

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

State of Ohio

Court of Appeals No. L-08-1383

Appellee

Trial Court No. CR0200702249

v.

Dennis Gould

DECISION AND JUDGMENT

Appellant

Decided: July 23, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which denied appellant's motion to suppress evidence. For the reasons set forth below, this court reverses the judgment of the trial court.

{¶ 2} On June 12, 2007, appellant was indicted on two counts of rape, both felonies of the first degree; one count of gross sexual imposition, a felony of the third degree; six counts of pandering sexually-oriented material involving a minor, one of which was a felony of the second degree, and the remainder of which were felonies of the fourth degree; and five counts of the illegal use of a minor in nudity-oriented material or performance, all of which were felonies of the fifth degree.

{¶ 3} Appellant moved to suppress all evidence obtained from a computer hard drive. Of greater relevance, the evidence sought to be excluded contained images of appellant engaging in sexual acts with a minor child. The motion to suppress was premised upon grounds that the hard drive was searched without a warrant or valid consent. On November 11, 2007, an evidentiary hearing was conducted. The trial court held that the hard drive was abandoned property and, as such, the police had a reasonable basis to believe that appellant had relinquished any expectation of privacy pertaining to it.

{¶ 4} Subsequent to the suppression ruling against appellant, the case proceeded to a jury trial. Appellant was found guilty of all charges. On September 30, 2008, appellant was sentenced to a term of imprisonment of approximately 13.5 years, followed by two concurrent life sentences for the rape convictions, and a four year term for the gross sexual imposition conviction.

{¶ 5} On appeal, appellant sets forth the following sole assignment of error:

{¶ 6} "The state's case rests entirely on evidence seized during a search of Gould's computer hard drive. Gould had originally left that drive in the possession of his

mother with instructions that she was not to give it to anyone. She agreed. Gould's mother eventually took it from Gould's apartment and turned the drive over to the police. Gould did not consent to the search of the drive, and no exigent circumstances existed for the police to search it without warrant. The state argued it was abandoned property even though it was in Gould's apartment. Gould believes that the state failed to prove it was abandoned and, as such, his motion to suppress should have been granted."

{¶ 7} The following undisputed facts are relevant to the issue raised on appeal. Appellant filed a motion to suppress the evidence, namely, the computer hard drive. Two witnesses testified at the hearing. Sharon Easterwood who is appellant's mother and Detective Gina Lester of the Toledo Police Division.

{¶ 8} Detective Lester testified that on September 6, 2006, appellant's mother, Sharon Easterwood, came to the Northwest District Police Station. Easterwood came to the police to turn over a computer hard drive that belonged to appellant. Though she had not viewed its contents, Easterwood indicated her suspicion that the hard drive contained child pornography to Detective Lester. She came to this belief after one of her sons, Douglas, indicated that he had seen child pornography on appellant's computer. The record does not reflect whether Douglas had knowledge that this particular hard drive came from the same computer.

{¶ 9} When asked how the hard drive came into her possession, Easterwood indicated to Detective Lester that appellant had given it to her in December 2005, and instructed her not to allow anyone else to have it. She further stated that the hard drive

had been abandoned by appellant, and that she no longer felt comfortable keeping it in her home.

{¶ 10} Upon further inquiry, Easterwood stated that she had no knowledge of appellant's whereabouts and that she had very limited contact with him at the time. Appellant had gone absent some months earlier. At the meeting's conclusion, Detective Lester took possession of the hard drive and booked it into the department's property room. Based on the discussion with Easterwood, Detective Lester indicated her belief that the hard drive was abandoned property.

{¶ 11} Within two months of the initial meeting, Easterwood provided Detective Lester with appellant's new cellular telephone number. Easterwood indicated that the telephone bill began coming to her home, and she opened it to retrieve the number. Detective Lester made multiple attempts to contact appellant at the number and left voicemail messages identifying herself and asking for him to return her call. These calls were never returned.

{¶ 12} After repeatedly attempting to contact appellant over the course of three months, Detective Lester asked Easterwood to return to the police station on December 2, 2006, to complete a consent form to search the hard drive. Easterwood voluntarily completed the form. Detective Lester subsequently forwarded the hard drive to another detective at the police division and requested that he conduct a forensic analysis of its contents.

{¶ 13} On January 3, 2007, Detective Lester received a report on the hard drive's contents. It was found to contain pornographic videos of children, as well as photographs of appellant engaging in sexual acts with a minor child. Appellant was subsequently arrested in June 2007, in connection with the materials found on the hard drive.

{¶ 14} Easterwood's testimony at the suppression hearing appeared to conflict with the representations made to Detective Lester. Easterwood suggested that appellant initially gave her the hard drive in December 2005, when he temporarily moved into her home. Appellant then apparently took back the hard drive when he procured his own residence in June 2006.

{¶ 15} Easterwood conceded that in late August while appellant had gone absent, she asked her son Gregory's girlfriend, who had also moved into appellant's apartment, to go through appellant's belongings and retrieve the hard drive for her. The meeting with Detective Lester took place two weeks later and the hard drive was turned over.

{¶ 16} It is well-established that in reviewing a motion to suppress, the appellate court may not reverse the trial court ruling if it is supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665. The rationale underlying this deferential standard of review is in recognition that the trial court is most effectively situated to weigh and consider evidence, witness credibility, and resolve factual questions. *State v. Mills* (1992), 62 Ohio St.3d 357, 366.

{¶ 17} In his sole assignment of error, appellant asserts that the trial court erred by not suppressing the images on the hard drive. Appellant argues that the state failed to

establish that the hard drive was abandoned. Appellant further claims that his mother had no authority to consent to a search of the hard drive.

{¶ 18} A review of the record sub judice reveals that the trial court apparently accepted Detective Lester's testimony as an accurate recitation of the facts. In its decision on appellant's motion to suppress, the court cited a period of nine months as sufficient in finding the hard drive to have been abandoned. On that basis, the court determined that the subsequent search by police did not violate Fourth Amendment limitations.

{¶ 19} Our review of the record, particularly the testimony of appellant's mother, leads to a contrary conclusion. During testimony at the suppression hearing, Easterwood unambiguously represented that she first gained possession of the hard drive nine months prior to her meeting with Detective Lester. Appellant regained possession of the hard drive when he moved out of his mother's home some months later. Easterwood ultimately conceded that she again secured possession of the hard drive by going to appellant's home and removing it without his knowledge or consent.

{¶ 20} Easterwood ultimately conceded that she failed to disclose the truth of how she came into possession of the hard drive to Detective Lester. Easterwood testified that her son Dennis Gould, the appellant herein, moved into her house and began residing with her sometime in January 2006.

{¶ 21} At some point during the period of time that he was living with his mother, appellant handed the hard drive to his mother and gave her explicit instructions to not let "anybody get their hands on it." It was Easterwood who then put the hard drive into a big brown manila envelope and put it in her nightstand.

{¶ 22} Appellant moved out of his mother's residence in May 2006, and was living at an Ontario Street address. The appellant had taken all of his personal possessions when he moved out of his mother's residence with the exception of the hard drive given to Easterwood in January. It remained in Easterwood's nightstand.

{¶ 23} At some undefined point in time after coming into possession of the hard drive, Easterwood had a telephone conversation with appellant's twin brother, Douglas. Douglas indicated that he had witnessed Dennis viewing child pornography on his computer when appellant lived in Mississippi and further surmised that such pornography was on the hard drive given to Easterwood. As a result of this telephone conversation, Easterwood gave the hard drive back to the appellant sometime around the first of June 2006.

{¶ 24} Appellant was living in his apartment by himself until the July 4th weekend of 2006 when his older brother Greg moved in with him. At some undetermined point in time, appellant's brother had a girlfriend also reside at the apartment.

{¶ 25} Easterwood had concluded that appellant had "gone missing essentially in August." She reached this conclusion from a statement made by appellant's brother. By

her own admission, she "wasn't around" appellant and could not indicate how or why she or her son Gregory had concluded that appellant had gone "missing" in August.

