NO. COA14-438

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Johnston County
No. 11 CRS 55763-65, 11 CRS 55896

JAMES JOSEPH GENTILE

Appeal by the State from order entered 4 November 2013 by Judge Reuben F. Young in Johnston County Superior Court. Heard in the Court of Appeals 8 October 2014.

*Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for defendant.*

ELMORE, Judge.

The State appeals from an order entered 4 November 2013 by Judge Reuben F. Young in Johnston County Superior Court granting defendant's motion to suppress evidence seized as the result of an unlawful search. After careful consideration, we affirm.

## I. Facts

On 14 September 2012, James Joseph Gentile (defendant) filed a motion to suppress illegal drugs and drug paraphernalia seized by law enforcement officers from his residence. During the 9 September 2013 session of Johnston County Superior Court, the trial court heard defendant's motion and made the following pertinent findings of fact:

> 2. On September 9, 2011, Detective Rodney Langdon received an anonymous complaint that there was a marijuana grow operation in a detached garage adjacent to the residence located at 3236 Jackson-King Road, Willow Spring, Johnston County, North Carolina 27592.
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> . . .
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> 5. After verifying ownership of the residence, Detective Langdon conducted surveillance on the 3236 Jackson-King Road residence on the dates of September 13, 15, and 17 of 2011. He testified that he observed no vehicles on the property on these dates or any persons outside the residence. However, the landscaping to the residence was maintained and it appeared as though the residence was occupied because on September 13, 2011, Detective Langdon, along with Detective Jay Creech, observed that no exterior lights were on, but on September 15 and 17 of 2011, Detective Langdon observed that each of the lights affixed beside the front door to the residence were illuminated.
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> 6. On September 21, 2011, Detectives Langdon and Creech, at approximately 11:10 a.m., went to the address of 3236 Jackson-King Road to conduct a knock and talk

investigation.

7. Detectives Langdon and Creech arrived at the residence in an unmarked patrol vehicle and parked near the entrance where the electronic gate was located on the driveway.

8. Detective Langdon pushed the button to the electronic gate in an attempt to make contact with someone at the residence; however, after pushing the button next to the key pad numerous times, nothing happened and he eventually heard what sounded like a dial tone through the intercom speaker. He announced "Sheriff's Office" several times but no response was noted. The dial tone led the detective to believe that the intercom to the electronic gate was not functioning properly.

9. After pushing the button several times to the dial pad and not receiving any response, Detective Langdon observed vehicle tracks next to the left hand side of the electronic gate. Based on the detective's training and experience, it appeared as though numerous vehicles had been traveling around the gate based on the track impressions observed in the grass on the left hand side of the gate. Detective Langdon testified that when he saw the track impressions on the grass next to the gate, this also led him to believe that the gate was broken as well.

10. Detective Langdon testified that the electronic gate was positioned only on the paved portion of the driveway and did not surround the entire property. There was an open field to the left of the gate looking toward the residence. There were no "No Trespassing" or any other signs positioned on the gate indicating that it was private property.

11. After observing the track impressions to the left of the electronic gate, Detectives Langdon and Creech then walked around the gate on the grass along the vehicle tracks on the left hand side of the gate. Detective Langdon testified that he and Detective Creech then walked the rest of the way up the paved portion of the driveway leading to the front door, which was approximately five hundred (500) feet in distance.

12. Detective Langdon testified that the residence was fairly large in size and had a detached two-car garage located directly at the end of the driveway next to the residence. The two-car detached garage was connected to the residence by a paved walkway.

13. Detective Langdon approached the front door to the residence and knocked multiple times. While waiting at the door, Detectives Langdon and Creech heard dogs barking, but testified that they could not tell from which direction the dogs were barking.

14. After efforts to reach someone at the front door were unsuccessful, Detectives Langdon and Creech walked through what both detectives described as a "privacy fence" around a paved pathway to the backyard, thinking that since they had heard dogs barking, that the owner could be in the backyard, having not heard the knocking at the front door. However, the [sic] Detective Langdon stated in his affidavit that he "could hear several dogs barking towards the rear of the residence."

15. Detective Langdon testified that he knocked on the backdoor, but was unable to make contact with anyone. While standing at

the back door, Detective Langdon testified that he heard an air conditioner unit running near the rear of the two-car detached garage.

16. The weather on September 21, 2011 was cool and brisk and the temperature was approximately 72 degrees according to the temperature gauge on the patrol vehicle. Detective Langdon testified that since an air conditioner unit was not running to the main residence, but was running to the two-car detached garage, he believed that the two-car detached garage could be occupied.

17. While standing at the back door to the residence, Detective Langdon instructed Detective Creech to go stand in front of the house for officer safety purposes, and to see if he could locate anyone on the property while he walked to the two-car detached garage.

18. Using the paved walkway that connected the house to the backyard, as well as the two-car detached garage, Detective Langdon testified that he walked to the door of the detached garage and knocked in an attempt to locate the owner or any other persons on the property. Detective Langdon observed while knocking at the door that there were two surveillance cameras on the garage, neither of which faced the main residence.

