[Cite as *State v. Woolley*, 2017-Ohio-576.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 16-COA-003
	:	
MONTY M. WOOLLEY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas, Case No. 15-CRI-007
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	January 30, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
CHRISTOPHER R. TUNNELL ASHLAND CO. PROSECUTOR GARY D. BISHOP 110 Cottage St., 3rd Floor Ashland, OH 44805	THOMAS L. MASON P.O. Box 345 Ashland, OH 44805

Delaney, J.

{¶1} Appellant Monty M. Woolley appeals from the February 29, 2016 Judgment Entry - Sentencing and August 5, 2015 Judgment Entry of the Ashland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the record of the suppression hearing held on July 20, 2015.[1]

{¶3} This case arose on September 4, 2014 when Sgt. Timothy Kitts of the Ashland County Sheriff's Department investigated an unrelated matter near County Road 620. Someone involved in that case told Kitts he knew of a marijuana grow operation on County Road 620. Kitts contacted the Medina County Drug Task Force and requested their assistance with a helicopter to look for the possible marijuana grow.

{¶4} Through B.C.I., the Medina County Drug Task Force had access to a contract pilot and helicopter for drug interdiction operations. As the pilot operated the helicopter, a B.C.I. agent "spotter" directed officers on the ground to the location of plants spotted from the air. In this case, the spotter directed agents and deputies of the Ashland County Sheriff's Office to a residence where appellant lived with his mother Juanita, the property owner.

{¶5} The B.C.I. spotter first alerted agents on the ground to potted marijuana plants observed in the immediate rear of the residence. The plants grew in white plastic five-gallon buckets and were "20 to 50 feet" from the rear of the residence. The plants could not be seen from the road and were not visible to officers on the ground until they

[1] The record does not contain transcripts of the jury trial, sentencing, or other proceedings.

had entered upon appellant's mother's property and proceeded to the back yard behind the residence.

{¶6} The spotter also directed agents on the ground to plants growing in a wooded area which was an unspecified further distance from the house. These plants were growing in the ground and law enforcement pulled them out.

{¶7} Officers initially approached the residence via a long driveway and parked their unmarked vehicles in the driveway. Lt. Scott Smith entered the residence through a large open garage door and knocked on an inside door, which was opened by Juanita. Smith told Juanita why officers were present and asked her about marijuana plants spotted from the air. She denied knowledge of any marijuana and said the potted plants were her flowers. She indicated appellant also lived with her in the residence and offered to bring him outside.

{¶8} Appellant came out and spoke to Smith. At first he too denied knowledge of the marijuana plants but then admitted the potted plants in the white buckets and the plants growing in the ground in the woods were his. He also said he had dried marijuana inside the house and voluntarily turned it over. The dried marijuana from inside the house was contained in Miller High Life boxes.

{¶9} Law enforcement described appellant as cooperative.

{¶10} Appellant was charged by indictment with one count of marijuana possession pursuant to R.C. 2925.11(A), a felony of the third degree, and one count of illegal cultivation of marijuana pursuant to R.C. 2925.04(A), also a felony of the third degree.

{¶11} Appellant entered pleas of not guilty and filed a motion to suppress all evidence law enforcement found upon entry onto the property without a search warrant. Appellee filed a response in opposition and the matter proceeded to an evidentiary hearing. The parties also filed post-hearing memoranda. On August 15, 2015, via Judgment Entry, the trial court granted the suppression motion in part and overruled it in part. Specifically, the trial court suppressed the potted marijuana found in the immediate rear of the residence but otherwise allowed evidence including the growing marijuana from the woods, the dried marijuana from inside the residence, and appellant's voluntary statements to police.

{¶12} The case proceeded to trial by jury and appellant was found guilty as charged in Count I, possession of marijuana, but guilty of cultivation or manufacture of marijuana in an amount "more than 100 grams but less than 200 grams." Appellant was thus found guilty upon a third-degree felony in Count I and a fourth-degree misdemeanor in Count II. The trial court ordered preparation of a pre-sentence investigation and scheduled the matter for sentencing.

