[Cite as *State v. Ballez*, 2010-Ohio-4720.]

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

State of Ohio — Court of Appeals No. L-10-1012

Appellant — Trial Court No. CR0200902316

v.

Connie Ballez — **DECISION AND JUDGMENT**

Appellee — Decided: September 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kevin A. Pituch, Assistant Prosecuting Attorney, for appellant.

Patricia Horner, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is a state appeal of a January 15, 2010 judgment of the Lucas County Court of Common Pleas suppressing evidence gained from search of an automobile owned by appellee, Connie Ballez. Pursuant to Crim.R. 12(K), the state has certified that the appeal is not taken for purposes of delay and that the trial court's ruling has rendered

the state's proof so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

{¶ 2} Appellee was indicted on July 7, 2009, under a two count indictment. In the first count, appellee was charged with carrying a concealed weapon, a violation of R.C. 2923.12(A)(2) and (F) and a fourth degree felony. In the second count, appellee was charged with obstructing justice, a violation of R.C. 2921.32(A)(5) and (C)(3) and a fifth degree felony.

{¶ 3} On September 4, 2009, appellee filed a motion in the trial court to suppress evidence gained from a February 13, 2009 search of her 2003 Ford Expedition automobile and items seized during the search. Prior to the search, the police secured a search warrant for search of appellee's residence at 549 Potter Street, Toledo, Lucas County, Ohio including all out-buildings, sheds, garages, other common spaces, and curtilage. No vehicles were named in the search warrant. At the time of the search, appellee's Ford Expedition was parked on the street in front of 549 Potter Street at the curb.

{¶ 4} The state opposed the motion to suppress. The trial court conducted an evidentiary hearing on the motion on October 30, 2009, and granted the motion to suppress in the January 15, 2010 judgment.

{¶ 5} The state asserts one assignment of error on appeal:

{¶ 6} "Appellant's Assignment of Error

{¶ 7} "The trial court committed prejudicial error when it granted the defendant's motion to suppress."

{¶ 8} Review of a trial court's grant or denial of a motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. An appellate court defers to a trial court's factual findings made with respect to its ruling on a motion to suppress where the findings are supported by competent, credible evidence. Id.; *State v. Brooks* (1996), 75 Ohio St.3d 148, 154. "[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. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539." *State v. Burnside* at ¶ 8.

{¶ 9} Sergeant J.C. Heffernan is a sergeant with the Toledo Police Department's vice/narcotics section. He conducted surveillance of appellee's residence at 549 Potter Street during January and February 2009. He initiated surveillance after receiving information from a confidential informant that prescription pills and crack cocaine were being sold out of the residence. During the investigation, a confidential informant also made a controlled buy of Percocet at the residence. However, Heffernan never saw appellee sell drugs from her car. He also never saw the confidential informant in the vehicle with appellee.

{¶ 10} Heffernan's affidavit, detailing his investigation including information from the confidential informant, was submitted in support of a request for a search warrant.

The Toledo Municipal Court issued a search warrant on February 11, 2009. The warrant provided for search of the 549 Potter Street premises as well as "all out-buildings, sheds, garages, other common spaces, curtiledge [sic] * * *." The warrant did not specify whether any motor vehicles were to be searched. The search proceeded on February 13, 2009.

{¶ 11} Heffernan testified at the hearing on the motion to suppress that the premises had no driveway or garage and that during surveillance appellee always parked her car in the same location, on the street in front of the house. He testified that where she parked was a public street, not restricted to her use, and not fenced or otherwise enclosed to prevent public use or access.

{¶ 12} At the time of the search of the residence, appellee gave her car keys to police. In the search of the vehicle, police found a single Percocet tablet and a handgun. The handgun was in the car glovebox.

Scope of Search Authorized under Search Warrant

{¶ 13} Although the search warrant for the premises at 549 Potter Street did not specify any motor vehicle was to be searched, it did provide for search of all out-buildings, sheds, garages, other common spaces and curtilage. Ohio appellate courts have recognized that such a warrant extends to permit search of motor vehicles located within the curtilage of the premises. *State v. Dudley*, 2d Dist. No. 21781, 2008-Ohio-6545, ¶ 7-9 (parked in driveway); *State v. Williams*. 8th Dist. No. 88137, 2007-Ohio-3897, ¶ 19-20 (parked in driveway); *State v. Simpson* (Mar. 22, 2002), 2d Dist. No.

19011 (parked in attached garage); *State v. Tewell* (1983), 9 Ohio App.3d 330, 330-331 (parked in driveway).

{¶ 14} The state argues that appellee's vehicle, while parked on the street, was within the curtilage of 549 Potter Street and therefore within the scope of the search permitted under the search warrant. It argues that its position is supported by a decision of the Twelfth District Court of Appeals in *State v. Webb* (July 19, 1993), 12th Dist. No. CA92-12-242.

{¶ 15} The search warrant in *Webb* authorized search of "vehicles or outbuildings found on the property under the control of Powell or other occupants of the property when search is executed." Id. at 1. At the time of the search of the premises, one occupant of the dwelling was the owner of the two vehicles searched. He and another occupant held keys to the cars. The two vehicles were located across the street. Id. The court of appeals upheld the constitutionality of the search of the two vehicles.

{¶ 16} The Twelfth District characterized its decision in the following terms:

{¶ 17} "Under the facts and circumstances in the instant action, i.e., a search warrant that disclosed with particularity the vehicles to be searched, the vehicles' owner found on the property that was searched, and the vehicles on the property that was searched, and the vehicles to be searched parked within one hundred feet of the property described in the warrant, we find that a Fourth Amendment violation did not occur." Id. at 4.

{¶ 18} Here, the warrant did not specify whether any vehicles were to be searched. Under existing Ohio precedent, search of the vehicle was authorized under the warrant if the vehicle was located within the curtilage of the premises. The *Webb* case did not involve consideration of the term "curtilage" or its use in a search warrant. The *Webb* warrant did not use the term.

{¶ 19} The term "curtilage" has historical roots. "The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *United States v. Dunn* (1987), 480 U.S. 294, 300, 107 S.Ct. 1134. In *United States v. Dunn*, the United States Supreme Court identified factors to be considered in determining the scope of curtilage for search and seizure purposes:

{¶ 20} "Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: 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. See *California v. Ciraolo*, 476 U.S. 207, 221, 106 S.Ct. 1809, 1817, 90 L.Ed.2d 210 (1986) (POWELL, J., dissenting) (citing *Care v. United States*, 231 F.2d 22, 25 (CA10), cert. denied, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956); *United*

States v. Van Dyke, 643 F.2d 992, 993-994 (CA4 1981))." *United States v. Dunn*, 480 U.S. at 301. (Footnote omitted.)

{¶ 21} In its review of these factors, the trial court made findings of fact:

{¶ 22} "In the case sub judice, Defendant's vehicle was parked on the curb in the public street. While this space may have been the closest parking area to Defendant's home, the space was not included within an enclosure surrounding the home. And, arguably, even if the Defendant always parked her car in the exact same space, Defendant took no steps to protect the space or the interior of her car from observation."

{¶ 23} These facts are fully supported in the record. They demonstrate that under an application of the analysis set forth in *United States v. Dunn*, the city street where appellant parked her car cannot reasonably be concluded to be within the curtilage of 549 Potter Street. We agree with the trial court that "[t]he street, as a public place, is by definition not part of 'the area [that] harbors the intimate activity associated with the "sanctity of a man's home and the privacies of life.'" *Dunn*, 480 U.S. at 300." Accordingly, we conclude that the search of the Ford Expedition automobile was beyond the scope of the search authorized under the search warrant. The search warrant did not otherwise authorize search of any vehicle.

{¶ 24} The state has not contended that under the circumstances the motor vehicle was subject to search without a warrant. The trial court's findings included on the motion to suppress included:

{¶ 25} "[T]he Court finds that the circumstances did not justify the search of Defendant's vehicle. The Defendant was in police custody, the officers were in lawful possession of the keys to the vehicle, and there was no evidence that Defendant ever sold drugs from her vehicle or that any of the items listed in the warrant would likely be found in the vehicle."

