

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000621-MR

ANTHONY TROY TALBERT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
INDICTMENT NO. 10-CR-01483

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES, AND VANMETER, JUDGES.

JONES, JUDGE: Appellant Anthony Troy Talbert entered a conditional guilty plea to trafficking in a controlled substance, first degree, without a firearm;

possession of marijuana; and possession of drug paraphernalia. On March 21,

2012, the trial court sentenced Talbert to eight years' imprisonment. On appeal,

Talbert asserts that the trial court erred in denying his motion to suppress evidence

seized during a warrantless search of a trash receptacle located outside of his

residence and evidence seized during the execution of a warrant to search his residence. For the reasons more fully explained below, we find no basis warranting relief on appeal. Therefore, we affirm the trial court.

I. Factual Background

On March 27, 2010, Detective Jared Curtsinger received information from an unnamed cooperating informant that Talbert was dealing large amounts of cocaine in the Lexington, Kentucky, area. The informant advised Curtsinger that Talbert was a “black male in his thirties” and went by the name “Tony.” The informant also stated that Talbert often drove a two-tone brown older model Chevrolet truck with a camper on the top of it and that he owned a newer model Infiniti passenger car that he did not drive frequently. The informant advised Curtsinger that he did not know Talbert’s exact address, but believed that he lived in the “Beaumont Center area.”

Acting on the tip, Curtsinger conducted an independent investigation. Using the police computer system, Curtsinger determined that an individual named Anthony Talbert resided at 3589 Robinhill Way, which Curtsinger knew to be located near Beaumont Center. Over the next several months, Curtsinger observed that a truck matching the description given by the informant was often parked in the driveway of the 3589 Robinhill Way residence. Curtsinger ran the plates of the truck and confirmed that it was registered to an “Anthony Troy Talbert.”

Curtsinger testified that he often drove by the 3589 Robinhill Way residence and was familiar with the locations where Talbert and his neighbor

stored their trash receptacles. Curtsinger testified that on September 8, 2010, he noticed that an uncollected trash receptacle was on the sidewalk between the 3589 Robinhill Way residence and the adjoining residence. Curtsinger testified that he believed that the receptacle belonged to Talbert because he had become familiar with the locations where Talbert and his neighbors stored their trash receptacles.

Curtsinger testified that he searched the contents of the trash receptacle in question. He testified that he removed two garbage bags of trash and two cardboard pizza boxes from the trash receptacle. He stated that inside the garbage bags he found approximately ten burnt marijuana cigarettes, marijuana stems, marijuana seeds, three plastic bags missing one corner each (one of which field-tested positive for cocaine), and six torn corners from plastic bags (some of which contained marijuana residue). Curtsinger testified that the pizza boxes were addressed to 3589 Robinhill Way on the delivery label and listed a cell phone number, which he later determined belonged to an Angela Talbert.

Thereafter, Curtsinger applied for, received, and executed a search warrant for the 3589 Robinhill Way residence. The search yielded four ounces of powder cocaine, four grams of crack cocaine, approximately seven thousand dollars in cash, marijuana, and various drug-trafficking related paraphernalia. The police subsequently arrested Talbert and charged him with several drug-related crimes.

Talbert moved the trial court to suppress the evidence seized from the trash receptacle and his residence. Following a January 3, 2012, suppression

hearing, the trial court overruled Talbert's motion. Specifically, the trial court found that Curtsinger did not need a warrant to search the trash receptacle because it was placed beyond the curbside of the residence for pickup. The trial court further determined that there was a nexus between the items found in the trash receptacle suggestive of drug activity and the 3589 Robinhill Way residence. Thus, the trial court determined that sufficient probable cause existed for issuance of the warrant.

Talbert ultimately entered into a conditional guilty plea to trafficking in a controlled substance, first degree, without a firearm; possession of marijuana; and possession of drug paraphernalia. The trial court sentenced Talbert to eight years' imprisonment. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion to suppress by applying a two-step analysis. *Goncalves v. Commonwealth*, 404 S.W.3d 180, 189 (Ky. 2013). First, we must determine if the trial court's findings of fact are supported by substantial evidence. *Id.* (citing *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998); *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008)). If so, the factual findings are conclusive. *Id.* Next, we conduct a *de novo* review of the trial court's application of the law to the facts to determine if the suppression decision was correct as a matter of law. *Goncalves*, 404 S.W.3d at 189.

III. ANALYSIS

A. Search of the Trash Receptacle

The trial court determined the trash receptacle at issue was beyond the sidewalk and the garbage therein had been abandoned. The trial court further determined that the receptacle belonged to the residents of 3589 Robinhill Way residence. Curtsinger testified at the suppression hearing as to the location of the receptacle. He indicated that it was beyond the sidewalk and was located at the curb between two residences. He further testified that based on his prior observations, he believed the receptacle belonged to the residents of 3589 Robinhill Way. We conclude that the trial court's findings are supported by substantial evidence.

