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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002188-MR

PHILLIP DIXON — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 12-CR-00133

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Phillip Dixon appeals from his conviction following the denial of a motion to suppress.

Kentucky State Police Troopers Daniel White and Jeremy Smith responded to an anonymous complaint alleging Dixon was using and making methamphetamine. The address they were given by dispatch was for Dixon's

mother, who indicated Dixon was living in a trailer on her property separated from her house by woods. The troopers drove on a gravel road past other homes to reach the trailer, which was the last home on the road.

As Troopers White and Smith parked in the driveway, located directly in front of the house, they observed four vehicles in the driveway. The trailer's windows were covered from the inside, and there was an open fire burning and the smell of burnt plastic.

Only the portion of the lawn immediately surrounding the trailer was mowed. Behind the mowed area were tall grass and weeds. About twenty-five feet from the trailer was a pond and the rest of the property was wooded.

As the troopers were approaching the front door of the trailer to perform a knock and talk, Dixon met them on the front porch. Dixon talked with Trooper White outside his front door. He stated he would like to cooperate, but would not consent to a search without a warrant.

Meanwhile, Trooper Smith went to the back of the trailer to make sure no one left through the back door while Trooper White was speaking with Dixon. Trooper Smith was standing approximately fifteen feet away from the corner of the trailer in a tall grassy area. The pond was behind him and he had a view of the back door which opened onto a deck.

While looking at the deck, Trooper Smith observed two clear twenty-ounce soda bottles that contained a white powdery substance on the bottom. One

of the bottles was located on top of the deck and the other was underneath it. He identified these bottles as one-step methamphetamine labs.

The back door was slightly open. Trooper Smith saw and smelled fumes emanating from this opening. The fumes had a chemical odor consistent with methamphetamine manufacture.

Trooper White did not observe anything from the front entrance that would justify entry into the residence. He could not see or smell the fumes from his location by the front door of the trailer.

Trooper Smith radioed Trooper White and told him about his observations. Trooper White joined Trooper Smith at his location in the back yard. Dixon followed. From that vantage point, Trooper White made the same observations as Trooper Smith.

Trooper White asked Dixon whether anyone was in the trailer and, after he said he had friends inside, informed him anyone inside the trailer was in eminent danger from the manufacture of methamphetamine and they would have to remove them. The troopers entered the trailer through the front door and observed several one-step labs, methamphetamine precursors and other illegal substances in plain view while they evacuated the trailer. Based on the troopers' observations from the back yard and inside the trailer, a search warrant was obtained and incriminating evidence discovered.

Dixon was charged with several drug-related felonies and misdemeanors in an eleven count indictment. He filed a motion to suppress,

arguing the entry into his back yard constituted an illegal search of the curtilage of his residence and all resulting evidence should be suppressed as fruit of the illegal search. Trooper White was the only witness at the suppression hearing and testified about his observations. The circuit court denied the motion, determining the observations of the incriminating one-step methamphetamine labs and fumes occurred while the troopers were outside the curtilage of the trailer.

Pursuant to a plea agreement, Dixon entered a conditional plea to complicity to manufacture methamphetamine, complicity to possess marijuana and complicity to possess drug paraphernalia, and the other counts were dismissed. Dixon was sentenced to a total of ten years' incarceration.

Dixon appeals the denial of his motion to suppress. While the circuit court's determination of where the troopers were located in the back yard is binding on us, its determination that this location was outside the curtilage is not. *Commonwealth v. Ousley*, 393 S.W.3d 15, 26 (Ky. 2013). We review *de novo* whether this location was curtilage. *Id.*

We determine in accordance with *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008), the troopers did not have a right to venture away from the front of the house pursuant to a knock and talk, and invaded the curtilage of Dixon's residence when they stood fifteen feet from his trailer in the back yard. Accordingly, we reverse and remand.

> Whether an officer is where he has a right to be when he does the knock and talk is defined by his limited purpose in going to the residence and the nature of the area he has

> invaded. There has been no finding of probable cause sufficient to grant a warrant, so the knock and talk is limited to only the areas which the public can reasonably expect to access. While there is a right of access for a legitimate purpose when the way is not barred, or when no reasonable person would believe that he or she could not enter, this right of access is limited. The resident's expectation of privacy continues to shield the curtilage where an outsider has no valid reason to go. Thus any part of the curtilage may be protected, including driveways, depending on the circumstances of each case. The back door of a home is not ordinarily understood to be publicly accessible, and thus could be subject to the curtilage rules where the front door would not be.

Id. at 759 (internal citation omitted). An officer is not authorized to approach areas outside of the main entrance to a residence under the knock and talk rule. *Id.* at 760. An officer has no legal authority to secure the back door of a residence without a valid search or arrest warrant. *See McCloud v. Commonwealth*, 279 S.W.3d 162, 166 (Ky.App. 2007).

