RENDERED: JULY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

SUPREME COURT ORDERED OPINION NOT PUBLISHED:
JANUARY 14, 2009
(FILE NO. 2008-SC-0593-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001230-MR
&
NO. 2006-CA-001282-MR

STEVEN GARNER PHILLIPS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
INDICTMENT NO. 04-CR-00079

COMMONWEALTH OF KENTUCKY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Steven Garner Phillips appeals from a conviction of cultivation of marijuana, trafficking in marijuana, possession of drug paraphernalia, and possession of marijuana. No sentence was imposed for possession of marijuana as it was a lesser included offense of the trafficking

charge. Phillips waived jury sentencing and accepted a three year concurrent sentence on both the trafficking and cultivation charge. The Commonwealth cross-appeals on the suppression of testimony regarding the identity of seeds found during the search of Phillips' property. Upon careful review, we affirm the judgment and sentencing of the trial court.

On August 13, 2004, two law enforcement officers were flying an airplane over Phillips' farm near Dover in Mason County. One of the officers had received training on how to spot marijuana from the air; marijuana plants have a bluish-green color, which allows police officers to recognize it. During the aerial search, one of the officers saw the bluish-green color of what appeared to be marijuana growing on Phillips' land. It appeared to be growing behind a barn some 500 feet away from Phillips' residence.

The officers landed the plane, met up with other law enforcement officials, and proceeded to Phillips' farm. When they arrived, they found that Phillips' property was blocked by a locked gate and had no trespassing signs. The police officers removed the gate and proceeded onto the property. Once there, they went to the house and announced themselves, however, no one was home. They then proceeded to the barn and saw marijuana plants growing behind it. After walking around the perimeter of the property, they found additional plants. After finding the plants, one of the officers obtained a search warrant for the house. The basis for the search warrant was the marijuana found on the property.

Before the trial began, Phillips made a motion to suppress all the evidence found on the property, asserting that the search was done on the curtilage of his house and without a warrant. The lower court found that the barn was not part of the curtilage and that the officers viewed the marijuana from a place they had a right to be. Accordingly, it denied the motion to suppress. After a guilty verdict was entered, Phillips waived his right to jury sentencing and accepted a three year concurrent sentence on both the trafficking and cultivating charge. This appeal followed.

Phillips first argues that the trial court erred in denying a motion to suppress evidence found in connection with a warrantless search of the curtilage of his home. The extent of curtilage is a finding of fact that will not be disturbed on review unless clearly erroneous. *Commonwealth v. Murray*, 174 S.W.3d 492, n.4 (Ky.App. 2004). In determining clear error, an appellate court's standard of review requires a judgment of whether the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). If they are, then they are conclusive. However, "[b]ased on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Id*.

Although the record does not contain a recording or transcript of the two suppression hearings, we think that the facts of the case and the order overruling the motion are sufficient for us to make a ruling. We have no reason to

think the findings of fact set forth by the court are erroneous. We find that they are supported by substantial evidence and therefore conclusive. We now turn to the application of law to those facts.

We have long recognized that a flyover by law enforcement officers who spot marijuana growing on a farm does not rise to the level of a search nor is it illegal. *See LaFollette v. Commonwealth*, 915 S.W.2d 747 (Ky. 1996). Our question, therefore, is not the validity of the flyover but whether the area searched was curtilage or open fields.

U.S. v. Dunn, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), established that:

> [c]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct" answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration-whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.

Areas and structures within the curtilage of a home are afforded the same protection as the dwelling itself, whereas those outside the curtilage are merely "open fields" for the purpose of Fourth Amendment analysis. *Id., citing Hester v.*

United States, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924). The term "open fields" may include any unoccupied or undeveloped area outside of the curtilage and "need be neither 'open' nor a 'field' as those terms are used in common speech." *Oliver v. United States,* 466 U.S. 170, 180, n.11, 104 S.Ct. 1735, 1742, n.11 (1984). "[T]he government's intrusion upon [] open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment." *See id*. at 177, 104 S.Ct. at 1740.

First, the barn was missing several sides and there is no evidence of any specific use that would weigh in favor of it being curtilage. Furthermore, the proximity of the barn to Phillips' house is not a determinative factor. In *Dunn,* the Supreme Court held that a barn located 180 feet away from a home was a "substantial distance" that did not support the idea that it was to be treated as part of the curtilage. In this case, the barn was approximately 500 feet away from the house. Therefore, neither the proximity of the barn to the home nor the nature of the use of the barn weighs in favor of finding it to be curtilage.

