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CLERK OF COURTS  
OTTAWA COUNTY, OHIO

IN THE COMMON PLEAS COURT OF OTTAWA COUNTY, OHIO

State of Ohio	)	Case No. 11CR164
Plaintiff,	)	Judge Bruce Winters
v.	)	<u>DECISION AND ORDER</u>
Scott Stacey	)	
Defendant.	)	

This cause comes before this Court upon a Motion to Suppress filed by Defendant.

**PROCEDURAL HISTORY**

The Original Motion to Suppress in this matter was filed on December 28, 2011 by the Defense. A hearing was held on said motion on January 20, 2012. Subsequent to said hearing, the parties filed written briefs in lieu of closing arguments. On March 7, 2012, this Court issued its decision denying the Defendant's Motion to Suppress.

On August 27, 2012, following a substitution of counsel, the Defendant filed a Motion to Reopen the Suppression hearing. Defendant requested the reopening of the Suppression Hearing due to the fact that, at the time of the original hearing, the Defendant had not yet received a copy of the video evidence that was seized from the Defendant's residence on October 26, 2011. The State filed an Objection to the

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Reopening on September 13, 2012. A hearing on this issue of reopening was held on September 20, 2012. On September 26, 2012, this Court issued a decision granting the Defendant's Motion to Reopen the Suppression Hearing.

The subsequent suppression hearing occurred on October 31, 2012. The parties then submitted briefs in lieu of closing arguments.

### FACTS

On October 26, 2011, Detective Doug St. Clair, Agent Don St. Clair and Deputy Jim Hanney arrived at Defendant's residence to investigate allegations that Defendant was growing marijuana in his basement. Upon arrival, the officers saw a woman in the driveway who was walking to the backyard. The officers then walked through two gates to the back door. Once on the back porch, Detective St. Clair smelled the odor of fresh marijuana. At this point, Detective St. Clair stepped off of the deck by the back door, kneeled down on the ground, and looked into one basement window. Deputy Hanney then went and retrieved a large flashlight. Detective St. Clair then laid down on the ground (off of the deck/landing area) and shined the flashlight into the basement window. The basement windows at issue are small ground level windows approximately 32 inches wide by 15 inches tall. Detective St. Clair testified that at this point he observed marijuana hanging from the rafters in the basement. At this point, Detective St. Clair telephoned the Prosecutor's Office for instruction.

While Detective St. Clair was on the phone, Agent St. Clair and Deputy Hanney then laid down on the ground with flashlights and peered into the first basement window. After peering into the first basement window, Agent St. Clair and Deputy Hanney then went to a second basement window, laid on the ground, and peered into the window using flashlights. At one point, Deputy Hanney moved a trash can out from in front of the second window, then laid down on the ground again and used the flashlight. Deputy Hanney and Agent St. Clair then went back to the first window, laid on the ground and again peered into the first basement window. Agent St. Clair then informed Detective St. Clair that the marijuana plants that were observed on the rafters were no longer there. The Officers then made forcible entry into the home without a warrant and arrested the Defendant and two other individuals. After making a sweep of the residence, Detective St. Clair secured a search warrant and the residence was searched.

It is important to note that all of the Officers' actions described above are depicted by the security camera video that was given to the defense subsequent to the first suppression hearing and was in direct contradiction of the testimony of the officers provided at the initial hearing. The Defense was informed of the security camera prior to the initial hearing, however, neither the State nor the Defense were able to open the video file due to formatting issues. Subsequent to the initial hearing, an expert was used to open and view the security camera video. At the initial hearing, the Officers involved provided testimony that is contradicted by the security video. This security video depicts the rear of the Defendant's residence at the time of the officers' entry on October 26, 2011.

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### ANALYSIS

The Fourth Amendment to the United States Constitution and Article I, Section 14, of the Ohio Constitution guarantee the right of people to be secure in their persons, houses, and effects from unreasonable searches. For a search or seizure to be reasonable, it must be based upon probable cause and executed pursuant to a warrant. Katz v. United States (1967), 389 U.S. 347 at 357. Warrantless searches or seizures are per se unreasonable, subject to only a few established and well-defined exceptions. State v. Kessler (1978), 53 Ohio St. 2d 204 at 207.

As is stated in Johnson v. U.S. (1948), 333 U.S. 10, “the point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies law enforcement of the support of the usual inferences which reasonable men draw from evidence. Its protection consists of requiring that these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer who engaged in the competitive enterprise of ferreting out crime.” Warrantless searches are not a preferred method of obtaining evidence. Id.