{¶ 26} After she concluded that appellant was "missing" in August, Easterwood went to appellant's apartment and asked "the girl" to "go through his things, which she did. And she gave it back to me. It was still in the brown manila envelope." It is undisputed that she took the drive to the Northwest District Police Station on September 6, 2006, several weeks after she obtained it from appellant's apartment.

{¶ 27} Her next contact with appellant occurred when she received a telephone call from him on October 10. Appellant asked Easterwood if his brother had filed a charge against him for stealing his truck. There was no discussion about his belongings or anything else concerning his apartment.

{¶ 28} The state contends that the hard drive was abandoned by appellant. Abandoned property is not subject to Fourth Amendment protection. *Abel v. United States* (1960), 362 U.S. 217. "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts." *United States v. Colbert* (C.A.5, 1973), 474 F.2d 174, 176. In determining whether someone has abandoned property, "[a]ll relevant circumstances existing at the time of the alleged abandonment should be considered." *Id.* "The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so

that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Id.*

{¶ 29} At the suppression hearing, there was no evidence presented to demonstrate appellant's intent, by words spoken or acts done, to abandon the hard drive.

{¶ 30} While intent of one in possession of property or premises often cannot be inferred from his actions, abandonment will not be presumed. It must be clearly established by the party asserting it. *Coleman v. Maxwell* (C.A.6, 1967), 387 F.2d 134, certiorari denied (1968), 393 U.S. 1007. Mere absence from the premises without a clear intention to abandon could not legitimize a search of property found therein. *U.S. v. Robinson* (C.A.6, 1970), 430 F.2d 1141.

{¶ 31} Detective Lester's subjective belief that the hard drive had been abandoned was unsupported by the objective facts and Easterwood's testimony. More significantly, the detective could have obtained additional information concerning the circumstances surrounding Easterwood's access to the computer hard drive through further questioning and properly sought a search warrant for the hard drive. Accordingly, we find that the state failed to demonstrate by credible, competent evidence that the hard drive was abandoned.

{¶ 32} The state alternatively argues that the search of the hard drive did not exceed constitutional limitations because the Fourth Amendment proscribes only governmental search or seizure. The Fourth Amendment is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as

an agent of the Government or with the participation or knowledge of any government official." *United States v. Jacobsen* (1984), 466 U.S. 109, 113, quoting *Walter v. United States* (1980), 447 U.S. 649, 662. The court stipulated that "additional invasions of * * * privacy by the Government agent must be tested by the degree to which they exceed the scope of the private search." *Id.* at 115. The *Belcastro* court held that "the government may not exceed the scope of the private search [or seizure] unless it has the right to make an independent search, e.g. through a warrant." *State v. Belcastro*, 8th Dist. No. 77443, 2002-Ohio-2556, ¶ 7.

{¶ 33} In applying this legal precedent to the instant case, the record shows that Easterwood acted as a private individual and not as an agent of the government when she acquired the hard drive from appellant's residence. Therefore, the government's *seizure* of the hard drive did not exceed Fourth Amendment limitations. However, there is no evidence that Easterwood, or anyone else, "opened" the hard drive and viewed its contents. The images on the hard drive were not manipulated until the police division did so at the direction of Detective Lester. Consequently, by conducting a warrantless search of the hard drive's contents absent exigent circumstances, the police exceeded the scope of Easterwood's private action.

{¶ 34} We find no credible, competent evidence to uphold the trial court's finding that the hard drive was abandoned property. The hard drive and its contents were subject to Fourth Amendment protections against warrantless governmental search. The state violated these protections when it exceeded the scope of the private seizure by appellant's

mother. As such, the disputed governmental search of the hard drive was unconstitutional and the evidence resulting from the search should have been suppressed. Appellant's sole assignment of error is found well-taken.

{¶ 35} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. The case is remanded to the trial court for further proceedings. Appellee is ordered to pay costs of this appeal pursuant to App.R. 24.

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.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.