Having determined that the trial court's factual findings were supported by substantial evidence, we will now conduct a *de novo* review of the trial court's decision regarding whether the search violated Talbert's rights under either the United States Constitution or the Kentucky Constitution.

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Section Ten of the Kentucky Constitution, prohibit unreasonable searches and seizures. The United States Supreme Court has held that one does not have a reasonable expectation of privacy in trash located outside the home's curtilage, and hence a warrantless search of such trash does not violate the Fourth Amendment. *California v. Greenwood*, 486 U.S. 35, 37, 108 S.Ct. 1625, 1627, 100 L.Ed.2d 30 (1988); *Commonwealth v. Ousley* 393 S.W.3d 15, 32 (Ky. 2013).

Apparently recognizing that United States Supreme Court precedent binds this Court as to issues of federal constitutional law, *Jefferson County v. Zaring*, 91 S.W.3d 583, 586 (Ky. 2002), Talbert urges this Court to hold that the Commonwealth extends greater privacy protections against searches and seizures than does the Fourth Amendment of the United States Constitution. We decline his invitation.

It is well established that the “the states are free to afford defendants greater rights than those afforded by the federal constitution[.]” and that “[t]he Kentucky Constitution has been held to offer greater protection of the right of privacy than provided by the Federal Constitution[.]” *Artis v. Commonwealth*, 360 S.W.3d 771, 773 (Ky. App. 2012) (internal citations and quotation marks omitted). However, the Kentucky Supreme Court has consistently held “that the protections of Section 10 of the Kentucky Constitution are no greater than those of the federal Fourth Amendment.” *Dunn v. Commonwealth*, 360 S.W.3d 751, 758 (Ky. 2012); *Williams v. Commonwealth*, 364 S.W.3d 65, 68 (Ky. 2011). This Court does not have the authority to extend Section Ten of the Kentucky Constitution in direct contravention of published authority from the Supreme Court of Kentucky.

Lastly, we turn to Talbert's argument based on a Lexington city ordinance prohibiting anyone other than refuse collectors from removing trash from residents' trash receptacles. It provided:

It shall be unlawful for any person, other than refuse collectors in the division of solid waste and a person duly licensed to collect, haul, convey or transport any of the

waste materials herein mentioned, to interfere in any manner with the receptacles: containing any such waste materials, or to remove any such receptacle from the location where placed by the owner thereof, or to remove any of the contents of such receptacles.

Lexington-Fayette County, Ky., Code of Ordinances ch. 16, Article II, Sec. 16-15(f).¹

In *Ashlock v. Commonwealth*, 403 S.W.3d 79 (Ky. App. 2013), this Court rejected an identical argument that this ordinance expanded the Kentucky Constitution's protections. The Court held that the ordinance "has no bearing on the validity of the search under the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution." A published decision from a panel of this Court, in the absence of a decision of the Kentucky Supreme Court on the same issue, is a binding precedent and constitutes the law of Kentucky. *See* SCR 1.030(7)(d) ("A decision of a majority of the judges of a panel shall constitute the decision of the Court of Appeals.").

Based on the published precedent of this Court, we reject Talbert's argument that the local ordinance afforded him any greater rights against warrantless searches and seizures than either the United States Constitution or Section Ten of the Kentucky Constitution.

B. Search Warrant for the 3589 Robinhill Way Residence

¹ The local ordinance has since been amended to exempt police officers.

We now turn to Talbert's argument that the trial court erred in concluding that probable cause supported issuance of the warrant to search the 3589 Robinhill Way residence.

In order to secure a search warrant, the supporting affidavit must “reasonably describe the property or premises to be searched and state sufficient facts to establish probable cause for the search of the property or premises.” *Guth v. Commonwealth*, 29 S.W.3d 809, 811 (Ky. App. 2000) (quotation omitted). The test for probable cause is whether, under the totality of the circumstances, a fair probability exists that contraband or evidence of a crime will be found in a particular place. *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005). Probable cause to support a search warrant has also been referred to as a “nexus between the place to be searched and the evidence sought.” *Id.* (quoting *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004)).

Talbert maintains that insufficient evidence existed to create a nexus between his residence and the contents of the trash receptacle. We disagree. The trial court concluded that the location of the trash receptacle and the information on the pizza boxes, combined with the contents of the receptacle and the information provided by the informant, provided a high level of probable cause for the issuance of the search warrant. The evidence was sufficient to support the trial court’s factual findings and we see no error with the trial court’s conclusion that the facts created a fair probability that contraband or evidence of a crime would be found at the 3589 Robinhill Way residence.

For the foregoing reasons, the March 21, 2012, final judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry L. Wright
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General
Frankfort, Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky