to get Bradford to come out. The Sheriff's deputies informed Bradford that they were there because of the wildlife officers' investigation and also because they found marijuana. After Bradford was informed of his Miranda rights, he indicated that he did not want to make a statement concerning the marijuana. Bradford was not handcuffed and sat at his kitchen table, drinking coffee with Copas. The officers also allowed him to smoke and use the restroom.

{¶18} Gilkey and Buddelmeyer quickly returned and entered the trailer. Buddelmeyer gave Bradford a "consent to search" form, which Bradford signed. Bradford testified that an officer told him that he could face a year in jail if he did not consent to a police search. All officers who testified disputed that they threatened Bradford in any way to induce him to sign the consent to search form, although one admitted that he told Bradford that signing the form would show the prosecutor "cooperation."

{¶19} After Bradford signed the form, the wildlife officers searched Bradford's trailer for evidence of deer, which they found in his refrigerator and freezer. The Sherriff's deputies searched the outbuilding and seized the marijuana plants.

{¶20} The trial court found Mingee's discovery of the marijuana was the result of an unreasonable search. The trial court concluded the outbuilding was a part of the curtilage of the Bradford's residence and when Mingee observed the marijuana in the outbuilding, he was trespassing. The trial court noted that there was some question concerning whether the marijuana was in plain view when Mingee observed it. But it found that plain view doctrine was not applicable because Mingee was in an unlawful position when he viewed the marijuana.

{¶21} The court also considered whether the evidence was admissible because Bradford later signed a consent to search form. The court found that Bradford's consent to search was involuntary because of the coercive atmosphere. The court then examined whether the evidence was admissible under the "inevitable discovery" doctrine. The court concluded inevitable discovery did not apply because the officers were not actively pursuing an "alternate line of investigation" at the time Mingee observed the marijuana. The court found that the illegal search by Mingee occurred prior to the officers attempting to obtain a search warrant.

{¶22} The State filed a timely notice of appeal and certified its purpose in accordance with Crim.R. 12(J).

II. ASSIGNMENT OF ERROR

{¶23} The State assigns a single error for our review:

> The trial court erred to the prejudice of the State of Ohio by suppressing the marijuana seized by law enforcement officers.

In conjunction with that assignment of error, the State presents four separate arguments, which we will discuss in a different order than presented by the State.

III. MOTION TO SUPPRESS

A. Standard of Review

{¶24} Our review of a trial court's decision on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. In a hearing on a motion to suppress evidence, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. DePew* (1988), 38 Ohio St.3d 275, 277, 528 N.E.2d 542; *State v. Warren* (Aug. 12, 1991), Hocking App. No. 90CA7, 1991 WL 156521, at *2. Thus, the credibility of witnesses at a hearing on a motion to suppress evidence is a matter for the trial court. A reviewing court should not disturb the trial court's finding on the issue of credibility. *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583; *State v. Tutt* (Apr. 14, 1986), Warren App. No. CA85-09-056, 1986 WL 4506, at *4. Accordingly, in our review we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, we independently determine as a matter of law whether they meet the appropriate legal standard without deference to the trial court's conclusion. *State v. Shelpman* (May 23, 1991), Ross App. No. 1632, 1991 WL 87312, at *2; *State v. Simmons* (Aug. 31, 1990), Washington App. No. 89CA18, 1990 WL 127065 at *3.

B. Reasonableness of Mingee's Search

{¶25} The Constitution only prohibits unreasonable searches or seizures. "The Fourth Amendment protects the individual's actual and justifiable expectation of privacy from the ear and eye of the government." *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006, at ¶13, citing *Smith v. Maryland* (1979), 442 U.S. 735, 740-

741, 99 S.Ct. 2577; *Katz v. United States* (1967), 389 U.S. 347, 351, 88 S.Ct. 507. Accordingly, the state is prohibited from making unreasonable intrusions into areas where people have legitimate expectations of privacy without a search warrant. *United States v. Chadwick* (1977), 433 U.S. 1, 97 S.Ct. 2476, abrogated on other grounds by *California v. Acevedo* (1991), 500 U.S. 565, 111 S.Ct. 1982. Generally, and absent a few well delineated exceptions, a warrantless search of a person's home is per se unreasonable. See *Katz* at 357. Like the home, the surrounding curtilage may enjoy substantial protection from unreasonable intrusions by the government because of the owner's expectation of privacy.

{¶26} Curtilage is the area immediately surrounding a dwelling. *United States v. Dunn* (1987), 480 U.S. 294, 300, 107 S.Ct. 1134. "Fourth Amendment protections of the home generally extend to the outbuildings located upon the curtilage, such as barns, and it can be fairly said that property owners have legitimate expectations of privacy in them." *State v. York* (1997),122 Ohio App.3d 226, 231, 701 N.E.2d 463, citing *Oliver v. United States* (1984), 466 U.S. 170, 180, 104 S.Ct. 1735.

{¶27} Looking at the totality of the circumstances, the factors to consider in pinpointing curtilage are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *Dunn* at 301. These factors are only relevant to the extent that they bear upon whether the area claimed to be curtilage is so intimately tied to the home itself that it should be placed under the home's "umbrella" of protection. Id.

{¶28} The State argues that the trial court erred in finding that the outbuilding was part of the curtilage. Presumably, the State believes the building was in an "open field" and thus, not entitled to any privacy expectation. See *Dunn* at 300. Although the State concedes that the outbuilding was in close proximity to the trailer, it contends that all other relevant factors indicate that the building was not part of the curtilage. First, the State points out that the outbuilding was not within any enclosure, such as a fence, that also surrounded the home. Second, the State contends that there is no evidence indicating the outbuilding was used for any household purposes. Last, the State argues that Bradford took no affirmative steps to protect the building from observation by others passing by.

{¶29} Bradford argues that the court properly found his outbuilding to be part of the curtilage because it was in close proximity to his residence. Furthermore, even though it was not within a fence or enclosure, Bradford argues he possessed a reasonable expectation that the public would not enter that building. Bradford agrees that the record does not indicate his use for the outbuilding but he suggests the building may have been used to store tools.

{¶30} First, we examine the court's factual findings concerning the *Dunn* factors. Competent, credible evidence supports the finding that the outbuilding was located within close proximity to the residence. Various parties testified that the outbuilding was located anywhere from 15 to 30 yards of the rear of the residence. Photographs admitted into evidence appear to corroborate that testimony.

{¶31} In considering the nature of the use of the area, the trial court found that the outbuilding was used as "part of the yard." A review of the photographs shows

various angles of the exterior of the outbuilding. One shows a metal ladder sitting on the ground and lying against the outbuilding. Above this ladder, another ladder is attached to and hanging from the outbuilding. Other photographs show another side of the outbuilding was littered with various items, including a section of fencing, another ladder, a wheelbarrow, a lawnmower, and what appear to be tarps. Additionally, the photographs show that the area surrounding the outbuilding was mowed.

{¶32} As the State contends, there is no evidence of an enclosure, but there is evidence of a path to the outbuilding from the residence.

{¶33} Finally, the court found that there was a curtain of some sort covering the interior windows of the outbuilding. Various parties described this material as a semi-transparent white silk or linen material. Photographs admitted into evidence reveal what appears to be a ruffled lace curtain with a wave design.

{¶34} Here, the trial court correctly determined that the outbuilding was a part of the curtilage of the home. The outbuilding was located within 15 or 30 yards from the residence, closer than the barn in *Dunn*. There was no evidence of enclosures anywhere on the property, natural or artificial. But there was evidence of a path linking the residence to the outbuilding. A path may associate an outbuilding with a residence in the same manner as an enclosure. Unlike in *Dunn*, police had no prior knowledge regarding any use of the outbuilding. Photographs admitted into evidence demonstrate that the exterior of the outbuilding was used to prop up or hang some typical household items and the area around the outbuilding was mowed. This indicates that the outbuilding was “part of the home itself.” *State v. Vondenheuvel*, Logan App. No. 8-04-15, 2004-Ohio-5348, at ¶10. The existence of curtains was not decorative, but rather

demonstrates that the owner took some steps to restrain passersby from observing the contents of the building. Likewise, the photographs of the building clearly show a "padlock" securing the door to the building. Implicit in the use of the padlock is an effort to keep the public out. Accordingly, the evidence supports the trial court's finding that the outbuilding was a part of the curtilage of the residence.

