NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-K-0041**
VERSUS	*	**COURT OF APPEAL**
DAVID FERNANDEZ AND RENARD GIBSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 461-033, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong,
Judge Dennis R. Bagneris Sr., and Judge Roland L. Belsome)

BELSOME, J., DISSENTS

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WRIT GRANTED; JUDGMENT OF THE TRIAL COURT REVERSED

JUNE 13, 2007

On July 11, 2005 the State charged David Fernandez and Renard Gibson with one count each of possession with the intent to distribute marijuana and possession of crack cocaine. At their arraignment on August 1, 2005 they both pled not guilty to both charges. Thereafter, the court heard the defendants' motion to suppress the evidence and took the matter under advisement. The court granted the motion and suppressed the evidence. The State now seeks supervisory review from this ruling.

FACTS

On June 9, 2005, police officers received a tip that several unknown subjects were in a shed in the back yard of 4955 St. Claude Avenue, probably selling or using drugs. Officers responded to that location and found a four-plex at that address, with a driveway along the side leading to the back of the building. The officers walked down the driveway into the back yard and found the shed. The door to the shed did not face the building, and the officers walked around the shed to the door. The door was open, and inside they saw the defendants Renard Gibson and David

Fernandez sitting at a table inside the shed, facing the door. Gibson and Fernandez were packaging crack cocaine and marijuana into plastic bags. The officers arrested the defendants, and in a search incident to these arrests the officers found $105 in various denominations in Gibson's pocket. Because both defendants also appeared to be intoxicated, the officers issued them citations for public intoxication with drug incapacitation. The officers seized a gallon-sized ziplock bag containing marijuana and two small plastic bags each containing ten to fifteen pieces of crack cocaine. The officers also seized ziplock bags as well as cigars that the officer indicated were used to smoke the marijuana.

On cross-examination, one of the arresting officers testified that there was a fence around the driveway with a gate that was open when the officers arrived. The officer stated that they did not knock on any of the apartment doors prior to walking back to the shed. The officer testified that the shed could not be seen from the street, and because the door to the shed did not face the apartment building, the officers had to walk around it to see inside. Although the officer testified that neither of the defendants lived at the complex, he later admitted that Fernandez gave the building as his address. The officer admitted he did not try to get a search warrant prior to going to the building to investigate the complaint. He also testified that if he and his

partner had driven all the way back to the end of the driveway, they would have been able to see into the shed.

DISCUSSION

The trial court suppressed the evidence in this case because it found that the officers were not lawfully in the back yard to allow them to look inside the shed door and observe the defendants with the drugs. The court specifically noted that the officers' actions violated the right to privacy as found in the Louisiana Constitution. The State argues that the trial court erred by so ruling because the defendants had no reasonable expectation of privacy, in that the gate to the driveway was open, and anyone driving to the back of the driveway would have been able to see into the shed.

A defendant may not assert the exclusionary rule unless his constitutional right to be free from unreasonable searches and seizures, as guaranteed by the United States and Louisiana Constitutions, has been violated. U.S. v. Ibarra, 948 F.2d 903 (5th Cir. 1991). Whether a defendant has a constitutionally protected expectation of privacy involves a two part inquiry. A defendant must first show that he has a reasonable expectation of privacy in the area searched for the items seized. Second, a defendant must also show that society is prepared to accept the expectation of privacy as objectively reasonable. State v. Ragsdale, 381 So. 2d 492 (La. 1980); State

v. Karston, 588 So. 2d 165 (La. App. 4 Cir. 1991). As noted in State v. Hemphill, 41,526, p. 14 (La. App. 2 Cir. 11/17/06), 942 So. 2d 1263, 1273:

> To determine whether an area is part of the curtilage, or extension of the residence's living area, courts look at four factors which indicate how intimately the area is tied to the home itself: (1) the area's proximity to the home; (2) whether the area is included within an enclosure surrounding the home; (3) whether the area is being used for the intimate activities of the home; and (4) the steps taken by the resident to protect the area from observation by passers-by. *United States v. Dunn,* 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987); *State v. Raborn,* 33,980 (La.App. 2 Cir. 11/15/00), 771 So.2d 877, *writ denied,* 00-3414 (La.11/2/01), 800 So.2d 868; *United States v. Gorman,* 104 F.3d 272 (9th Cir.1996).

