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RENDERED: MAY 20, 2004
NOT TO BE PUBLISHED

Kentucky Supreme Court

FINAL

2002-SC-0469-MR

DATE 6-10-04 ELIA GROW, H.D.C.

KENNETH BELCHER — APPELLANT

V.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
01-CR-00010

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment of conviction based on a jury verdict which convicted Belcher of wanton murder. He was sentenced to twenty years in prison.

The questions presented are whether it was error for the trial judge to refuse to suppress a search of the premises and whether it was error to permit the admission of photographs of various weapons found at the scene.

At around 6 p.m. on November 17, 2000, police responded to a report of a shooting that wounded two individuals occurring at the location of Belcher's home. Two officers initially arrived at the scene. Belcher's home is a trailer located within a chain link fenced yard. The front gate to the fence was locked. About an hour and a half later, when a sergeant and detective arrived, the officers walked along the fence to find another gate in an attempt to investigate and determine if anyone was injured or had knowledge of the shooting.

While walking along the outside perimeter of the fence, the officers spotted several guns and a bag lying within a doghouse that was situated outside of the fence by several yards. The officers retrieved two SKS assault-type rifles and a .12-guage shotgun therein. The bag was a plastic, grocery-type bag containing ammunition boxes. Looking further around this area, the officers also discovered two pistols lying on the ground and a third pistol wrapped in a shirt placed in another grocery bag. The officers photographed the evidence in the locations where each was found.

Wyatt, one of the individuals wounded by the gunshots, died in the hospital about an hour after placing the 911 call reporting the shooting. He and the other victim, Carter, had visited Belcher's home earlier that evening to purchase marijuana from Belcher. Carter and Belcher had gone off into the trailer to bargain the sale but Carter was short $10 of the price. He attempted to barter a loan using a knife as security on the loan amount with Belcher, but the deal fell through when Belcher demanded a cash only transaction. Despite the failure to settle the purchase, they shook hands and Belcher gave Carter a beer. Meanwhile, Wyatt attempted to come into the house as well, but another person in the trailer, Coldiron, objected to his entry and they began to bicker. Even when trying to leave, Coldiron and Wyatt were bickering in the yard. At some point here, the gunshots began from the front porch of the house.

There were several versions of the facts offered in the testimony at this point, however, it is not contested that Belcher fired a shotgun in the direction of Wyatt and Carter and that these shots caused the wounds in each. Belcher testified that he gave Coldiron a 9mm pistol to use at that time as well and that he had fired 4 shotgun blasts: two shots into the air as "warning shots" and two at the victims. Among the various assertions presented to support a theory of self-defense, was testimony that Carter and

Wyatt fired guns at the trailer. Evidence collected at the request of defense counsel on subsequent investigation included analysis of certain bullet holes in Belcher's trailer. There was expert testimony that the direction of those shots and the age of the marks did not support that they were caused during this event. Also, no gunshot residue was found on the hands of either Wyatt or Carter at the hospital, nor was any gun found in their vehicle. No shell casings other than those from the shotgun and the pistol used by Coldiron were found at the scene.

Belcher testified that after Wyatt and Carter left in their vehicle he became "scared," packed the guns up from his father's house next door, and placed them into the doghouse because he did not want the police to take them away. He then fled to a friend's home. It was the next morning when he was informed that he killed Wyatt.

The Bell County jury rejected his claim of self-defense and returned a verdict of guilty of wanton murder. Belcher was sentenced to twenty years. This appeal followed.

I. Motion to Suppress

Before trial, Belcher moved to suppress the guns and ammunition that were seized from the doghouse and yard outside his fence. The trial court denied the motion, but the order overruled the motion based on a lack of standing. Relying on the Fourth and Fourteenth Amendments of the U.S. Constitution, he argues that the holding of United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), would define the areas as curtilage and, therefore, protected from warrantless searches by the government. After a careful review of Dunn, supra, and comparing the factors therein to the facts of this case, we disagree.

Dunn gave four guidelines to aid courts in determining whether an area surrounding the house may be considered an intimate part of the home, and therefore

protected from warrantless searches under the Fourth Amendment. These four factors are: 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. Kentucky has long understood that officers may search a field without a warrant, so long as the area is outside the curtilage. Even if the search began within the curtilage, and extended to areas beyond the curtilage, the evidence found outside of the curtilage is not tainted and, therefore, admissible. See, e.g., Richardson v. Commonwealth, 205 Ky. 434, 266 S.W. 1 (1924). This view carries into modern Fourth Amendment analysis. Cf. Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). Therefore, we must determine whether the area surrounding the doghouse and outside the chain link fence is within the curtilage.

The doghouse is located 30 yards (90 feet) away from Belcher's home and outside of a tall chain link fence. The fence, which surrounds the home and defines an inner yard, certainly serves to define an area closer to the home, but even the fence did not protect the yard from observation by passersby. Dunn declined to hold that a barn located outside of a fence was part of the curtilage. Likewise, a doghouse that has no door, an open front, is far from the home, and located outside of a fence is not within the curtilage. Therefore, those areas outside of the fence where the pistols were found were in this same open field.

This finding is consistent with the testimony of Belcher who claimed that he placed the guns and ammunition in these places away from his home because he was afraid the police would find them and take them away. In this attempt to "stash" the guns, he abandoned them to an area not protected by the Fourth Amendment.

Nonetheless, Belcher argues that the police were improperly located in this area and tries to extend the "plain view" doctrine of Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), to suggest that the officers saw the guns because police had a "warrantless presence". This analysis has no bearing here because the police were free to go around the fence line to find a way to the front door of the trailer to see if anyone was home or injured. Seeing the contents of the doghouse was easily accomplished while standing in the open field. Therefore, they did not require an unlawful vantage point to notice the guns, nor did they require a warrant to knock on the front door. Belcher uses Flippo v. West Virginia, 529 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d (1999), to support his argument that the police investigation may not invoke a "crime scene exception" to the warrant requirement. The police in Flippo entered a cabin rented by the defendant, opened a closed container therein finding an envelope which they opened and therein evidence. Our case has no similarity because the police did not seize evidence from inside a locked container within Belcher's home. Rather, they found these items far away from his home, outside his fence, in an open doghouse.

Because the area in question was not protected from warrantless searches, the guns and ammunition found there were admissible. Regardless of the grounds upon which it denied the motion to suppress this evidence, the trial court reached the correct result and we decline to reverse. See Commonwealth v. Congleton, 267 Ky. 22, 101 S.W.2d 210 (1937).

II. Photographs

Belcher challenges the admission of certain photographs admitted into evidence that contained pictures of the guns as located by the police. He believes these images were unduly prejudicial and served no probative value because he conceded having

shot Wyatt with a .12-gauge shotgun thereby leaving only his claim of having shot in self-defense as a matter of proof. He argues that the Commonwealth's pictures of the guns lying in the doghouse portrayed him as a "crazed, fanatical killer." After a careful review of the record, including review of these pictures, we disagree.

Deciding to admit or exclude evidence under KRE 403 is a matter of trial court discretion. Commonwealth v. English, Ky., 993 S.W.2d 941 (1999). An abuse of discretion occurs when the trial court makes "arbitrary action or capricious disposition under the circumstances, at least an unfair or unreasonable decision." Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679 (1994).

Belcher points us to Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 707 (1967), to support his idea that admitting evidence of "an arsenal of guns and ammunition that was not involved in the crime in the case at bar was not harmless error." That case had numerous distinctions from this. There, the defendant's silence, coupled with the prosecutor's comments, meant to paint the defendant as drunk and ready to shoot the victim, created a situation that was unduly predjudicial beyond a reasonable doubt. Here, we are faced with photographs indicating the manner and location of the guns Belcher claimed to place. Although there was more than the murder weaponry found, these guns were found placed together as they appeared in the pictures. Even though some of the pictures displayed the guns spread out on the ground outside, the images do not rise to the level of representing an "arsenal" nor are they irrelevant to the claim of self-defense.

The pictures contain the shotgun and pistol, which were directly relevant to the case, and the location showing where they were placed indicates the nature of Belcher's flight after the incident. Such evidence of flight has long been considered

proof of some sense of guilt. See Rodriquez v. Commonwealth, Ky., 107 S.W.3d 215 (2003), *citing* Hord v. Commonwealth, 227 Ky. 439, 13 S.W.2d 244, 246 (1928); see also, e.g., Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 496 (1995); Hamblin v. Commonwealth, Ky., 500 S.W.2d 73, 74 (1973). This inference from this evidence has direct bearing on the claim of self defense and is admissible. KRE 404(b)(1). There was no abuse of discretion in admitting the photos. Belcher received a fair trial. He was not denied any due process under either the state or federal constitution.

The judgment of conviction is affirmed.

Cooper, Graves, Keller and Wintersheimer, JJ., concur. Johnstone, J., concurs in result only. Lambert, C.J., concurs in part and dissents in part by separate opinion and is joined by Stumbo, J.

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COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY CHIEF JUSTICE LAMBERT CONCURRING IN PART AND DISSENTING IN PART

I must dissent from the majority opinion regarding the photographs of the numerous guns and ammunition found during the search of Appellant's premises. While I concur with the conclusion reached by the majority that the search of Appellant's property did not amount to a constitutional violation, I do believe that the introduction of numerous photographs of guns and ammunition not involved in the crime, in addition to the actual weapons used, was prejudicial and should not have been allowed.

Appellant admitted that he fired shots from a shotgun. The weapon Appellant admitted firing was identified by the Commonwealth's expert witness as the weapon that fired the fatal shotgun round. There was no dispute as to who fired the shot or with what weapon the shot was fired. Therefore, the only question to be resolved was whether Appellant fired the fatal shot in self-defense. The evidence of numerous guns and ammunition not involved in the crime were not relevant to the necessary determination. While the majority states that "[t]he pictures contain the

shotgun and pistol, which were directly relevant to the case,"[1] the photographs also depict several other weapons that were not related to the crime. Appellant says this made him look like a "crazed, fanatical killer" and he is right. This additional evidence was irrelevant and unfairly prejudicial.

The admission of the numerous weapons and the photographs of them illustrate the error. While I reach this conclusion reluctantly, I believe that this cause should be remanded to the trial court for a new trial in which the Commonwealth would not be permitted to introduce such evidence.

Stumbo, J., joins this opinion concurring in part and dissenting in part.

[1] Slip Op. at 6.