19. Unable to make contact with anyone at the door to the two-car detached garage, Detective Langdon testified that as he was turning to leave the property, Detective Creech told him that he detected the odor of marijuana emitting from the front of the two-car detached garage. Detective Creech testified that while standing on the driveway approximately eight to ten feet from the front of the two-car detached

> garage, he immediately detected the overwhelming odor of marijuana and informed Detective Langdon.
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> 20. Detective Langdon then stepped to Detective Creech's location at the front of the detached garage on the driveway and detected the "overwhelming pungent odor of marijuana" emitting from the front of the two-car detached garage.
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> 21. Based upon the overwhelming "pungent odor of marijuana" and their training and experience the detectives left the residence and applied for a search warrant for the address of 3236 Jackson-King Road.
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> 22. During the execution of the search warrant, the Detectives located two hundred twenty-eight (228) pounds, or one hundred forty-three (143) marijuana plants and approximately three (3) ounces of psilocybin along with digital post scales, gallon Ziploc bags and other miscellaneous drug paraphernalia items.

Based on these findings of fact, the trial court concluded that the evidence seized pursuant to the search warrant had been unconstitutionally obtained because "when the detectives smelled the odor of marijuana, they were not in a place in which they had a right to be." Thus, the trial court granted defendant's motion to suppress the seized evidence.

## II. Analysis

The State argues that the trial court erred in granting defendant's motion to suppress because it erroneously concluded

as a matter of law that "when the detectives smelled the odor of marijuana, they were not in a place in which they had a right to be." We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents." *State v. Weaver*, __ N.C. App. __, __, 752 S.E.2d 240, 244 (2013) (citation and quotation marks omitted). A search "conducted outside the judicial process, without prior approval by judge or magistrate, [is] per se unreasonable under the [f]ourth [a]mendment—subject only to a few specifically established and well-delineated exceptions." *State v. Rhodes*, 151 N.C. App. 208, 213, 565 S.E.2d 266, 269 *writ denied*, *review denied*, 356

N.C. 173, 569 S.E.2d 273 (2002) (citations and quotation marks omitted).

> One such exception is the plain [smell] doctrine, under which a seizure is lawful when the officer was in a place where he had a right to be when the evidence was discovered and when it is immediately apparent to the police that the items [smelled] constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause.

*State v. Pasour*, __ N.C. App. __, __, 741 S.E.2d 323, 324-25 (2012) (citations and internal quotation marks omitted).

The fourth amendment generally protects "persons, houses, papers, and effects[.]" U.S. Const. amend. IV. Fourth amendment protections also extend to the curtilage of an individual's home. *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271. In this state, the curtilage "will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).

However, "no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper." *State v. Lupek*,

214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (citations and internal quotation marks omitted). However, where officers have no reason to believe that entering a homeowner's curtilage will produce a different response than knocking on the residence's front door, the Fourth Amendment is violated. *Pasour*, __ N.C. App. at __, 741 S.E.2d at 325-26.

Here, the detectives had far exceeded the scope of their right to generally inquire about the information received from the anonymous tip at the time they smelled the marijuana. When the detectives initially reached the house, they knocked on the front door for a "couple [of] minutes" but received no human response. They only proceeded to the back of the house because they heard barking dogs, and believed that an occupant might not have heard the knocks. However, the detectives could not determine from which direction the dogs were barking. There was no evidence of any vehicles on the property, persons present, lights illuminated in the residence, or furniture in the house, and the detectives believed that no one resided there. Accordingly, the sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard of the home and the area on the driveway within ten feet of the

garage. *See Florida v. Jardines*, __ U.S. __, __, 185 L. Ed. 2d 495 (2013) (noting that a law enforcement officer without a search warrant may merely "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave").

As a result, when the detectives smelled the odor of marijuana, their purported general inquiry about the information received from the anonymous tip was in fact a trespassory invasion of defendant's curtilage, and they had no legal right to be in that location. Accordingly, the subsequent search of the residence based, in part, on the odor of marijuana was unlawful. Thus, the trial court did not err by granting defendant's motion to suppress.

**Remaining Portions of Search Warrant Affidavit**

Next, the State argues that even if the detectives' entry onto constitutionally protected areas of defendant's property was unlawful, the trial court erred by granting the motion to suppress because it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause, absent the odor of marijuana. We disagree.

As defendant correctly points out, the State failed to preserve this issue on appeal. During the motion to suppress, the State argued that because the detectives were conducting a general inquiry about the information received from the anonymous tip and smelled the marijuana while on the driveway, they were in a place in which they had a right to be when they smelled the marijuana. Accordingly, the State argued that the motion to suppress should be denied. However, the State never argued before the trial court that the motion to suppress should be denied because even if the detectives had no legal right to be on the driveway when they smelled the marijuana, the remaining portions of the search warrant were nevertheless sufficient to establish probable cause. Thus, we dismiss this argument because the State did not preserve this issue for appellate review. *See State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539 (2010) ("[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court.").

## III. Conclusion

In sum, we affirm the trial court's order granting defendant's motion to suppress because the evidence seized from

defendant's residence was obtained as a result of an unlawful search.

Affirmed.

Judges BRYANT and ERVIN concur.