In State v. Hines, 323 So. 2d 449 (La. 1975), the Court held the defendant had no reasonable expectation of privacy rights in a common courtyard of an apartment complex. The courtyard had a low fence and no gates, and the courtyard was open to public view. In United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134 (1987), the Court found a barn, which was sixty yards from the residence and outside the fenced area around the residence, to be outside of the curtilage of the residence, and thus the defendant did not have a reasonable expectation of privacy in the barn.

By contrast, in Karston, the evidence was seized pursuant to a warrant which recounted that a police officer placed himself in a location where he

could observe any activity at an apartment about which the police had received a tip from an untested informant. At the subsequent suppression hearing, that officer testified "that he pushed open a solid black gate which was unlocked in order to secure entry into the courtyard and in turn enter into this private apartment building. After entering, he went to the second floor of the apartment building and concealed himself on the floor of the second floor balcony to watch the activity below." Karston, 588 So. 2d at 166. From his concealed vantage point, the officer witnessed apparent drug transactions, leading to the issuance of the search warrant. On review, this court described the issue as whether the officer "could enter a closed but unlocked gate to a private apartment complex courtyard to establish a surveillance . . . ." Id. at 167. The Court noted that the officer had no probable cause or reasonable suspicion to enter the courtyard, but it further noted that "not all intrusions onto property infringe on a person's reasonable expectation of privacy." Id. However, considering that the officer entered an area which "was not open to the public but rather was a courtyard to a private apartment complex which was fenced off to the general public by a brick wall and a solid black gate," the defendant-tenant had a legitimate and reasonable expectation of privacy in the courtyard area outside of his apartment. Id.

Likewise, in Ragsdale, the officer entered the patio connected to the defendant's apartment. The patio was enclosed by a tall wooden fence with a latched gate, and the slats of the fence were so closely placed that no one could see through the fence. The Court found the nature of the fence, which completely blocked the view of the patio and the apartment off of the patio from the general public, gave the defendant a reasonable expectation of privacy which the officer violated by entering the patio without a warrant and without probable cause.

In support of its contention that the officers were justified in walking down the driveway to the back yard and then around the shed to its open door, the State cites State v. Deary, 99-0627 (La. 1/28/00), 753 So. 2d 200, where a police officer walked up on a porch, looked inside the opened door, and saw the defendant standing with his back to the door. The officer knocked, and the defendant turned and dropped a bag containing what appeared to be cocaine. The Court found that although there was a fence in front of the residence, there was a mailbox on the porch, showing that the residents did not consider the porch to be a private enclave. The Court noted that the officer had just as much right to be on the porch as any casual visitor, and he noticed the contraband the defendant dropped by merely looking though the open door, as could any casual visitor to the porch.

In so finding, the Court relied on its earlier case, State v. Dixon, 391 So. 2d 836 (La. 1980). Police officers went to the defendant's trailer to investigate a missing juvenile. No one answered their knock, but one officer looked through the window next to the door and saw a fishbowl and a planter containing what appeared to be marijuana plants, as well as what appeared to be marijuana cigarettes. The officers waited outside the trailer. When the defendant and two companions soon arrived, the officers saw someone throw a bag out the car's window. The officers retrieved the bag, which contained drugs, and then arrested the three people in the car. The officers also stopped two other cars that soon appeared and found more drugs and paraphernalia. The officers then obtained a search warrant and searched the trailer, finding more drugs and paraphernalia. On appeal, the Court rejected the defendant's claim that the evidence should have been suppressed because the officer first saw the drugs from the porch. The Court noted that the officer had the same right as anyone else to be on the doorstep, and his observation of the marijuana inside the trailer was not a violation of the defendant's privacy.