Once an officer leaves the main entrance of a residence he was authorized to access pursuant to a knock and talk, the court must decide whether the new area entered is within the curtilage. *Quintana*, 276 S.W.3d at 760. If the area the officer enters is outside the curtilage, the officer's visual inspection of an area within the curtilage from that vantage point does not violate the Fourth Amendment. *See California v. Ciraolo,* 476 U.S. 207, 215, 106 S.Ct. 1809, 1813-1814, 90 L.Ed.2d 210 (1986). If the area entered is within the curtilage, any evidence discovered from that location must be suppressed. *Quintana*, 276 S.W.3d at 760.

Curtilage is typically defined as "the land immediately surrounding and associated with the home[,] . . . the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, . . . [and] an area immediately adjacent to the home [reasonably expected to] remain private." *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 1742, 80 L.Ed.2d 214 (1984) (internal citation and quotation omitted). Areas intimately tied to a home are "part and parcel of that [home]." *Ousley*, 393 S.W.3d at 27.

Kentucky courts determine whether an area is within the curtilage by applying the test announced in *United States v. Dunn,* 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987): "proximity to the house, whether the area is enclosed with the house, how the area is being used, and what the resident has done to secure his privacy." *Quintana*, 276 S.W.3d at 760.

It is well established that backyards are usually considered part of the curtilage. *Childers v. Commonwealth*, 198 Ky. 848, 250 S.W. 106, 107 (1923). As *Quintana* explained:

> A back yard is not normally an area that the general public would perceive as public access. While the back yard may not always enjoy the protection of the curtilage, it is a rare one that does not. *See Daughenbaugh v. City of Tiffin,* 150 F.3d 594, 601 (6th Cir.1998) ("The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is not true simply in a mechanical sense because the areas are geographically proximate. It is true because people have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house.")

Quintana, 276 S.W.3d at 760.

It is highly significant that Trooper Smith was only fifteen feet from the trailer in the back yard when he made his observations about illegal activities. While areas hundreds of feet from a residence are unlikely to be within the curtilage, areas within a few feet from a residence are usually within the curtilage. *Compare Dunn,* 480 U.S. at 302, 107 S.Ct. at 1140 *and Dunn v. Commonwealth*, 360 S.W.3d 751, 758-759 (Ky. 2012), *with Ousley*, 393 S.W.3d at 27-29 *and Quintana,* 276 S.W.3d at 760. Therefore, we determine the troopers' mere proximity to the residence strongly supports a determination they were within the curtilage when they made their incriminating observations.

While the factors of the lack of a formal enclosure connecting the residence and back yard, and manner in which the back yard was used support a determination that it was not within the curtilage, these factors alone do not preclude a determination of curtilage. In *Ousley*, 393 S.W.3d at 27, the Kentucky Supreme Court determined an area in front of the home was curtilage despite not being fenced, noting "obviously not all houses have fences, nor are they required for a house to have curtilage." In *Widgren v. Maple Grove Tp.*, 429 F.3d 575, 582 (6th Cir. 2005), the Sixth Circuit determined lack of fencing did not preclude the back yard from being within the curtilage because "erecting a fence likely would have added little privacy in this remote rural location." Therefore, lack of a fence in this county setting, for an area of the yard close to the residence and

encompassed by the natural enclosure of the woods, has very little impact on our determination.

While the evidence does not show this back yard was used as an extension of the residence, the area where the troopers stood was very close to the residence on a large parcel of land. The Fourth Amendment does not protect only those who maintain a well manicured lawn. *See, e.g., Jacob v. Township of West Bloomfield,* 531 F.3d 385, 387-388 (6th Cir. 2008) (noting the trial court's determination that a yard was within the curtilage despite the lawn growing around inoperable vehicles and other castoff material).

Finally, Dixon went to great lengths to secure his privacy. He placed his trailer away from his mother's house and the main road at the back of his mother's property in a secluded wooded area. His trailer was also located far away from any neighbors at the end of a gravel road.

The way the trailer was situated relative to the gravel road also communicated Dixon's intent that his back yard be private, as his trailer was located at the end of the road and the driveway only came to the front of the property. The long grass, itself, and absence of a path through it, shielded the back yard area from view and communicated that visitors were not welcome to access it.

Having thoroughly examined the *Dunn* factors, we determine as a matter of law, the back yard area from which the troopers made their observations was within the curtilage of Dixon's home and the troopers did not have a right to access this area without a warrant. Therefore, because "the discovery made by the officer

could not have been made by sight (or smell) from an area outside the yard," the information uncovered there was improper and tainted the subsequent search warrant, requiring suppression of all evidence obtained pursuant to it. *Quintana*, 276 S.W.3d at 760-761.

Accordingly, we reverse and remand the Hart Circuit Court's final judgment of conviction of Dixon.

ALL CONCUR.

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