

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-13-007

Appellee

Trial Court No. 12CRB01941

v.

Connor C. DeLong

DECISION AND JUDGMENT

Appellant

Decided: June 27, 2014

* * * * *

Matthew L. Reger, Bowling Green Prosecutor, for appellee.

Michael S. Skulina, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Connor DeLong, appeals the January 15, 2013 judgment of the Bowling Green Municipal Court which, following the court’s denial of his motion to suppress, accepted his no contest plea and found him guilty of underage possession of alcohol. Because we find that the warrantless entry into the residence was constitutionally invalid, we reverse.

{¶ 2} On August 19, 2012, appellant was charged with one count of underage possession of alcohol, in violation of R.C. 4301.69(E)(1). The charge stemmed from the Bowling Green police response to a nuisance party call. Appellant entered a not guilty plea. On October 19, 2012, appellant filed a motion to suppress the evidence related to the charge of underage possession of alcohol arguing that because the warrantless entry into a residence was not pursuant to an exigent circumstance it was constitutionally invalid. In opposition, the state argued that the officer's entry into the residence was in furtherance of the effort to abate the nuisance and an attempt to locate any of the persons who fled from police after being asked for identification. The attempt to abate the ongoing nuisance, the state argued, could be considered an exigent circumstance which justified a warrantless entry into the residence. Both parties cited case law which, they believed, supported their arguments.

{¶ 3} A hearing on the motion was held on October 26, 2012, and the following evidence was presented. The parties stipulated that appellant was an invited, overnight guest at the subject residence. Bowling Green Police Officer Adam Skaff testified that on August 18, 2012, at approximately 11:56 p.m., he was dispatched to a loud party complaint in the 300 block of North Summit Street in Bowling Green, Ohio. Upon arrival, Officer Skaff observed approximately 30 to 40 people in the front yard and people entering and exiting the house. Skaff stated that he first attempted to make contact with a resident in order to inform him or her of the complaint and to address the

issue. Officer Skaff was able to locate a resident who began informing guests that they needed to leave. Skaff stated that he did not go to the front door or look in a window.

{¶ 4} Officer Skaff acknowledged that as a result of police presence, people were dispersing. After approximately 20 minutes, the majority of people were gone and the nuisance abated. Skaff acknowledged that he observed no acts of violence or weapons.

{¶ 5} During this time, Bowling Green Police Chief Bradford Conner, Liquor Control agents, and additional officers had arrived on the scene. Officer Skaff stated that Chief Conner had apprehended two underage partygoers who were in possession of alcohol and brought them to Skaff to issue citations.

{¶ 6} Chief Conner testified that when he arrived on the scene he observed a large gathering of people on the sidewalk and in the front yard and porch. Chief Conner spoke briefly with Officer Skaff. He then observed two “youthful” looking individuals with red Solo cups which Conner testified are frequently used in the consumption of alcoholic beverages. Chief Conner stated that they began briskly walking away; he followed them around to the back of the house. Conner stated that he lost sight of them but “assumed” that they went in the back door of the house.

{¶ 7} Chief Conner stated that there were 60 to 70 people in the backyard in addition to the 30 to 40 people in the front. Conner stated that people were dispersing in all directions. Chief Conner stated that as he was returning to the front he found two additional “young” partygoers with red Solo cups. Conner asked for their identification

and, when he determined that they were under 21, he took them to Officer Skaff for him to issue citations.

{¶ 8} Chief Conner then testified that he went up on the front porch to find a resident of the house. Conner stated that his requests for people to leave the party were not making an impact and that people were going inside the house. Conner testified that pursuant to the Bowling Green Nuisance Party Regulations, he decided to go into the home to announce that the party was over and get people to leave and to look for the two individuals he suspected went in the back door.

{¶ 9} According to Chief Conner, when he entered there were approximately 50 to 60 people in the home with approximately 25 in the kitchen. Upon entering the kitchen, Conner observed appellant with a red Solo cup in his hand. Conner engaged him in conversation and determined that he was drinking alcohol and was under the age of 21. He issued appellant a citation. The police left shortly thereafter.

{¶ 10} During cross-examination, Chief Conner clarified that he was not initially notified that Officer Skaff had made contact with a resident. Conner reiterated that he did not see the two individuals he followed around to the back of the house go in the back door and that he did not walk up to the back door. Conner also admitted that he observed no violence or weapons. Finally, Conner agreed that a violation of the nuisance party regulations is a minor misdemeanor and that he did not receive permission to enter the closed front door of the house.

{¶ 11} Appellant presented the testimony of partygoer Katie Moorman who testified that she was inside the house when police arrived and that it was announced that everyone needed to leave. She stated that people were leaving and that when Chief Conner entered the residence there were only 10 to 15 left inside with six or seven in the kitchen.

{¶ 12} When cross-examined, Moorman admitted that prior to police arrival the house was full of people. She stated that after the police came, people left the house and that only friends of the residents remained. Moorman stated that the outside partygoers were “friends of friends” that they did not know well. Moorman admitted that there could have been more people in the living room; she could not see into it from the kitchen. She also admitted that she did not know how many individuals were upstairs.

{¶ 13} On November 15, 2012, the trial court denied appellant’s motion to suppress. The court analyzed the cases relied upon by the parties. The court ultimately relied on a 1990 Bowling Green Municipal Court case which involved an “open party” where partygoers entered and exited the residence at will. Thus, the court found that there was no reasonable expectation of privacy in the residence and, as such, no constitutional standing to object to police entry.

{¶ 14} Following the court’s denial of the motion, appellant entered a no contest plea to the charge. He was sentenced to 32 days in jail with 30 suspended, ordered to pay a \$1,000 fine, with \$600 suspended, subject to various community control restrictions ending on his 21st birthday, and ordered to pay court costs. This appeal followed.

{¶ 15} Appellant raises one assignment of error for our review:

The trial court erred by denying appellant's motion to suppress, as evidence against him was obtained in violation of his rights afforded by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶ 16} We first note that review of a trial court's denial of a motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). "[T]he appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside* at ¶ 8, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 17} Used as justification for the warrantless entry into the residence, Bowling Green Nuisance Party Regulations, Section 132.18 of the Bowling Green Municipal Code, provides:

(C) Order to cease and disperse. A party or social gathering that is or becomes a nuisance party, as defined in division (A), shall cease upon the order of the Police Chief, or the Police Chief's designee; and all persons not residing therein at the site of such social gathering or party shall leave

the premises immediately. Any person who fails or refuses to obey and abide by such an order shall be guilty of a violation of this section.

(D) Penalty. Whoever violates this section is guilty of a minor misdemeanor; for a second offense committed within six months after the commission of the first offense, the person shall be guilty of a fourth degree misdemeanor.

{¶ 18} Section 14, Article I of the Ohio Constitution prohibits warrantless arrests for minor misdemeanors absent special circumstances and also prohibits searches incident to such arrests. *State v. Brown*, 99 Ohio St.3d 323, 792 N.E.2d 175, 2003-Ohio-3931, ¶ 25. This court has held that the exigent circumstances exception to the presumption of unreasonableness of warrantless home entries is not applicable to misdemeanor offenses. *State v. Christian*, 6th Dist. Fulton No. F-04-003, 2004-Ohio-3000, ¶ 11; *State v. Scott*, 135 Ohio App.3d 253, 258, 733 N.E.2d 653 (6th Dist.1999). Underage possession of alcohol, R.C. 4301.69(E)(1) is a misdemeanor.

{¶ 19} Further, the cases relied upon by the state involved situations where either the underage drinkers were visible through the window or, after repeated attempts to contact residents by knocking on the door and announcing police presence the noise level was not abated and police had no other option but to enter the residence. *See State v. Namay*, 106 Ohio Misc.2d 72, 735 N.E.2d 526 (M.C.2000) (warrantless search upheld where officers observed through a window a large party and three youthful males drinking beer and an individual opened the front door); *United States v. Rohrig*, 98 F.3d

1506 (6th Cir.1996) (loud music in the middle of the night upsetting neighbors created exigent circumstances after police continued to knock and announce their presence with no response).

{¶ 20} The nature of the ordinance and statutory violation aside, in this case the court concluded that due to the size of the party, it was considered an “open party” and the residents or overnight guests did not have a reasonable expectation of privacy. In reaching its conclusion, the court relied heavily on *Bowling Green v. Campbell*, Bowling Green M.C. No. 90 CRB-01539 (Nov. 16, 1990)¹. In *Campbell*, the court determined that an apartment in a complex, which was the site of a party of 2,000 to 3,000 individuals, was an “open party” and individuals were free to come and go. In fact, police first entered through an open door. Based on this, the court determined that there was no reasonable expectation of privacy.

{¶ 21} The present case is distinguishable from *Campbell* in many respects. The size of the party at issue; an apartment complex with upwards of 3,000 partygoers is not comparable to a party with 100 or so guests. Further, the doors were not left open. Finally, and most importantly, the nuisance was in the process of abating when Chief Conner entered the residence through a closed door.

{¶ 22} Based on the foregoing, we find that the state failed to meet its burden of demonstrating that the warrantless entry and search of the residence by police fell within

¹ The *Campbell* decision included numerous other defendants and case numbers; for simplicity, we cite only to the *Campbell* portion.

an exception to the warrant requirement under the Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution. Accordingly, the trial court erred in failing to suppress all evidence gained from Chief Conner's entry into the residence. Appellant's assignment of error is well-taken.

{¶ 23} On consideration whereof, we find that appellant was denied a fair proceeding and the judgment of the Bowling Green Municipal Court is reversed and the matter is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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