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Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001481-MR

JAMES HOWELL LEACH — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 05-CR-00277

COMMONWEALTH OF KENTUCKY — APPELLEE

AND: NO. 2006-CA-001486 -MR

KAREN ELAINE LEACH — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 05-CR-00277

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

STUMBO, JUDGE: This consolidated appeal is brought from the convictions of James and Karen Leach. Mrs. Leach appeals a conviction on a charge of firearm enhanced possession of marijuana and firearm enhanced use/possession of drug paraphernalia. She was sentenced to two-and-a-half years in prison, probated for two years. She entered a conditional guilty plea and appeals the denial of a motion to suppress certain evidence obtained during a search of her home.

Mr. Leach also entered a conditional guilty plea which resulted in a sentence of five years, probated for two years, for one count of firearm enhanced cultivation of marijuana, one count of firearm enhanced possession of drug paraphernalia, and one count of firearm enhanced possession of marijuana. Because both cases arise from the same set of facts and the issue raised is identical, they will be heard together.

On April 15 and 16, 2005, the West Kentucky Crimestoppers in McCracken County received anonymous tips. The two tips alleged that the Appellants were dealing drugs, specifically cocaine, methamphetamine and marijuana, out of their house. On April 22, 2005, Detective Matt Carter and Deputy Jesse Riddle went to Appellants' home to investigate. According to the officers, the tipster stated that the Appellants would not answer the front door to the home, but would come to the back door. Detective Carter

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

testified that Deputy Riddle had advised him that he (Riddle) had been to the residence before on a previous domestic call and that "everyone" at the house on that occasion used the back door to enter and exit the house. He did not say whether these people were all members of the Leach family. Relying on this information, upon arrival the officers immediately went around to the back door and knocked without first attempting entry via the front door.

Photographs in the record indicate that to reach the back door, the officers had to walk down a driveway, pass a number of parked vehicles and go behind the house to a position not visible from the street. Additional photographs reveal that the back yard was ringed with an overgrowth of trees and bushes and had a garage in one corner. From the front of the house, the parked vehicles and vegetation appear to conceal the rear of the house completely from the street.

The back door was open, but it had a closed screen door. Upon reaching this back door, Carter smelled the odor of marijuana. When the detective knocked, someone from inside yelled "come in." The officers did not enter because they had not yet identified themselves. Eventually, Mr. Leach came to the door. Detective Carter told Mr. Leach why the officers were there, but Mr. Leach denied knowing anything about drug activity. Mr. Leach did say he had a friend who was also inside the house. The detective instructed the friend to come to the door. Both men were then given the *Miranda* warnings. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Detective Carter told the men that the smell of marijuana was coming from the house. Mr. Leach admitted that there was an ounce of marijuana and some firearms in the house, and that his wife was in the bedroom. At this point, both men were detained and asked for consent to search the house. Mr. Leach consented and took the officers through the house, pointing out the marijuana and guns. Mrs. Leach was also instructed to come out of the bedroom. When the officers came to the room of the Leaches' son, Mr. Leach revoked his consent and would not let them enter the room. The officers then obtained a search warrant and found in the room more marijuana, drug paraphernalia, and firearms.

During the ensuing criminal proceedings, Mrs. Leach filed a motion to suppress the evidence found in the house. Mr. Leach later joined in this motion. The Leaches argue that the initial search of the house was improper because no warrant had been issued and there was no applicable exception to the warrant requirement. The Leaches contend that the officers were illegally on the property when they smelled the marijuana because the back door of the house is part of the curtilage. The curtilage is a protected private area and is not subject to a general search absent a properly issued warrant or an appropriate exception to the warrant requirement. In short, their argument is that the presence of the officers in the protected area was inherently coercive, rendering Mr. Leach's consent invalid.

The motion was denied by the trial court, which concluded that the officers were lawfully at the back door to make contact with the owners of the house and that the

back door was open for public use. The open for public use conclusion was derived from the case of *Cloar v. Commonwealth*, 679 S.W.2d 827 (Ky. App. 1984), which will be discussed more fully *infra*.

Both Appellants argue that their right to be secure from unreasonable search and seizure guaranteed by the 4th and 14th Amendments to the U.S. Constitution was violated when the police officers breached the curtilage of their property without a search warrant and conducted a search by coming to the back door. The Commonwealth responds that the officers were rightly at the back door to affect a knock-and-talk and that valid consent to search the premises was given.

First, we must address the issue of whether the back door was open to the public. The lower court concluded that it was based on the *Cloar* case mentioned above. In *Cloar*, a deputy sheriff went to the house of Gerald Gravitt to talk with him in connection with the theft of a chainsaw and other items. The deputy parked in the driveway and then knocked on both the front and back doors, but got no response. He then noticed a cabin by a lake that was further down the driveway. The deputy drove down to the cabin, apparently in search of Gravitt. He went to the back door, which was the one facing his vehicle, and knocked. Receiving no response, he went to the front door, which he found to be padlocked. As he was coming back around the house to his car, the deputy noticed a motorcycle cover which fit the description of one that had been stolen a few months prior. He removed the cover and brought it to the original owner who identified it as the stolen property.

Later that day, the deputy got information that Gravitt was in the cabin. Officers went to the cabin and arrested him. Gravitt moved to suppress the motorcycle cover, contending that it was illegally seized from the curtilage of his residence. The Kentucky Supreme Court disagreed. That court stated that although Kentucky adheres to the rule that the curtilage of a residence may not ordinarily be searched without a warrant, contraband may be seized if it is in plain view and in a protected area. *Cloar* at 829. The court stated that the rule had evolved saying:

> if a police officer is lawfully engaged in an activity in a particular place and inadvertently observes an object in plain view that he or she has probable cause to associate with criminal activity, the officer may seize the property without a warrant. Such a seizure is not infirm under either the United States or Kentucky Constitutions.

Id. at 829-30. A primary issue in *Cloar* became whether the deputy was in a lawful place at the time he observed the stolen property. If he was, then the seizure was lawful and should not be suppressed. The court found that the deputy was in a lawful position upon seeing the stolen property. It held:

> that a police officer in the furtherance of a legitimate criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public use. We limit the permissible scope of this right, however, to driveways, access roads, and as much of the property's sidewalks, pathways, and other areas as are necessary to enable the officer to find and talk to the occupants of the residence. We fail to perceive that such a rule sanctions an unreasonable invasion of privacy. After all, there is nothing unreasonable about a person in broad daylight openly and peacefully walking up to the door of a residence with the honest intent of asking questions of the occupant.

Id. at 831. So the question remains, was the back door impliedly open to public use? We do not think it was.

Curtilage is a protected part of an individual's property under the 4th Amendment of the United States. It is given protection because it is an extension of the home and can be used for intimate activity associated with the home. *Oliver v. United States*, 466 U.S. 170 (1984). The United States Supreme Court outlined four factors to be considered in determining whether property fell within the curtilage of one's home. The four factors to be considered are: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the house, 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." *U.S. v. Dunn,* 480 U.S. 294, 301 (1987). When this test is applied to the facts found in the case at bar, it is clear that the Leach's back door is undeniably part of the curtilage. The back door was concealed from the public roadway by the house itself, vehicles parked in such a manner as to conceal the back yard, and tall trees, shrubbery and the garage from the three remaining sides of the back yard. Additionally, as noted by counsel in the Appellant's brief, the back yard was being used to grow marijuana, which is a use certainly meant to be concealed from passersby. (We note that apparently the officers did not notice the marijuana plants located in pots on a table in back yard until after the search warrant was obtained.) A cursory glance at the photos in the record establish that there was no pathway and the back yard of the

property was not otherwise impliedly open to the public which would allow it to fall under the *Cloar* exception stated above.

Generally speaking, no reasonable member of the public would believe that a back door not visible to the casual observer would be open to him. There could be circumstances where members of the public could think that a back door would be open to the public. For example, if the front door is somehow inaccessible or there is no response to attempts to contact the inhabitants via the front door. *See, e.g.*, *Warner v. State,* 773 N.E.2d 239 (Ind. 2002) (police who received no response at front door properly went to side door). In this case, all we have to suggest that the back door is impliedly open to the public is an anonymous tip and the hearsay statement of one of the police officers that on a previous occasion he had been at the house and noticed that "everyone" used the back door to enter and exit. There was no testimony that those who used the back door included the public or even when this previous visit took place. Considering that the officer's previous visit to the residence was in response to a domestic disturbance, it is logical, without more information, to assume the only people involved were members of the family and that no members of the public were seen using the back door. We cannot in good conscious deem a back door to be impliedly open to public use based on an uncorroborated anonymous tip and the single previous experience of one of the officers.

The Commonwealth offers up a number of cases from other jurisdictions that say an officer may go to the back door to execute a knock-and-talk. However, all

these cases state that the officer may do so only if the front door is inaccessible or if they first knocked on the front door and got no response. Neither of these instances was the case here. The officers did not try the front door, which was accessible. Upon arriving, they went immediately to the back door. This was a violation of the Appellants' curtilage.

Having concluded that the officers were not properly on the curtilage of the Leaches' property, we must then turn to whether the consent given to the officers to search the home was sufficient to cure the violation of the curtilage. Was the consent to search the house valid? We find that the consent was not valid when given. In order for consent to search to be valid, it must be voluntary. "One's consent to a search must be voluntary which means it must result from an essentially free and unconstrained choice rather than from duress or coercion." *United States v. Sanchez*, 156 F.3d 875, 878 (8th Cir. 1998). "The question of voluntariness is to be determined by an objective evaluation of police conduct and not by the defendant's subjective perception of reality." *Cook v. Commonwealth,* 826 S.W.2d 329, 331 (Ky. 1992). Appellants argue that since the officers were in an unlawful position, namely the back door, this was a form of coercion. If this was coercive in nature, then the consent to search would have been involuntary. "The question of voluntariness turns on a careful scrutiny of all the surrounding circumstances in a specific case." *Id.* "Consent to a search must be free, voluntary, and without coercion of any type." *Middleton v. Commonwealth,* 502 S.W.2d 517, 518 (Ky. 1973). When the consent given by Mr. Leach was obtained, the officers had already

intruded upon constitutionally protected property and had confronted Mr. Leach with their conclusion that marijuana was present within the home. Similarly, in *Middleton*, the officers were upon the property of the defendant and advised him that they had a search warrant when asking for consent to search. As the court did in *Middleton*, we find that "there can be no consent under such circumstances," due to the coercive situation. *Id.*

Because the warrantless search of the property rendered the evidence found pursuant to consent given by Mr. Leach inadmissible, we must reverse and remand for further proceedings.

ALL CONCUR.

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