[Cite as *State v. Tallent,* 2011-Ohio-1142.]

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

State of Ohio — Court of Appeals No. L-10-1112

Appellant — Trial Court No. CR0200902760

v.

Thomas Tallent — **DECISION AND JUDGMENT**

Appellee — Decided: March 11, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Michael Loisel and Brenda J. Majdalani, Assistant Prosecuting Attorneys, for appellant.

Ronnie L. Wingate, for appellee.

* * * * *

SINGER, J.

{¶ 1} This is a state appeal of an April 12, 2010 judgment of the Lucas County Court of Common Pleas suppressing evidence gained from a search of appellee, Thomas Tallent's, property. 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. For the reasons that follow, we reverse.

{¶ 2} On September 11, 2009, appellant was indicted on one count of improperly discharging a firearm at or into a habitation, a violation of R.C. 2923.161(A)(1) and a felony of the second degree, and one count of illegal cultivation of marijuana, a violation of R.C. 2925.04(A), (C)(1) and (C)(5)(c) and a felony of the fifth degree.

{¶ 3} On November 12, 2009, appellant filed a motion to suppress challenging the adequacy of the search warrant used to search appellant's premises. A suppression hearing commenced on January 29, 2010.

{¶ 4} Only one witness appeared. Sergeant Bill Wauford of the Toledo, Ohio Police Department, testified that he was on duty the afternoon of July 12, 2009, when he responded to a call from a house on Kettner Street in Toledo. The resident of the house had found a bullet in a bedroom next to a baby's crib. There was a bullet hole in the ceiling and a bullet hole in the roof, visible from the back of the house. Judging from the location of the bullet hole in the roof, Wauford testified, he determined that the bullet was most likely fired from a house on Newport Street, the house behind the Kettner address.

{¶ 5} Wauford decided to drive over to the Newport Street house. He parked in the driveway and knocked on the front door. When he got no response, he walked up the driveway around to the back of the house and knocked on the back door. While there, he looked down and saw an empty bullet casing on the ground. He testified that the casing

looked to be of the same caliber as the bullet in the baby's room. Close by, he observed a small pile of bullet casings. No one answered the back door. Neighbors also reported hearing gunshots in the early morning hours coming from the area around 1837 Newport Street. That evening, Wauford swore out an affidavit in support of a search warrant for the residence at 1837 Newport Street, the home of appellant.

{¶ 6} On April 12, 2010, the trial court granted appellant's motion to suppress, finding that "* * * the state failed to establish the police were lawfully on defendant's property when they discovered the shells and shell casings." Appellant now appeals setting forth the following assignments of error:

{¶ 7} "I. The trial court improperly suppressed evidence seized during the lawful execution of a valid search warrant.

{¶ 8} "II. The trial court improperly suppressed the shell casing evidence since the evidence was not within the curtilage."

{¶ 9} We will initially address appellant's second assignment of error. Appellant contends that the trial court erred in granting appellee's motion to suppress. Specifically, appellant contends that the court erred in finding that Wauford was unlawfully on appellee's property when he discovered the shells and shell casings, in plain view, the discovery of which served as a basis for a search warrant.

{¶ 10} An appellate review of a ruling on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez* (C.A.11, 1992), 949 F.2d 1117, 1119; *State v. Long* (1998), 127 Ohio App.3d 328, 332. During a suppression

hearing, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548. As a result, an appellate court must accept a trial court's factual findings if they are supported by competent and credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594; *City of Bowling Green v. Cummings*, 6th Dist. No. WD-07-084, 2008-Ohio-3848, ¶ 9. The reviewing court must then review the trial court's application of the law de novo. *State v. Russell* (1998), 127 Ohio App.3d 414, 416; *State v. Klein* (1991), 73 Ohio App.3d 486, 488; *State v. McNamara* (1997), 124 Ohio App.3d 706; *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶ 11} Here, appellant does not challenge any factual findings made by the trial court. Appellant contends that the trial court's legal conclusions were wrong. Thus, we must independently review whether those legal conclusions are correct.

{¶ 12} The Fourth Amendment to the United States Constitution was intended to protect citizens from unreasonable searches and seizures within the privacy of their own homes. The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court for E. Dist. of Michigan, S. Div.* (1972), 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752. Warrantless entries of residences are presumptively unreasonable, subject to only a few established, well-delineated exceptions. *Payton v. New York* (1980), 445 U.S. 573, 100

S.Ct. 1371, 63 L.Ed.2d 639. The curtilage of a residence is also afforded protection under the Fourth Amendment. *State v. Karle* (2001), 144 Ohio App.3d 125.

{¶ 13} 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* (1984), 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214. The extent of a home's curtilage is resolved by considering four main factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the use to which the area is put; and (4) the steps taken to protect the area from observation by passersby. *U.S. v. Dunn* (1987), 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326.