The most persuasive fact in Phillips' favor is the existence of the padlocked gate at the edge of his property. At first glance, it suggests that he was trying to protect the property from observation, and it clearly meets the definition of an enclosure as set forth in factor two. However, the Supreme Court has held that neither fences nor no trespassing signs are completely effective bars against the Open Fields Doctrine. *See Oliver v. U.S.*, 466 U.S. 170, 183, n.13, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)("Certainly the Framers did not intend that the Fourth

Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post 'No Trespassing' signs."); *see also McCray v. Commonwealth*, 675 S.W.2d 397 (Ky.App. 1984) (holding that a fence around the property was not sufficient to override the Open Fields Doctrine). The fence did not set off Phillips' home but instead set off all of his property, and there was no specific enclosure to prevent observation of the marijuana plants found by the barn. Therefore, we find the existence of a locked gate at the edge of Appellant's property insufficient in light of the totality of the circumstances to establish the barn as curtilage. Accordingly, we affirm the trial court's denial of the motion to suppress.

Phillips next argues that the trial court erred in allowing witnesses to testify that untested plants and/or plant material found on his property was marijuana. We disagree.

Two laboratory technicians, Mr. Boggs and Mr. Morrow, each testified at trial. Boggs testified that he had received seventy-four samples from the plants removed from Phillips' property and had randomly tested five samples, which were perhaps chemically determined to be marijuana. Boggs visually confirmed that the other sixty-nine samples were marijuana. Additionally, Morrow testified that he had received four bags of material from the search and tested one of the four samples, which was again determined to be marijuana.

In *Taylor v. Commonwealth*, 984 S.W.2d 482, 485 (Ky.App. 1998), this Court adopted the reasoning of *United States v. Scalia*, 993 F.2d 984 (1st

Cir.1993), and held that the government presented sufficient reliable evidence to attribute the full quantity of marijuana seized to a defendant when:

> a proper random selection procedure was employed; the tested and untested substances were contemporaneously seized at the search scene; the tested and untested substances were sufficiently similar in physical appearance; the scientific testing method conformed with an accepted methodology; all of the samples subjected to scientific analysis tested positive for the same substance; and the absence of evidence that the untested substance was different from the tested substance.

Phillips relies on the facts that the search took two days and that the plants were located in various areas of his property. He asserts that this makes the testimony unreliable because it was not sufficiently contemporaneous. There is no evidence, however, in the record to suggest that the untested substance was different from the tested substance, and we decline to find that an ongoing search of the same piece of property for two days is not "contemporaneous" as contemplated by this Court in *Taylor*. The samples were properly taken at random, and the remaining samples were visually verified as marijuana. Accordingly, we find no error in the trial court allowing the testimony that all plants seized were marijuana.

Phillips also alleges that the trial court erred in allowing in testimony as to the weight of the marijuana seized without actually weighing the plants. However, the laboratory technician, Mr. Boggs, testified that the bags of marijuana in the home weighed 3.96 ounces and that the five samples he specifically tested weighed approximately one ounce in total. Phillips' charge of trafficking required

only eight ounces. Therefore, the other sixty-nine plants had to have a combined weight of only a little over three ounces to convict.

Phillips contends that the testimony of the police officers as to the approximate weight of the plants when lifted was reversible error as they were not expert witnesses. The testimony was not offered as expert opinion but rather as lay opinion, which under KRE 701 is admissible if it is a rationally based perception helpful to the understanding of a fact in issue, in this case the total weight of the seized marijuana. Therefore, we find no error. Alternatively, in light of the totality of the evidence offered, specifically the number of plants in total and the weight of the very limited number actually weighed, any error in admitting lay opinion as to the weight of the plants was harmless.

Phillips additionally argues that the trial court improperly allowed testimony regarding seeds that had already been determined to be inadmissible. Phillips, however, ignores the fact that the trial court did not permit testimony that the seeds were in fact marijuana seeds. The Commonwealth, in its cross-appeal, alternatively argues that the trial court erred in not allowing all testimony regarding the nature and identification of the seeds. We disagree with both parties.

The determination of admissibility may only be overturned on appeal if there was an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The record reflects that the trial court properly considered the probative value of the testimony that the seeds were in fact marijuana seeds versus the prejudicial effect of that testimony. Accordingly, we find that it was within the

court's discretion to permit questioning regarding the seeds generally and to admit the seeds marked as "Panama Red" but to exclude the officer's testimony that the seeds were in fact marijuana seeds when no seeds had been tested for that fact.

Phillips next contends that it was reversible error for the prosecuting attorney to ask if Phillips had asked for an independent testing of the plants seized on his property. He specifically asserts that this line of questioning attempted to shift the burden of proof on him rather than on the Commonwealth, where it rightfully belonged. He ignores, however, the trial court's specific instruction that the question be rephrased to "[w]hile he had no duty to do so, did the defendant request any additional testing of the plants?" The corrected phraseology clearly does away with any implication that the burden was on Phillips to prove his innocence. Therefore, we find no error.

Phillips finally argues that the trial court improperly denied his motion for directed verdict. Specifically, he contends that there was insufficient evidence that there were more than eight ounces of marijuana seized from his house and farm and that charging him with both cultivation of marijuana and trafficking in marijuana constituted double jeopardy and reversible error. We disagree.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. *See Beaty v. Commonwealth*, 125 S.W.3d 196, 204 (Ky. 2003). "For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and

weight to be given to such testimony." *See Commonwealth v. Benham*, 816 S.W.2d 186, 188 (Ky. 1991).

We have previously addressed the validity of the testimony submitted at trial regarding the weight of the marijuana, and, when viewed in a light most favorable to the Commonwealth, it was proper for the trial court to deny the directed verdict on this issue.

Additionally, Phillips' argument that he was subject to double jeopardy by being charged with both cultivation and trafficking of marijuana is completely without merit. The United States Supreme Court has made clear that, in a single proceeding, the government may prosecute a defendant for multiple offenses that are constitutionally the "same offense" without violating the Double Jeopardy Clause, but they may not punish for convictions of the same offense. *Ohio v. Johnson*, 467 U.S. 493, 499-500, 104 S.Ct. 2536, 2540, 81 L.Ed.2d 425 (1984). Phillips *accepted* a concurrent sentence of three years, and he raises no issue on appeal as to the punishment he received but only as to the charges. Therefore, we find that there was no violation of the Double Jeopardy Clause, and alternatively that Phillips waived any appeal of his sentencing by waiving his right to jury sentencing and accepting the three year concurrent sentence.

For the reasons set forth herein, we affirm the judgment and sentencing of the Mason Circuit Court.

KELLER, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I must dissent. I disagree with the majority's resolution of the curtilage issue. The factors to consider when deciding if certain property is considered curtilage is set forth in *U.S. v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L. Ed.2d 326 (1987). The United States Supreme Court held that:

> curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct" answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration-whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.

Id. I believe that the lower court erred in its analysis of this law, and that the barn was part of the curtilage of Appellant's home. As the Court in *Dunn* stated, the four factors are not to be applied mechanically. The second and fourth *Dunn* factors support my conclusion that the barn was part of the curtilage. The entire parcel of Appellant's property was surrounded by fencing and wooded area, the entrance to the property was blocked by a locked gate that had to be removed, and the house and farm were set back a good distance from the road. In fact, the locked gate is the strongest indication that the barn was part of the curtilage. It is

obvious that the locked gate was to stop any uninvited guests or members of the public from gaining access to his land.

While police officers are allowed to enter onto someone's property without a warrant for legitimate police purposes, they can only enter those parts that are impliedly open to public use. *Cloar v. Commonwealth*, 679 S.W.2d 827 (Ky. App. 1984). The locked gate shows that no part of Appellant's land was open to the public. This forces me to believe that once the police officers removed the gate and entered Appellant's property, they violated Appellant's Fourth Amendment right against unreasonable search and seizure. The marijuana was not positively identified as contraband until the officers went onto the land. Since the incriminating nature of the marijuana was not certain until after the officers breached the curtilage, not even the plain view doctrine can save the Commonwealth's case. *See Hazel v. Commonwealth*, 833 S.W.2d 831 (Ky. 1992). The incriminating nature of the marijuana must have been seen from a place the police officers had a right to be in order for the plain view doctrine to work. Since the officers were illegally on Appellant's curtilage, the plain view doctrine fails.

Also, since the warrant to search Appellant's house was based on the marijuana found during the search of the curtilage, the evidence found inside the house must also be suppressed. Any evidence found once the curtilage was breached must be suppressed as fruit of the poisonous tree.

I would reverse and remand for further proceedings consistent with this opinion.

BRIEF FOR PHILLIPS:

Stacey S. Sanning
Raymond S. Bogucki
Maysville, Kentucky

BRIEF FOR APPELLEE:

Gregory Stumbo
Attorney General

Michael A. Nickles
Assistant Attorney General
Frankfort, Kentucky