

Commonwealth v Long

Commonwealth of Pennsylvania v. Jamie Lee Long, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch; No. 1479-2012

HEADNOTES

Fourth Amendment; Expectation of Privacy; Curtilage of the Home

1. Article 1, Section 8 of the Pennsylvania Constitution as well as the Fourth Amendment of the United States Constitution protect zones where an individual is recognized as having a reasonable expectation of privacy.
2. An expectation of privacy exists when an individual exhibits: 1) a subjective expectation of privacy, and 2) demonstrates that the expectation is one which society is prepared to recognize as reasonable and legitimate.
3. The Fourth Amendment provides for the right of the people to be secure in their persons, houses, papers and effects. The word "houses" in the Fourth Amendment has been extended by the Courts to include the curtilage, thus, the enclosed area surrounding a dwelling place is part of the protected premises.

Subjective Expectation of Privacy; Curtilage of Home

1. A defendant is not required to present any evidence in order to establish a subjective expectation of privacy but may rely upon the Commonwealth's witnesses and evidence.
2. Even though a person has not erected fencing around his home, he maintains a subjective expectation of privacy in the landscaped area within close proximity to his home.

Expectation of Privacy Recognized by Society as Reasonable and Legitimate; Curtilage of Home

1. Not every object near or attached to a dwelling is entitled to Fourth Amendment protection. Whether a given area is within the protected curtilage of one's dwelling depends upon a number of factors, including its proximity to the dwelling, whether it is within the enclosure surrounding the dwelling, and its use as an adjunct to the domestic economy of the family.
2. The Pennsylvania Superior Court has determined that a front porch, which is open to members of the public, is not part of the curtilage. A front porch does not have an expectation of privacy where the porch butts up against the sidewalk, there is no front yard, and the porch is unenclosed.
3. Police entry onto private property does not violate the Fourth Amendment when the police have a legitimate investigatory purpose for being on the property and limit their entry to places visitors would be expected to go, such as walkways, driveways, and porches.
4. Where an officer begins his inquiry at the front porch of the home but, after receiving no response at the front door, proceeds to walk in close proximity to the house through a landscaped area, the home owner's expectation of privacy has been invaded.
5. Black's Law Dictionary defines curtilage as "the land or yard adjoining a house, usually within an enclosure." An unenclosed area, directly adjoining the home and located ten feet from the front door, is within the curtilage of the home such that an officer's action of kneeling down within one foot of a basement window in order to detect the smell of marijuana is an invasion of privacy.
6. Where a trooper walks in close proximity to the home such that he is walking through mulching that spans several feet from the home and came within one foot of a basement window, he has invaded the curtilage of the home. The area is not a porch, driveway, or walkway and the landscaping suggests that it is not an area where people should be walking.

Appearances:

Jamie Lee Long, Defendant
Jeffrey S. Evans, Esq., Attorney for the Defendant
Franklin County District Attorney's Office

OPINION

Before Meyers, J.

On September 27, 2012 the Defendant filed an Omnibus Pretrial Motion to Suppress Evidence. After multiple continuance requests, the Court held hearing on January 24, 2013 and set a briefing schedule. The Defendant filed his brief on February 4, 2013 and the Commonwealth filed its brief on February 5, 2013.

FACTS

The Commonwealth presented the testimony of Trooper Gregory Strayer who has been a patrol trooper since 2005 and is also on the Vice Narcotics Task Force. Trooper Strayer testified that he is familiar with the odor of marijuana as well as the sight of marijuana plants based on his training and experience. On June 20, 2012, Trooper Strayer responded to 6015 Dumeny Road in Montgomery Township, Pennsylvania because the police had received information that marijuana was being grown there. Trooper Strayer went to the residence with the intent to speak with the owners. As he pulled up to the residence, he observed a ranch style home with a basement/crawl space that had a walk out entrance. There was no outward indication that anyone was home at the residence such as cars in the driveway but the air conditioning unit was running at the time. Trooper Strayer knocked on the front door of the residence and noted that there were no gates, fences, or other obstructions to prevent access to the front door. From the front door, there was no suggestion of criminal activity and no smell of marijuana emanating from the front door. After knocking several times, Trooper Strayer waited about one minute. He did not receive a response and did not hear any sounds indicating that someone may have been approaching the door.