{¶ 14} Unless a property owner has made express orders to the contrary regarding possible trespass, there is no rule that makes it illegal per se, or a condemned violation of an individual's right to privacy, for anyone to openly and peaceably walk up to the front door of a man's "castle" with the honest intent to ask questions, whether the questioner be a pollster, salesman, or police officer. *United States v. Taylo*r (C.A.4, 1996), 90 F.3d 903; *Davis v. United States* (C.A.9, 1964), 327 F.2d 301. "No trespassing" signs and the like are indications that a property owner or occupier expects privacy within a certain area of the curtilage. *United States v. Depew* (C.A.9, 1993), 8 F.3d 1424, 1428, overruled on other grounds *United States v. Johnson* (C.A.9, 2001), 256 F.3d 895. It reasonably follows that areas so designated are places into which the public is expressly not invited.

{¶ 15} Absent a warrant, police have no greater rights on another's property than any other visitor has. Thus, it has been held that the only areas of the curtilage where officers may go are those impliedly open to the public. Police are privileged to go upon private property when in the proper exercise of their duties. See *State v. Chapman* (1994), 97 Ohio App.3d 687. "There is an implied invitation for the public to use access routes to the house, such as parking areas, driveways, sidewalks, or pathways to the entry, and there can be no reasonable expectation of privacy as to observations which can be made from such areas. Like other citizens, police with legitimate business are entitled to enter areas of the curtilage that are impliedly open to public use." *State v. Rigoulot* (1992), 123 Idaho 267, 846 P.2d 918. 1 LaFave, Search and Seizure (2004) 600-602, Section 2.3(f).

{¶ 16} "In *United States v. Hammett* (C.A.9, 2001), 236 F.3d 1054, the court held that law enforcement officers did not violate the Fourth Amendment when, after receiving no response to their knocks at the front door, they circled around the house in a good-faith attempt to find another entrance and notify the occupants of their presence." *State v. Holt* (2002), 119 Ohio Misc.2d 1, ¶ 8.

{¶ 17} Similarly, in *Holt*, the court found that officers were legitimately fulfilling their duties at the time that they entered onto a defendant's property as they were investigating a hit and run accident and they had been told by the victim that the defendant was the errant driver.

{¶ 18} "The police were making a good-faith attempt to verify [defendant's] account of the evening's events. When the officers did not receive any response to their knock at the front door, [the officers were] entitled to go around the defendant's home to see if, in fact, the defendant was home and amenable to questioning."

{¶ 19} In *United States v. Anderson* (C.A.8, 1977), 552 F.2d 1296, the court addressed whether the police's action of proceeding to the backyard of a home after receiving no response at the front door, violated Fourth Amendment principles. The court determined that the police had entered an area in which there was a reasonable expectation of privacy, but went on to state that the initial intrusion was justified by legitimate police objectives, namely questioning a suspect. In so holding, the court stated:

{¶ 20} "[W]e cannot say that the agents' action in proceeding to the rear after receiving no answer at the front door was so incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded as the fruit of an illegal search." Id. at 1300. See, also, *Miller v. State* (2000), 342 Ark. 213, 27 S.W.3d 427, *Estate of Smith v. Marasco* (C.A.3, 2003), 318 F.3d 497, 520-21; *United States v. Bradshaw* (C.A.4, 1974), 490 F.2d 1097, 1100.

{¶ 21} In this case, Wauford testified that, on legitimate police business, he walked up the driveway to the back of the house because he believed someone may have been inside. He testified that appellant's driveway is next to his house and his back door is to the right of it. The asphalt of the driveway comes all the way up to the back door.

He testified he saw no privacy fence in the backyard. There is no evidence that there were any barriers to the back of the house. He testified that a chain link fence "skirted the outer portion of the property" and came down the driveway but the front of it was open. He did not see an opening gate. He did not see any "no trespassing signs." He walked up the driveway and turned to the right to approach the back door. He saw the first casing, in plain sight, on asphalt right by the back door. He saw a second casing next to the house and another one by the back door. Not too far from the back door, he saw a pile of casings. Based on the foregoing, we conclude that Wauford did not violate appellee's Fourth Amendment rights when he went to the back of the house in an attempt to speak to him. Accordingly, the trial court erred in granting appellee's motion to suppress. Appellant's second assignment of error is found well-taken.

{¶ 22} In his first assignment of error, appellant contends that the trial court erred in suppressing all of the evidence seized as a result of the search warrant. Because the trial court suppressed the evidence based on a finding that Wauford was initially on appellee's property illegally, appellant's first assignment of error is found well-taken.

{¶ 23} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed and this case is remanded to that court for further proceedings. Appellee is ordered to pay the 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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE