ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CACR07-1301

June 4, 2008

NORMA DAYBERRY
APPELLANT

AN APPEAL FROM STONE COUNTY CIRCUIT COURT [NO. CR2005-84]

V.

HON. JOHN DAN KEMP, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

On May 24, 2007, Norma Dayberry pleaded guilty to manufacturing marijuana, reserving her right to appeal from the denial of her motion to suppress under Ark. R. Crim. P. 24.3. She now challenges the trial court's decision to deny her motion, contending that the police obtained a search warrant only after conducting an illegal search of her property. We affirm, holding that the investigating officer's observation of marijuana plants in appellant's backyard was legal in light of evidence that the officer saw the plants from a neighbor's property and absent evidence that the officer entered appellant's property.

Appellant was charged with manufacturing a controlled substance after police executed a search warrant and found marijuana in her backyard and inside her residence. Appellant admitted to knowledge of the plants and stated that the marijuana was for medicinal purposes. According to the affidavit in support of the search warrant, David Burnett of the Stone County Sheriff's Office received a tip that appellant was growing marijuana behind her residence. He went behind appellant's residence and saw marijuana plants growing in and near a drainage ditch on appellant's property. He went to the property ten days later and again saw

the marijuana plants. Burnett stated in the affidavit that the plants would be visible to anyone mowing or caring for the area near the plants. Appellant filed a motion to suppress the evidence found pursuant to the search warrant and the statements made after the execution of the search warrant.

The trial court held hearings on the motion to suppress on October 31, 2006, and April 3, 2007. Burnett admitted that he went to appellant's residence solely based on the information he received. He testified that he did not step onto appellant's property; rather, he went upon her neighbor's driveway and saw marijuana plants from there. He noted that the plants were not in a ditch, as he stated in his affidavit; they were in an area that was two feet deep. Burnett acknowledged that his affidavit did not mention that he went onto his neighbor's driveway, but he testified that he did not see the need to state that fact. He denied stepping onto appellant's property prior to obtaining the search warrant.

Appellant called Kenneth Crimes to support her motion. His property is northwest of appellant's property and behind her residence. He testified that he was familiar with marijuana by virtue of his former employment with Arkansas State Forestry and that he had never seen marijuana on appellant's property. On cross-examination, Crimes acknowledged that Burnett's testimony that he saw marijuana plants on appellant's property was plausible.

The trial court found Burnett's testimony credible and denied appellant's motion to suppress. Appellant later pleaded guilty to manufacturing marijuana, reserving her right to appeal under Ark. R. Crim. P. 24.3, and was sentenced to three years' probation.

The sole issue here is whether the trial court erred in denying appellant's motion to suppress. In reviewing the denial of a motion to suppress, this court makes an independent determination based on the totality of the circumstances, reviews findings of historical facts for clear error, and determines whether those facts give rise to reasonable suspicion or probable cause that a crime has been committed, while giving due weight to inferences drawn by the

trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). This court does not reverse the trial court's decision unless that decision was clearly erroneous. *Lawson v. State*, 89 Ark. App. 77, 200 S.W.3d 459 (2004).

Appellant contends that the trial court should have granted her motion to suppress. She argues, "Mr. Burnett did not have probable cause, based upon an anonymous tip, to come up on the curtilage of her home to search for contraband and then use what he found to bootstrap himself into convincing a magistrate he had probable cause of the issuance of a warrant to search not only the yard but also Ms. Dayberry's home." True, law enforcement cannot use the fruits of a tainted search as probable cause to obtain a search warrant. *Cf. Evans v. State*, 33 Ark. App. 184, 804 S.W.2d 730 (1991) (reversing the denial of a motion to suppress when police secured consent to search a home after entering a home without probable cause and finding several marijuana plants). However, neither the affidavit in support of the search warrant nor Burnett's hearing testimony indicates that Burnett ever came upon appellant's property to search for contraband. In fact, Burnett explicitly denied coming onto appellant's property, and appellant presented no proof to the contrary. Appellant misstates the record when she argues that Burnett's probable cause was a result of him illegally stepping upon her property.

Appellant also argues that Burnett's testimony was "radically different" from his affidavit and suggests that the inconsistencies taint the affidavit in support of the search warrant. However, the affidavit and Burnett's testimony are consistent. Contrary to appellant's argument, both the affidavit and his testimony show that Burnett investigated the marijuana on appellant's property after receiving an anonymous tip about the property.[1] Further, while

[1]Appellant contends, "[A]t the hearing, Deputy Burnett clearly and unequivocally testified that there was no third party who gave him any information but that he rather simply walked to the back of Ms. Dayberry's house and began looking around at which time he observed one plant which he believed to be marijuana." Yet, in response to questioning from appellant's counsel, Burnett acknowledged that the investigation was pursuant to information

the affidavit states that Burnett "checked behind the Norma Dayberry residence," nowhere in the affidavit or in his testimony did Burnett state that he entered appellant's property. Granted, Burnett could have been clearer in the affidavit, as he readily acknowledged in cross-examination, but none of his actions violated appellant's Fourth Amendment rights.

Appellant continues by asserting that the marijuana plants could not be seen from the street or the front of the porch, and she argues that Burnett did not have a right to go into her neighbor's yard and look across the fence onto her curtilage. While one's residence and curtilage have been consistently held to be areas that may be free from government intrusion, those things that a person knowingly exposes to the public are not subject to Fourth Amendment protection. *See McDonald v. State*, 354 Ark. 216, 119 S.W.3d 41 (2003). Here, Burnett did not intrude onto appellant's property by walking onto her neighbor's property, and he did not violate appellant's Fourth Amendment rights by looking over the fence and observing what was in plain view in her backyard. The facts here are similar to those in *Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000). There, the supreme court affirmed the denial of the motion to suppress on an unrelated issue, but it stated that the evidence would have still been admissible because police would have inevitably discovered the evidence by lawful means. Specifically, it noted the testimony of another police officer, who stated that he observed marijuana plants on the appellants' property while standing in a parking lot next to their residence.

Finally, appellant argues that Burnett failed to comply with Rule 13.1(b) of the Arkansas Rules of Criminal Procedure, which provides that "if an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained." However, the information about the tip was not to

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that he received and that the information was hearsay.

provide probable cause that there was marijuana in appellant's backyard, but to explain why Burnett went to the property to investigate a crime. *Cf. Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003) (noting that an out-of-court statement offered to explain a police officer's actions during an investigation is not hearsay). The probable cause that led to the issuance of the warrant was based on Burnett's observations, not the anonymous tip.

An accurate recitation of the record shows that Burnett received a tip, then obtained a search warrant after observing the marijuana plants in her backyard without illegally intruding onto her property. Appellant has suffered no violation of her Fourth Amendment rights, and the trial court properly denied her motion to suppress.

Affirmed.

GLOVER and HEFFLEY, JJ., agree.