{¶13} On February 22, 2016, appellant was sentenced to 180 days of local incarceration. The sentence of the trial court also included, e.g., a probation term of three years, community work service, substance abuse treatment, and suspension of appellant's operator's license.

{¶14} Appellant now appeals from the trial court's decision to overrule the motion to suppress in part.

{¶15} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶16} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT SUPPRESSING ALL EVIDENCE GATHERED AFTER THE WARRANTLESS ENTRY OF LAW ENFORCEMENT AGENTS ONTO THE APPELLANT'S PROPERTY. THIS ERROR IS REFLECTED IN THE RECORD IN THE TRIAL COURT'S DECISION ON THE MOTION TO SUPPRESS AND IN THE TRANSCRIPT OF THE HEARING ON THE MOTION."

ANALYSIS

{¶17} In his sole assignment of error, appellant argues the trial court erred in failing to suppress all of the evidence flowing from law enforcement's warrantless entry onto his property. We disagree.

Standard of Review

{¶18} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long,* 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist .1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks,* 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf,* 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State*

v. Williams, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶19} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning,* 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein,* 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See, *Williams,* supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry,* 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

Appellant's Argument before the Trial Court and on Appeal

{¶20} Appellant cites generally "the illegal entry onto the premises" and specifically Smart's entry into the garage as the triggering events of the Fourth Amendment analysis in this case, arguing all evidence obtained therefrom must be suppressed pursuant to the "derivative evidence rule." We first note that although appellant's brief generally elucidates search and seizure law, he does not tie that discussion to any argument arising from the evidence in the record of this case. "It is the duty of the appellant, not this court, to demonstrate [ ] assigned error through an argument

that is supported by citations to legal authority and facts in the record." *State v. Harrington*, 5th Dist. Licking No. No. 15–CA–10, 2015-Ohio-4440, ¶ 21, appeal not allowed, 144 Ohio St.3d 1479, 2016-Ohio-467, 45 N.E.3d 245, citing *State v. Taylor*, 9th Dist. Medina No. 2783–M, unreported, 1999 WL 61619 (Feb. 9, 1999). See, also, App.R. 16(A)(7). "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." Id., citing *Kremer v. Cox*, 114 Ohio App.3d 41, 60, 682 N.E.2d 1006 (9th Dist.1996). Appellant's argument does not cite to the record and he does not describe law enforcement's perceived constitutional violations other than to state Smart entered the garage without a warrant.

{¶21} It is not evident from the record, though, that the issue of Smart's entry through the open garage door was raised before the trial court. Appellant's suppression motion refers generally to officers' "entry onto the premises" and the voluntariness of his own statements. His post-hearing memorandum addresses "plain view." The opinion of the trial court does not address the entry into the garage but generally finds the statements of appellant stemming therefrom to be voluntary and thus not subject to suppression.

{¶22} We find the entry into the garage to be significant to the search and seizure analysis and will therefore address three intrusions upon the property: the spotting of the marijuana from the air, officers' initial approach in the driveway and Smart's entrance through the open garage door.

Warrantless Entry Analysis

{¶23} It is undisputed that law enforcement entered upon the property without a warrant. The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception to the warrant requirement applies. *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The government may not intrude into areas where legitimate expectations of privacy exist. In determining whether the Fourth Amendment protects against a search, "the rule that has emerged * * * is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz,* 389 U.S. at 361 (Harlan, J., concurring). See *Rakas v. Illinois,* 439 U.S. 128, 143–144, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *State v. Williams,* 73 Ohio St.3d 153, 166–167, 652 N.E.2d 721 (1995).