Claimed Good Faith Exception to Exclusionary Rule

{¶ 26} The state nevertheless argues that evidence from the search of the vehicle should not be suppressed under the objective good faith exception to the exclusionary rule. The United States Supreme Court officially recognized the existence of a good faith exception to the exclusionary rule in *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405. *State v. Wilmoth* (1986), 22 Ohio St.3d 251, 259. In *State v. Wilmoth* the Ohio Supreme Court followed *Leon* and applied the rule:

{¶ 27} "1. The exclusionary rule should not be applied to suppress evidence obtained by police officers acting in objectively reasonable, good faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. (*United States v. Leon* [1984], 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, followed.)" *State v. Wilmoth* at paragraph one of syllabus.

{¶ 28} In *Leon*, the search warrant was invalid due to lack of probable cause. *Leon*, 468 U.S. at 905. In *Wilmoth*, validity of the search warrant was challenged on the basis of a failure to follow Crim.R. 41(C) procedure concerning use of a written affidavit and procedure relating to the administration of the oath to the affiant. *Wilmoth*, 22 Ohio

St.3d at 262-264. The errors in each case rendering search warrants defective were deemed errors of the magistrates issuing the warrants. *Leon*, 468 U.S. at 920-921; *Wilmoth*, 22 Ohio St.3d at 266. In each case the objective good faith exception to the exclusionary rule applied.

{¶ 29} In *Herring v. United States* (2009), ___U.S.___, 129 S.Ct. 695, the United States Supreme Court considered the exception to the exclusionary rule in circumstances involving a search incident to an arrest. Police arrested the defendant in *Herring* and conducted a search incident to the arrest based upon mistaken information received from another police department of an outstanding warrant for the defendant's arrest. *Herring*, 129 S.Ct. at 698. The error was determined to be a clerical error resulting in a failure to update a computer database when the arrest warrant was recalled five months before. Id. The United States Supreme Court ruled that the good faith exception to the exclusionary rule applied due to lack of any police culpability in the error:

{¶ 30} "Our cases establish that * * * suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence." *Herring*, 129 S.Ct. at 698.

{¶ 31} Here, it is not claimed that the search warrant in this case was invalid or that police reasonably relied on mistaken information from others. Rather, the search

went beyond the scope of the search authorized under the search warrant. It is the type of error for which the police conducting the search are directly responsible.

{¶ 32} "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 129 S.Ct. at 702.

{¶ 33} The state argues that police acted in a reasonable belief that search of appellant's car was within the scope of the search warrant. The trial court concluded it was not:

{¶ 34} "As to the State's argument that the evidence should not be excluded because the officers acted in good faith, this Court does not agree.

{¶ 35} "There is no case law available that would have told Sergeant Heffernan that it was reasonable to search Ballez's car when that car was not included in the warrant and not parked within the curtilage of the home. The car was not listed in the search warrant."

{¶ 36} The trial court also found that Sergeant Heffernan could not point to any evidence to support probable cause for search of the car. The state has not contended that there was any basis to search the vehicle without a warrant.

{¶ 37} We agree with the trial court that the search of vehicle was not undertaken with any reasonable expectation that the search would be upheld if challenged. Search of the car was not specifically authorized in the search warrant. Under the historical analysis required to determine curtilage, the facts of this case present no reasonable basis

to claim appellee's car, parked on a public street, was within the scope of the curtilage of 549 Potter St. As stated by the trial court, "[t]he street, as a public place, is by definition not part of 'the area [that] harbors the intimate activity associated with the "sanctity of a man's home and the privacies of life."' *Dunn*, 480 U.S. at 300."

{¶ 38} On an objective basis, the search of the car was undertaken with knowledge that it was beyond the scope of the search authorized under the warrant and unlawful. The exclusionary rule properly serves to discourage and deter such searches. We conclude that the trial court committed no error in granting the motion to suppress evidence.

{¶ 39} Appellant's assignment of error is not well-taken.

{¶ 40} On consideration whereof, the court finds that substantial justice was done the party complaining. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.
CONCUR.

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JUDGE