Trooper Strayer proceeded to walk to his right-hand side, stepped off the porch, and moved about ten feet away along the front of the house. It is unclear what precise path Trooper Strayer took from the front porch to the window but it is certain that he observed a basement window with a piece of glass missing that was covered by cardboard.^[1] Trooper Strayer took note of the window because in his training he learned that people who are growing marijuana try to conceal it from sight and smell.^[2] Once he observed the window, located on the front of the house, he walked through one to two feet of mulch, around the edge of the home, to get to the window. After kneeling down about one foot away from the window, the trooper noticed the odor of marijuana but did not manipulate the cardboard or window in any way. He then proceeded around the back of the residence to look for the home owner as he heard air conditioning units running at the rear of the residence. Trooper Strayer thought perhaps the noise from the air conditioning units may have caused any residents within the home not to hear his knock. He did not make contact with anyone. At that time, Trooper Strayer left and applied for a warrant based on the smell of marijuana coming from the residence.

DISCUSSION

The threshold issue for the Court to determine is whether the Defendant has standing which is based upon whether the Defendant had a privacy interest in the place searched. Article 1, Section 8 of the Pennsylvania Constitution as well as the Fourth Amendment of the United States Constitution protect zones where an individual is recognized as having a reasonable expectation of privacy. Commonwealth v. Viall, 890 A.2d 419, 422 (Pa. 2005). An expectation of privacy exists when an individual exhibits: 1) a subjective expectation of privacy, and 2) demonstrates that the expectation is one which society is prepared to recognize as reasonable and legitimate. Commonwealth v. Gordon, 683 A.2d 253, 256 (Pa. 1996).

1. Subjective Expectation of Privacy

In reviewing whether a defendant has a subjective expectation of privacy in a given area, the burden is on the defendant to prove that "his subjective expectation of privacy is one that society is prepared to recognize as reasonable and legitimate." Commonwealth v. Gordon, 683 A.2d 253, 256 (Pa. 1996). There was no testimony from the Defendant as to his subjective expectation of privacy in the front area of his home. The Commonwealth argues that the Defendant's burden as to his subjective expectation of privacy has not been met because he did not present any evidence. In Gordon, the defendant did not present any witnesses and the Commonwealth only presented the testimony of the police officer, just as in this matter. The Superior Court agreed with the defendant's argument that the officer's testimony was sufficient to prove he had a subjective expectation of privacy.^[3] Id. at 257. Based upon the court's analysis in Gordon, this Court does not believe that the defendant had to present his own evidence but could rely upon the officer's testimony.

Using Trooper Strayer's testimony, this Court finds that the Defendant had a subjective expectation of privacy in the area directly around his home. Although the Defendant did not erect any fencing around his home, he had landscaped several feet against the home with mulch to indicate that this is not an area where a person would walk. It was not as if the Defendant had a pathway around the home on which the trooper was walking as he viewed the window, the trooper was either walking in the yard or in the mulch adjoining the home. Furthermore, the area in which Trooper Strayer was walking was in such close proximity to the home that any person would find it unusual for someone to be coming within that area without being invited.

2. Expectation of Privacy Recognized by Society as Reasonable and Legitimate

In determining whether a person's expectation of privacy is reasonable, the Court must utilize a totality of the circumstances approach and the "determination will ultimately rest upon a balancing of the societal interests involved." Commonwealth v. Peterson, 636 A.2d 615, 61 (Pa. 1993). The Fourth Amendment provides for "the right of the people to be secure in their persons, houses, papers and effects." U.S.C.A. Const. Amend. IV. "The word "houses" in the Fourth Amendment has been extended by the Courts to include the curtilage...Thus, the enclosed area surrounding a dwelling place is part of the protected premises." Commonwealth v. Cihylik, 486 A.2d 987, 991 (citing U.S. v. Wolfe, 375 F.Supp. 949, 958 (E.D.Pa. 1974)). "Not every object near or attached to a dwelling is entitled to Fourth Amendment protection. Whether a given area is within the protected curtilage of one's dwelling depends upon a number of factors, including its proximity to the dwelling, whether it is within the enclosure surrounding the dwelling, and its use as an adjunct to the domestic economy of the family." Cihylik, 486 A.2d at 991-92 (citations omitted).

The Pennsylvania Superior Court has determined that a front porch which is open to members of the public is not part of the curtilage. Commonwealth v. Gibbs, 981 A.2d 274, 279-80 (Pa. Super. 2009). In Gibbs, the Court reasoned that the evidence illustrated that the front porch had no expectation of privacy because there was no front yard and the porch butted up against the sidewalk, there was no gate blocking entry, the porch was unenclosed, and was used by deliverymen and visitors. *Id.* at 280. In reaching this conclusion, the Court in Gibbs discussed and analyzed the jurisprudence of other states including the Indiana Appellate Court in Davis v. State. *Id.* In Davis, 907 N.E. 2d 1043 (Ind. App. 2009), the Court analyzed an officer's entry into the curtilage of a person's property stating that "police entry onto private property and their observations do not violate the Fourth Amendment when the police have a legitimate investigatory purpose for being on the property and limit their entry to places visitors would be expected to go, such as walkways, driveways, and porches." *Id.* at 1048-50.

In looking at the totality of the circumstances, it is important to note that Trooper Strayer went to the Defendant's residence because the police had received information that marijuana was being grown there. The information gave Trooper Strayer a legitimate basis to go to the Defendant's home and investigate whether this was, in fact, true. The porch itself was not enclosed or barring access in any way that would suggest it was closed to the public. Trooper Strayer's position on the unenclosed front porch of the home did not invade the Defendant's expectation of privacy as it was a front porch which would not be considered part of the curtilage of the home. Commonwealth v. Gibbs, 981 A.2d 274, 279-80 (Pa. Super. 2009).

The question for the Court then becomes whether the area ten feet to the right side of the front porch is part of the curtilage of the home. If an area is found to be within the curtilage of the home it is given an expectation of privacy which society would recognize as reasonable. Again, an important part of the inquiry is whether there is unfettered access to the area in question. Here, the Defendant did not have any fencing in his yard or other physical impediments that would be recognized as attempting to prevent public access. In the trooper's estimation the window was approximately ten feet from the front door. The fact that the window is located on the front side of the house affords it less privacy than perhaps a backyard area. There was no testimony from the Defendant as to his subjective expectation of privacy in the front area of his home but it is clear that he did not take any steps to shield his front yard from public view. In order to get to the small basement window, Trooper Strayer had to walk very close to the home through a mulched area that spanned several feet from the base of the house. Trooper Strayer was not walking on a driveway, pathway, or porch. The area that Trooper Strayer seemed to be walking was in such close proximity to the house that the Court cannot find that it was outside the curtilage of the home.

Furthermore, if Trooper Strayer had solely been looking for occupants of the home, it is unlikely he would have chosen this path around the home to get to the back yard as there were no apparent obstacles in the yard. Arguably, the trooper only entered the mulched area once he noticed the cardboard on the window. It should have been apparent to the trooper that attempting to peer into a window that was covered by cardboard would not have allowed him to see into the basement to determine if there were any occupants. Regardless of his motivation, Trooper Strayer admitted to kneeling down about one foot away from the window at which time he noticed the smell of marijuana. The Defendant argues that

the mulching takes up several feet between the house and the rest of the yard which suggests that it is an area where people should not walk. This Court tends to agree. The fact that the trooper was walking so close to the home suggests that he was searching or attempting to look within the home. Furthermore, Black's Law Dictionary defines curtilage as "the land or yard adjoining a house, usually within an enclosure" and the area in question here was directly adjoining the house. The trooper did not take a wide loop around the house to determine if anyone may have been in the yard or in the back yard area and it does not appear that the trooper was compelled by other obstacles in the yard to walk through the mulch beds. It is clear to this Court that Trooper Strayer entered the curtilage of the home once he left the front porch area and began walking around the home such that he came within one foot of the basement window. Accordingly, the odor of marijuana that Trooper Strayer was able to detect by entering the curtilage, cannot be used as a basis for the search warrant. Without the evidence that the Court has deemed inadmissible, there is no other possible basis within the affidavit of probable cause to support a finding of probable cause for the search warrant under Pa.R.Crim.P. 203(B). As a result, the evidence resulting from the search warrant must be suppressed.

ORDER OF COURT

AND NOW THIS 5th day of March, 2013, the Court having considered the Defendant's Omnibus Motion to Suppress Evidence and having held hearing on this matter,

IT IS HEREBY ORDERED that the Motion to Suppress Evidence is GRANTED. The Court's Opinion is attached.

Pursuant to the requirements of Pa.R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.

[¹]Trooper Strayer did not encounter any obstructions as he moved along the side of the residence and did not turn the corner of the house. He also noted that there was no plastic covering the window.

[²]Trooper Strayer estimated that it was about ten to fifteen seconds between the time he left the front door to the time he smelled the marijuana.

[³]The court then looked to the totality of the circumstances to determine whether he had a legitimate expectation of privacy that society would recognize and determined that he did not.