{¶24} The Ohio Supreme Court has recognized seven exceptions to the search warrant requirement: (a) [a] search incident to a lawful arrest; (b) consent signifying waiver of constitutional rights; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search and the presence of exigent circumstances; (f) the plain-view doctrine; or (g) an administrative search. *State v. Akron Airport Post No. 8975,* 19 Ohio St.3d 49, 51, 482 N.E.2d 606 (1985), certiorari denied, 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 777 (1986); *Stone v. Stow,* 64 Ohio St.3d 156, 164, 593 N.E.2d 294, fn. 4 (1992).

Spotting of the Marijuana from the Air

{¶25} In this case, the officers' decision to approach appellant's residence arose from the spotting of marijuana plants from the air. Air surveillance generally does not

require a warrant. *State v. Little*, 183 Ohio App.3d 680, 2009-Ohio-4403, 918 N.E.2d 230, ¶ 22 (2nd Dist.), appeal dismissed, 125 Ohio St.3d 1458, 2010-Ohio-2753, 928 N.E.2d 735. Marijuana plants spotted from a helicopter may be held to be within "plain view." See, *United States v. Perry*, 95 Fed.Appx. 598, 602 (5th Cir.2004). Whether the plants were in an "open field" or within the curtilage of the home, though, affects the analysis, as it did for the trial court in the instant case. See, *State v. Jones*, 6th Dist. Lucas Nos. L–00–1231, L–00–1232, L–00–1233, 2003-Ohio-219, ¶ 88. Here, the trial court allowed the evidence of the growing marijuana in the woods but suppressed the potted marijuana because the latter was within the curtilage of the residence.

{¶26} The helicopter view alone does not support entry upon appellant's property where he has a reasonable expectation of privacy. "While warrantless aerial *observations* may be permissible, warrantless *seizures* without exigent circumstances are not permissible." (emphasis in original) *State v. Vondenhuevel*, 3rd Dist. Logan No. 8-04-15, 2004-Ohio-5348, ¶ 16, citing *State v. Wangul*, 8th Dist. No. 79393, unreported (Feb. 14, 2002) and *State v. Staton*, 2d. Dist. No. 90-CA-62, unreported (Mar. 15, 1991). Plain view alone is not enough to justify the warrantless seizure of evidence, although "[i]ncontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause." Id., citing *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Even where the object is obviously contraband, the U.S. Supreme Court has repeatedly "enforced the basic rule that the police may not enter and make a warrantless seizure." Id.

Entrance into Driveway and Woods Permitted

{¶27} The first physical entry by law enforcement onto the premises was driving down the driveway of appellant's residence. We have previously found officers are permitted to enter upon the driveway of a house and walk up to the front door to speak to occupants about complaints that they were growing marijuana in the garage. See, *State v. Schorr*, 5th Dist. Fairfield No. 13-CA-45, 2014-Ohio-2992, ¶ 26, citing *State v. Cook,* 5th Dist. Muskingum Nos. 2010–CA–40, 2010–CA–41, 2011–Ohio–1776, ¶ 67.

{¶28} Also, the officers' entry into the wooded area away from the home is not a constitutional violation. The marijuana growing in the woods is subject to the open-fields doctrine first enunciated by the United States Supreme Court in *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), wherein the court found that even though there had been a trespass by police officers, no illegal search or seizure occurred because the Fourth Amendment protection afforded to people in their "persons, homes, papers, and effects" is not extended to "open fields." Id. at 59. Government intrusion upon open fields is not an "unreasonable search" as proscribed by the Fourth Amendment. *State v. Paxton*, 83 Ohio App.3d 818, 824, 615 N.E.2d 1086 (6th Dist.1992), citing *Oliver v. U.S.,* 466 U.S. 170, 177, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984).

Entrance into Curtilage to Secure Potted Marijuana Not Permitted

{¶29} The officers' entry into the backyard of the residence to secure the potted marijuana, however, is problematic. The open fields doctrine does not apply to the curtilage of a dwelling because there is a reasonable expectation of privacy that attaches to curtilage. See*, State v. Jedrick*, 8th Dist. Cuyahoga No. 60276, 1991 WL 76108, *3.

The trial court found appellant had a reasonable expectation of privacy in the backyard area where the potted plants were found, and we agree.

{¶30} The spotting of the potted marijuana from the air does not change this conclusion. The curtilage enjoys greater constitutional protection, including in the matter of searches by air. "The curtilage is an area around a person's home upon which he or she may reasonably expect the sanctity and privacy of the home. For Fourth Amendment purposes, the curtilage is considered part of the home itself." *Oliver v. United States,* 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The only areas of the curtilage where officers may lawfully go are those impliedly open to the public, including walkways, driveways, or access routes to the house. *State v. Cook,* 5th Dist. Muskingum Nos.2010–CA–40, 2010–CA–41, 2011–Ohio–1776, ¶ 65, citing *State v. Birdsall,* 6th Dist. Williams No. WM–09–016, 2010–Ohio–2382, ¶ 13. Because the curtilage of a property is considered to be part of a person's home, the right of the police to come into the curtilage is highly circumscribed. *State v. Woljevach,* 160 Ohio App.3d 757, 2005–Ohio–2085, 828 N.E.2d 1015, at ¶ 29. We agree with the trial court that the potted marijuana in the rear of the house, within the curtilage, is not subject to any exception to the warrant requirement. It was unreasonable for law enforcement to enter the backyard and seize evidence without a warrant. *State v. Littell*, 9th Dist. No. 27020, 2014-Ohio-4654, 21 N.E.3d 675, ¶23 [aerial observation of marijuana within curtilage provided probable cause for search warrant but not authority to enter property to seize marijuana], citing *State v. Mims,* 6th Dist. Ottawa No. OT–05–030, 2006-Ohio-862, 2006 WL 456766, ¶ 14–26 [aerial observation of marijuana provided probable cause for search warrant but did not establish basis for warrantless search or exigent circumstances]; *State v. Vondenhuevel,*

3d Dist. Logan No. 8–04–15, 2004-Ohio-5348, 2004 WL 2260102, ¶ 15–20 [aerial observation of marijuana in curtilage does not constitute exigent circumstances justifying warrantless search].

Entry through Garage and Appellant's Admissions

{¶31} The final physical entry onto the premises is Smart's entry through the open garage to knock on the inside door. The trial court found appellant's statements to be voluntary and noted "[w]ithout a clear understanding from the evidence as to how Lieutenant Smart came to speak directly to [appellant], he and [appellant] engaged in a voluntary conversation…" Our review of the record indicates Smart walked through an open garage door to approach and knock upon an inside door. Appellant's mother opened the door, spoke to Smart voluntarily, and offered to have appellant come outside. We agree with the trial court that the ensuing admissions by appellant were voluntary, but appellant has assigned as error the constitutionality of Smart's entrance through the garage.

{¶32} "A law enforcement officer may enter a home's curtilage without a warrant if he has a legitimate law-enforcement objective, and the intrusion is limited." *Turk v. Comerford,* 488 Fed.Appx. 933, 947 (6th Cir.2012), citing *United States v. Weston,* 443 F.3d 661, 667 (8th Cir.2006). In this case, no evidence was found in the garage but the knock upon the door led to the conversation with Juanita and eventually to appellant's admissions.

{¶33} An attached garage falls within the curtilage of the home and is not subject to search without a warrant unless one of the few, specific exceptions to the warrant rule applies. *State v. Cooper*, 2nd Dist. Greene No. 97-CA-15, 1997 WL 593754, *2, citing *Los*

Angeles Police Protective League v. Gates, 907 F.2d 879, 885 (C.A.9, 1990). Further, an open door does not necessarily eliminate a reasonable expectation of privacy in those areas not made plainly visible by the opening. Id., citing *City of Athens v. Wolf*, 38 Ohio St.2d 237, 240, 313 N.E.2d 405 (1974). See also, *State v. Cross*, 4th Dist. Washington No. 12-CA-54, 2014-Ohio-1046, ¶ 18.

{¶34} In *Cooper*, police entered through an open garage door to speak to the defendant's wife, and while inside the garage observed contraband. 2nd Dist. Greene No. 97-CA-15, 1997 WL 593754. The state argued the appellant relinquished any expectation of privacy in the garage because his wife met police in the garage, conversed with them there without objection, and left them waiting in the garage while she retrieved her husband, facts on point with those in the instant case. The state argued the wife essentially consented to the entry into the garage.

{¶35} The law permits police officers to engage in consensual encounters with citizens without violating the Fourth Amendment. *U.S. v. Thomas,* 430 F.3d 274, 277 (6th Cir.2005). Moreover, consensual encounters do not lose their propriety simply because they take place at the entrance of citizen's home. Id. The *Cooper* court "recognize[d] that the issues of consent and privacy are closely related" and that "[b]y giving consent to a search, a party can be said to relinquish his expectation of privacy." *Cooper*, supra, 1997 WL 593754 at *3, citing *State v. Posey*, 40 Ohio St.3d 420, 427, 534 N.E.2d 61 (1988). The court ultimately found the acquiescence of the appellant's wife to the officers' presence constituted a waiver of the warrant requirement.

{¶36} In the instant case, the circumstances surrounding Smart's entry into the garage and ensuing conversation with Juanita, the property owner, were not examined in

great detail by either party at the suppression hearing. As we recognized supra, it is not clear to us that the garage entry was an issue at suppression. Nevertheless, as the purported owner of the property, we recognize Juanita's "consent" to the entry could waive Fourth Amendment protections if given voluntarily because she has authority over the property. *Cooper*, supra, at *4, citing *State v. Sneed*, 63 Ohio St.3d 3, 7, 584 N.E.2d 1160 (1992), certiorari denied, 507 U.S. 983, 113 S.Ct. 1577, 123 L.Ed.2d 145. To demonstrate the voluntariness of her consent, appellee need only show that consent was a product of free choice under a totality of the circumstances test. Id., citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

{¶37} The limited information here arises from Smart's testimony at the suppression hearing. On both direct and cross examination, Smart stated he approached the house through a large open garage door and knocked on the door of the house; Juanita answered the door; and he told her why police were present. T. 42, 46. Juanita denied marijuana was growing on the property, so Smart offered to show her the potted plants and proceeded to do so. T. 47. Juanita said her son, appellant, was home and offered to get him. T. 47. Appellant came out and subsequently admitted the marijuana in the pots and the woods was his, and further admitted he had marijuana drying inside the house, which he turned over. T. 48-49. Under the totality of the circumstances, we find Juanita validly consented to Smart's entry and that entry provided a lawful premise for appellant's eventual voluntary admissions. See, *Cooper*, supra, 1997 WL 593754, at *5.

{¶38} We thus arrive at the same conclusion reached by the trial court. The officers' entry into the driveway did not require a warrant. Juanita impliedly consented to

Smart's entry into the garage to knock on the door, leading to appellant's voluntary admissions and surrender of the dried marijuana. The helicopter "spotting" of the potted marijuana in the curtilage of the house does not provide an exception to the warrant requirement which would permit officers to enter the backyard and seize the plants. The potted marijuana was not subject to warrantless seizure. Finally, based upon the evidence in the record before us, appellant had no expectation of privacy in the marijuana growing in the woods, which was properly subject to warrantless seizure.

{¶39} Appellant's sole assignment of error is thus overruled and the decision of the trial court allowing the motion to suppress in part and overruling the motion to suppress in part is affirmed.

CONCLUSION

{¶40} Appellant's sole assignment of error is overruled and the judgment of the Ashland County Court of Common Pleas is affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.