{¶35} The State contends in its second argument that the marijuana was in "plain view." It contends "that if an officer observes something in plain sight it does not amount to a constitutional violation." However, "plain view" is a term of art that has a specific meaning in the Fourth Amendment context. See Katz & Giannelli, Ohio Criminal Law (2 Ed.), Section 16:3, "Plain view and open view distinguished." The plain view doctrine applies to warrantless seizures, not warrantless searches. The open view doctrine applies where an officer views an object that is not subject to a reasonable expectation of privacy. No search occurs because the owner of the object has voluntarily exposed it to public view. Id.

{¶36} Just because a building is part of the curtilage does not mean that a law enforcement officer necessarily conducts an illegal search by observing its contents. As the Court noted in *Katz*, supra, at 351, the Fourth Amendment protects people, not places. When the police enter private property to conduct an investigation and they restrict their movement to places where the public is expressly or implicitly invited, they have not infringed upon any Fourth Amendment protection. See *State v. Hart* (Dec. 23, 1997), Athens App. No. 97CA18, 1997 WL 800898, at *2, fn. 8, citing 1 LaFave, Search and Seizure (3 Ed. 1996), 506-508, Section 2.3(f). In other words, home owners normally have a limited expectation of privacy in their driveway, sidewalk, doorstep, or

other normal routes of access to the home. Id., citing *State v. Durch* (1984), 17 Ohio App.3d 262, 263, 479 N.E.2d 892. Even in the home and areas surrounding it, the Fourth Amendment does not protect what one readily exposes to the open view of others, regardless of where that exposure takes place. Katz, Ohio Arrest, Search and Seizure (2009 Ed.), Sections 1:8 and 14:1. Thus, an officer who goes to the front door of a house on official business and observes some form of contraband inside the house while standing at the doorstep has not conducted a search. But if the officer should go to the side window and climb a ladder or stand upon a bucket to gain a view of the inside, the officer has exceeded the occupant's implicit invitation to the public and now is treading upon Fourth Amendment protections. See *State v. Peterson*, 173 Ohio App.3d 575, 2007-Ohio-5667, 879 N.E.2d 806, at ¶13 (when police make observations from a position to which the officer has not been expressly or implicitly invited, the intrusion is unlawful). And it is important to note that while the observation of something that is in "open view" does not amount to a search, this discovery does not justify a subsequent warrantless seizure absent some specific exception to the warrant requirement. See Katz & Giannelli, supra, at Section 16:3.

{¶37} Likewise, neither R.C. 1531.14, which authorizes employees of the division of wildlife to access private property during a lawful investigation, nor any common law privilege of law enforcement officers to enter on private land while performing their official duties, can override the constraints of the Fourth Amendment. Thus, for Mingee's discovery of the marijuana to be the result of an "open view," Mingee had to be in a constitutionally permissible position to view it. We conclude he was not.

He was able to view the inside of the building only by entering an area that was not either expressly or implicitly open to public access.

{¶38} Mingee was summoned to Bradford's residence to assist wildlife officers in a deer poaching investigation. The wildlife officers knew that a suspect was in the residence. There is little question that the law enforcement officers could lawfully approach the front door of Bradford's residence and attempt to make contact with him. The tire tracks leading out of the field and the items in plain view in the bed of the truck constituted a sufficient basis to question the person seen inside the residence regarding the deer poaching investigation. And any incriminating evidence the officers could view from the driveway or front door of the trailer would be "open view."

{¶39} However, Gilkey recommended that the sheriff's deputies walk around to the back of the residence and examine the outbuilding for evidence of deer parts. There is no evidence in the record that suggests Bradford had extended an explicit or implicit invitation to anyone to have access to that building. To the contrary, the closed curtain and padlocked door indicate the public was not welcome. The officers were not free to walk to the side of that building and peer into it in light of Bradford's efforts to maintain its privacy. When Mingee walked behind Bradford's residence and peered into the outbuilding he conducted an illegal search. Stated otherwise, the contraband in the building was not in open view.

{¶40} Having determined that the discovery of the marijuana occurred as the result of a warrantless search, we next examine whether any exceptions to the warrant requirement apply.

C. Voluntariness of Consent to Search

{¶41} The issue of voluntariness in the consent to a search presents a question of fact, rather than a question of law. *State v. Southern*, Ross App. No. 00CA2541, 2000-Ohio-2027, 2000 WL 33226310, at *2, citing *Ohio v. Robinette* (1996), 519 U.S. 33, 40, 117 S.Ct. 417; *State v. Robinette*, 80 Ohio St.3d 234, 243, 1997-Ohio-343, 685 N.E.2d 762. Thus, we review the court's finding that Bradford's consent was involuntary under the manifest weight of the evidence standard set forth in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578.

{¶42} A warrantless search based upon a suspect's consent is valid if her consent is voluntarily given, and not the result of duress or coercion, either express or implied. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041. Voluntariness of consent is determined by examining "the totality of the circumstances" involved. Id. at 226. The State must show by clear and convincing evidence that the consent was freely and voluntarily given. *Bumper v. North Carolina* (1968), 391 U.S. 543, 88 S.Ct. 1788.

{¶43} Citing *State v. Webb* (Jan. 28, 2000), Montgomery App. No. 17676, 2000 WL 84658, the trial court used a six factor test to assess the voluntariness of the consent in this case: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent (5) the defendant's education and intelligence; (6) the defendant's belief that no incriminating evidence will be found. We will review the trial court's factual findings separately and in order.

{¶44} 1. Voluntariness of the Defendant's custodial status. The trial court found that the defendant was in police custody involuntarily, because, although he was not told he was under arrest, he was not free to leave the trailer. This finding is supported by the record. Most officers who testified in this regard admitted that Bradford would not have been free to leave the trailer had he made an attempt.

{¶45} 2. Presence of coercive police tactics: The trial court found that the police acted coercively by surrounding Bradford's trailer, shining lights in his windows, knocking on the doors and windows, and using bullhorns. The court found that this activity lasted for hours. The court also found that officer statements including "you might as well open the door, as we've found your marijuana" or "[you] should come out and talk with us, as they are going to get a search warrant" were coercive in nature and implied to Bradford that it would be futile to refuse consent to search the property. Although the court found that after Bradford opened up his trailer the situation calmed down, it concluded that the hours of intimidation and their effect had not subsided to the point that Bradford voluntarily signed the form in his kitchen.

{¶46} The trial court's findings that the police acted coercively are supported by some evidence in the record. Law enforcement officers camped outside Bradford's residence for hours, starting at approximately 10:30 P.M. Bradford finally opened the door at around 3:00 a.m. There is evidence that throughout this time they tried every tactic to get Bradford to come out and speak with them. Gilkey testified that they used loudspeakers to announce themselves and order the defendant to come out of his residence. Gilkey testified that they used police strobe lights and shone spot lights on

the residence. He testified that police eventually turned off the strobe lights because they tired of seeing them.

{¶47} Mingee testified that they "hollered Deputy Sheriff and Game Warden for three or fours hours," trying to get Bradford to come out of his residence. Mingee recalled walking around the trailer and beating on all the windows and doors. He testified that they knocked and beat for probably three or four hours. Mingee even agreed with defense counsel's comparison that it was "like Waco." Mingee admitted to making the comment to Bradford that he should come out of the trailer as they had seen his marijuana and other officers were en route to obtain a search warrant. Thus, there is some evidence in the record that police engaged in intimidating tactics for hours before Bradford came out of his residence.

{¶48} The evidence does indicate that once Bradford opened up the trailer, the coercive tactics subsided. However, given the "Waco" like atmosphere, we will not second guess the trial court's conclusion that the effects of such an experience would not wear off in the half hour of time between when Bradford allowed police to enter his residence and he signed the consent to search form.

{¶49} 3. Extent and level of cooperation with police: The court did not apply this factor to its analysis because it was unable to draw any conclusions based on Bradford's varying levels of cooperation that night.