Likewise, in State v. Brisban, 2000-3437 (La. 2/26/02), 809 So. 2d 923, officers made a narcotics arrest at a residence next door to the apartment building where they later arrested the defendant. The arresting

officer testified that he knew that several older people lived in the apartment building, and these people generally sat out on the building's porch. He testified that these people had told him in the past that if he did not see them on the porch, it was because drug activity was taking place and they did not want to be involved. There was no one on the porch when the officer made the arrest at the building next door, and the officer walked over to the apartment building and stood on the porch. The door to one of the apartments was open, and the officer could see a man inside the apartment sitting at a table cutting what appeared to be crack cocaine. The defendant was sitting on a sofa in the room. The officer entered the apartment, and the defendant lay down on the sofa and pretended to be asleep. The officer searched the defendant and found two crack pipes with residue in his pocket. The Court rejected the defendant's claim that the evidence should have been suppressed, finding that while the front porch was part of the curtilage of the building, it had limited privacy in that it could have been approached by anyone. The Court noted that the contraband would have been visible to anyone standing on the porch.

In State v. Campbell, 93-1959 (La. App. 4 Cir. 5/26/94), 640 So. 2d 622, also cited by the State, officers received a detailed tip concerning the defendant, his residence, and the house where he stored drugs for sale. The

officers followed the defendant from his house to the storage residence. The defendant entered the yard through an unlocked gate. Through a fence was made of chain-link, the officers watched as he walked over to the house, removed a bag containing a white powder from his pocket, and placed the bag under the house. The officers then watched as the defendant met with a man across the street and gave him an object. The other man swallowed the object before the officers could stop him, but the officers were able to stop the defendant and found he was carrying a large amount of money. The officers took the defendant back to the house and seized the bag from under the house, finding it contained a large amount of cocaine. The officers later got a warrant to search the defendant's residence, but they found only residue in a glass vial. On appeal, this court found that because the defendant presented no evidence that he owned or rented the house where he hid the cocaine, he had no reasonable expectation of privacy in the house or its yard. This court held that although the bag of cocaine was within the curtilage of the residence, the defendant had no privacy interest in the residence. This court also noted that the officers were able to see him place the bag with the drugs under the house, and they had probable cause and exigent circumstances that allowed them to enter the yard to retrieve the bag of cocaine.

In State v. Paulson, 98-1854 (La. App. 1 Cir. 5/18/99), 740 So. 2d 698, police officers drove to the defendant's house and parked in his driveway to investigate a tip they had received. An officer in one of the cars looked over to a part of the front yard and saw marijuana plants growing in a plot. Although the plants were not visible from the street because of a wooden fence, they were visible from the driveway, which had no fence or gate on it. The court rejected the defendant's claim that his right to privacy had been violated, finding that anyone on the driveway could have seen the marijuana, and thus the defendant did not have a reasonable expectation of privacy.

This court found no reasonable expectation of privacy in State v. Baker, 99-2846 (La. App. 4 Cir. 10/18/00), 772 So. 2d 225. Officers were responding to a call when they saw the defendant sitting on the porch of the residence next door. They saw the defendant become nervous and drop a baggie into the grass, and when they retrieved the bag, they found it contained cocaine. This court held that the defendant had no reasonable expectation of privacy in the unfenced front yard where he threw the cocaine.

In State v. Julian, 2000-1238 (La. App. 4 Cir. 3/14/01), 785 So. 2d 872, this court found that the officers were justified in entering the back yard

of the residence in front of which they had seen a drug transaction. The officers had received information concerning drug sales from the residence, and from their surveillance point they saw the codefendant, who fit one of the descriptions given by the informant, standing in the alleyway which led to the back of the residence. While the officers watched, they saw the codefendant engage in what appeared to be a drug transaction in front of the residence. While some officers arrested the codefendant, others walked down the alleyway to the back of the residence, where they saw several people, including the defendant, standing around a washer that had crack cocaine on top of it. The defendant threw down a bag of marijuana as the officers entered the back yard. The officers arrested him, searched him, and found heroin in his pocket. On appeal, this court found that the officers had probable cause to believe there were drugs in the back yard (because the codefendant had come from that direction prior to the drug sale) and had exigent circumstances to enter the yard.

Most recently, in State v. Hemphill, 41,526 (La. App. 2 Cir. 11/17/06), 942 So. 2d 1263, the appellate court upheld the trial court's suppression of the evidence discovered when police officers, acting only on a tip, entered the defendant's back yard and discovered that he was running a methamphetamine lab. The tip indicated that the lab was being run in a shed

behind the defendant's trailer and that the defendant "cooked" the methamphetamine after midnight. The officers waited a few days and then approached the defendant's property after midnight across a neighbor's land. The defendant's land was partially fenced, and it was apparent to the officers when they actually entered the defendant's land because the vegetation changed to grass. Some of the officers walked into the defendant's yard and soon smelled ether, which they knew was used in the manufacture of methamphetamine. They soon saw someone leave the trailer, walk to the shed, and enter it. The officers also heard activity inside the shed. Other officers drove down the defendant's driveway to the shed using bright lights in an effort to flush the person out of the shed. The officers opened the shed door and found the defendant inside, along with equipment for making methamphetamine. The trial court suppressed the evidence, finding that the defendant had a privacy right in the yard and the shed, and the officers did not have probable cause or exigent circumstances to enter the defendant's property. On review, the appellate court affirmed the trial court's ruling, also finding that the officers lacked probable cause until they had entered the defendant's property. The court noted that the property was partially enclosed by a privacy fence, but the part of the yard they entered was not encumbered by the fence. Nonetheless, the court noted that the partial fence

evinced a desire by the defendant to distinguish his property from the open land adjacent to it. Based upon the fact that "there were some steps taken by the defendant toward privacy," the appellate court found that the trial court "was not clearly wrong in finding that the defendant was adversely affected by this entry." Id. at p. 16, 942 So. 2d at 1274.

Here, at the suppression hearing the State tried to analogize this case to a few U.S. Supreme Court cases where the police discovered illegal activity by flying over the defendant's property. See California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809 (1986). However, those cases are really not applicable to this case. If neither of the defendants had lived in the apartment building, it could have been argued that they had no privacy right in the shed behind the building, as per this court's ruling in Campbell. However, even though the officer testified that neither defendant lived in the building, there is some indication that Fernandez gave the building as his address. Thus, at least Fernandez potentially had a privacy right in the back yard and the shed.

The facts of this case are not as straightforward as those in Deary or Karston. Unlike in Deary, Dixon, Brisban, Paulson, and Baker, the narcotics activity did not occur in the front yard, nor was the activity visible from the front porch. The shed was not in public view from the street, as was the

courtyard in Hines. Nor did the officer observe any illegal activity prior to entering the property, as in Julian. Conversely, the shed was not behind a gated fence, as in Karston and Ragsdale. The shed here could not be seen from the street, and apparently there was no fence around the yard, as was the case in Hemphill. There was a fence around the driveway, but the gate was open when the officers arrived, and they were able to walk down the driveway into the back yard where the shed was located. In addition, the officer testified that anyone pulling to the back of the driveway would have been able to see into the shed.

The facts of this case present a close call, but considering that the driveway was open and anyone pulling to the back of the driveway could have seen into the shed and discovered the narcotics activity, we find that the defendants did not have a *reasonable* expectation of privacy in the open-door shed.

Accordingly, we hereby find that the trial court erred in granting the motion to suppress the evidence. Accordingly, we hereby grant the writ, reverse the trial court's ruling, and remand the case for further proceedings.

WRIT GRANTED; JUDGMENT OF THE TRIAL COURT REVERSED