{¶50} 4. The Defendant's Awareness of his right to refuse: The court found that Bradford was not informed that he had a right to refuse consent. This finding is supported by the record. There is no testimony in the record that Bradford was informed that he had a right to refuse consent. Additionally, Buddelmeyer testified that

he did not tell Bradford to read the consent to search form but gave it to him and told him to sign it.

{¶51} 5. The Defendant's education and intelligence: The court found that there was no evidence presented on this factor. Bradford testified that he had an 11th grade education. We see no reason why the court would have discredited this testimony so we believe the trial court may have simply forgotten about this portion of the hearing. Its omission does not change our conclusion.

{¶52} 6. The Defendant's belief that no incriminating evidence would be found: The court found that Bradford had every reason to believe marijuana would be found. The trial court concluded that this factor indicated that Bradford's consent was involuntary. Again, this finding is supported by the evidence. As stated previously, Mingee testified that Bradford was informed before he signed the consent to search that they found the marijuana.

{¶53} Based on the foregoing, we conclude there is some evidence in the record to support the trial court's finding that, based on the totality of the circumstances, the State failed to demonstrate that Bradford's consent was voluntary. Moreover, even if we were to conclude otherwise, there is some question about whether a subsequent consent can validate a prior illegal search. See *State v. Myers* (1997), 119 Ohio App.3d 376, 381-82, 695 N.E.2d 327.

D. Inevitable Discovery Doctrine

{¶54} The inevitable discovery doctrine, set forth by the United States Supreme Court in *Nix v. Williams* (1984), 467 U.S. 431, 104 S.Ct. 2501, allows evidence that was obtained illegally to be admitted if it would have inevitably been obtained lawfully. This

exception was adopted by the Supreme Court of Ohio in *State v. Perkins* (1985), 18 Ohio St.3d 193, 480 N.E.2d 763. In *Perkins*, the Court said that it is the state's "burden to show within a reasonable probability that police officials would have discovered the derivative evidence apart from the unlawful conduct." Id. at 196.

{¶55} There are two primary means by which the State can establish the inevitable discovery of an unconstitutionally seized item: 1) prior to the misconduct, authorities were actively pursuing an alternate line of investigation that would have led to discovery of the item; or 2) they would have subsequently discovered the item by virtue of some standardized procedure or established routine. Because the State has not raised the second grounds, we look only to see if it has established that the deputies were actively pursuing an alternate line of investigation prior to the misconduct. In this regard, "the state must show that police were actively pursuing an alternate line of investigation, one untainted by the illegality that took place prior to the particular misconduct." *State v. Porter*, 178 Ohio App.3d 304, 2008-Ohio-4627, 897 N.E.2d 1149, at ¶43, citing *State v. Taylor* (2000) 138 Ohio App.3d 139, 740 N.E.2d 704.

{¶56} Although not all courts have limited the inevitable discovery exception to lines of investigation already underway, see 6 LaFave, Search and Seizure (4 Ed. 2004), 278-280, Section 11.4, most courts have applied a "prior" timeline requirement to this prong of the doctrine. See, e.g., *United States v. Buchanan* (C.A.6, 1990), 904 F.2d 349; *United States v. Reilly* (C.A.9, 2000), 224 F.3d 986. Ohio courts have also restricted the doctrine to situations where alternative investigatory procedures were already underway or completed. See *State v. Sharpe*, 174 Ohio App.3d 498, 2008-Ohio-267, 882 N.E.2d 960; *State v. Pearson* (1996), 114 Ohio App.3d 168, 682 N.E.2d

1086; and *State v. Nicole*, Athens App. No. 99CA49, 2001-Ohio-2451. As the Sixth Circuit noted in *United States v. Griffin* (C.A.6, 1974), 502 F.2d 959, at 961, "[t]he assertion by police (after an illegal entry and after finding evidence of crime) that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." Also relevant is *State v. Masten* (Sept. 29, 1989), Hancock App. No. 5-88-7, 1989 WL 111983. There the State argued that the illegally obtained evidence would inevitably have been found because police had probable cause to obtain a search warrant. The court disagreed, explaining "[w]hile there was undoubtedly sufficient probable cause to obtain a search warrant for the file cabinet in this case, we find that the mere fact that a search warrant would in all probability have been issued on request cannot be considered as the implementation of investigative procedures that would have ultimately led to the 'inevitable' discovery of the evidence." Id. at *8. Additionally, the court noted that the search warrant procedures begun earlier in the day had been terminated and the police never attempted to reinitiate those procedures upon being confronted with the locked filing cabinet.

{¶57} In the present case, the trial court found that "the illegal search by Deputy [Mingee] occurred prior to the officers attempting to obtain a search warrant."[1]

{¶58} Given our posture as a reviewing court, we are unable to say this is against the weight of the evidence notwithstanding Gilkey's testimony that the decision to obtain the search warrant was made prior to the discovery of the marijuana. Gilkey's

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[1] The court did not address the State's abandonment of its efforts in that regard. But it is hard to see how a procedure that has been affirmatively abandoned can lead to inevitable discovery.

testimony is clearly contradicted by that of both Mingee and Buddelmeyer. On direct, Mingee testified:

> Prosecutor: And, that's when you seen what you believed to be marijuana?
>
> Mingee: Yes.
>
> Prosecutor: And, you went out and informed Officer Gilkey?
>
> Mingee: Yeah. And, Deputy Copas.
>
> Prosecutor: What occurred next?
>
> Mingee: Well, we walked back and looked in the window to make sure…, you know, looked in the window, it was marijuana. Then we beat around the trailer again, and the, the Game Warden decided they'd go get a Search Warrant . . ."

{¶59} And the following conversation took place during cross examination of Buddelmeyer:

> Defense counsel: And, uh, at that point in time, did you conclude that this . . ., this is not a minor misdemeanor case, but actually a marijuana bust?
>
> Buddelmeyer: That's what the . . .
>
> Defense counsel: And, that's why you then contacted Dave Kelley?
>
> Buddelmeyer: That's when Officer Copas uh, decided to contact Mr. Kelly.
>
> Defense counsel: Right. And, certainly the odds, the nature of the case had changed, from a misdemeanor deer case to something that was involving a Search Warrant with Mr. Kelley, right?
>
> Buddelmeyer: I mean, in my eyes . . ., I'm there for the deer. We're, we're fish and game . . ., we're not drugs.
>
> Defense counsel: I understand, I understand. But, you brought in these other officers.
>
> Buddelmeyer: Yes, sir.

> Defense counsel: So that you could get a Search Warrant, right?
>
> Buddelmeyer: No, sir, we called in, and, and, it's standard . . ., I, I, I, work in 17 different counties, and it's common practice for us to . . ., you know. . ., there's one officer per county. . ., and we commonly call in sheriff's deputies for assistance.
>
> Defense counsel: Okay. Alright. Okay. So, actually, the decision to get a Search Warrant was way after they had seen the marijuana, and they thought we need to . . .
>
> Buddelmeyer: Yes sir.
>
> Defense counsel: develop a ma., uh, a Search Warrant for that?
>
> Buddelmeyer: Yes sir.

{¶60} These exchanges provide some evidence to support the trial court's conclusion that the decision to obtain a search warrant was not, as Gilkey testified, made prior to the observation of the marijuana. The trial court apparently found Gilkey's testimony in this regard less credible than the testimony of Mingee and Buddelmeyer. We are not in a position to weigh credibility. The trial court's factual finding that the decision to obtain a search warrant was made after the marijuana was observed is supported by competent and credible evidence.

IV. CONCLUSION

{¶61} We hold that the search of Bradford's outbuilding was unreasonable under the Fourth Amendment. Bradford maintained a reasonable expectation of privacy in the outbuilding and Officer Mingee was not in an area where the public was implicitly invited when he observed the marijuana. We further hold that some evidence supports the trial court's finding that the State failed to meet its burden of showing that Bradford's consent to search was obtained voluntarily. Finally, we hold that the inevitable discovery doctrine is inapplicable to this case because the wildlife officers were not actively

pursuing a search warrant for their ongoing deer poaching investigation prior to discovering the marijuana.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, P.J.: Dissents.

For the Court

BY: ________________________
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.