In the case at hand, the Defendant has made two legal arguments for suppression of the evidence: (1) the officers conducted an illegal search of the Defendant’s home/curtilage; and (2) the officers created their own exigency to allow for a warrantless

search of the Defendant's residence pursuant to the exigent circumstances exception to the search warrant requirement. The State has countered and argues (1) the Defendant's claims are barred by res judicata; (2) no "search" occurred while the officers were in the area behind the Defendant's home; and (3) that the officers had a right to enter the residence of the Defendant without a warrant due to exigent circumstances exception to the warrant requirement. Each contention has been analyzed below.

*The Defendant's arguments are not barred by res judicata.*

The State has argued that the Defendant's Motion to Suppress should be denied due to res judicata. The State alleges that the Defendant is barred from making arguments regarding the propriety of the officer's arrival at the back door and warrantless entry due to the fact these arguments were made at the initial suppression hearing.

The Court finds this argument unpersuasive. In this Court's prior order, the Defendant's Motion to Reopen Suppression hearing was granted based upon the introduction of new video evidence. At the subsequent suppression hearing, the parties stipulated to the officers' prior testimony and the surveillance video was admitted and displayed.

The Defendant is now arguing, based upon the new video evidence, that the officers "went beyond public access ways" and peered into his windows. As evidence of this, the Defendant has asserted that the video evidence shows a contradiction between the officers' testimony at the first suppression hearing and the surveillance video displayed at the second suppression hearing. The Defendant has asserted that there are

contradictions relating to (1) the officers' use of flashlights; (2) the officers' movement of a trash can in front of a window; (3) the number of windows looked into by the officers; and (4) the location/positioning of the officers while looking into the windows. These arguments are based upon video evidence that the Defense did not have available at the initial suppression hearing and are used for purposes of contradicting and supplementing prior testimony.

In fact, the security video does contradict the Officers' previous testimony. First, Detective St. Clair specifically stated that no flashlight was used. The video clearly depicts Deputy Hanney leaving and returning with a flashlight, which is then passed on to Detective St. Clair to use in looking into the windows. Second, the Officers testified that they only looked into one window. The video clearly shows that the Officers looked into multiple windows on multiple occasions. Third, Deputy Hanney testified that he did not move a trashcan at any time. The video clearly depicts Deputy Hanney moving a large trash can then laying on the ground and looking into the window that was covered up by the trashcan.

The testimony of the Officers at the initial hearing drastically minimized the intrusiveness of the Officers' actions while at the back of the Defendant's residence. The video depicts the Officers engaging in a multitude of actions, which were not known to the Court during the initial suppression hearing.

The arguments made by the Defendant in the second Motion to Suppress are based upon facts that were not available to the trial court at the initial hearing. Admittedly, the existence of a security camera was known to the Defense prior to the initial hearing. However, neither the State nor the Defendant knew if there was a video

recording of the incident due to the complicated nature of opening the video file. The State and the Defendant were not able to open the video file until an expert had been retained to open the video file, which was completed after a decision on the initial suppression motion had been made. As such, the video evidence was not available to the Defense prior to the initial hearing.

As a result, the Defendant's arguments are not barred by res judicata.

*Presence of Officers within the curtilage of Defendant's residence*

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. Oliver v. United States (1984), 466 U.S. 170 at 180. 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.

In the case at hand, the area of the home where the officers were located is clearly within the definition of curtilage. The windows that were looked into by the officers were on the back of the home. Second, the area where the officers entered was inside of two gates. Third, the area where the officers entered, behind the home, was fenced in and immediately adjacent to the home.

Because the curtilage of a property is to be considered part of an individual's home, the right of officers to come into the curtilage is highly circumscribed. State v. Woljevach (Apr. 29, 2005), 6<sup>th</sup> Dist. No H-040027.

In the Woljevach case, officers approached a building in behind the home of the defendant but within the curtilage. This building was over 20 feet away from the actual residence. Officers then knocked on the front door of the building with no answer. The officers then looked for another entrance to the building, proceeded to the rear of the building, and while there, smelled fresh marijuana. The officers in this case then applied for a search warrant based upon the "plain smell" doctrine. The application for search warrant was granted and marijuana was located within the building. The Appellate Court found that the officers' entry to the rear of the building constituted a warrantless search and was therefore in violation of the Fourth Amendment.

The Woljevach Court states, "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." Id. at Para. 29. The Court further states that these areas include walkways, driveways, or access routes leading to the residence. Id. In providing further direction, the Court states "the guiding principal is that a police officer on legitimate business may go where any "reasonably respectful citizen may go." Id. citing State v. Tanner (Mar. 10, 1995) 4<sup>th</sup> Dist. No. 94CA2006, 1995 WL 116682.



In analyzing the case at hand in light of the holdings in Woljevach, it is clear that the actions of the officers, as depicted in the video, amounted to a warrantless search. Here, the officers went past the front door of the house, through two gates, and to the rear door of the house. The officers did not limit their movements to areas that were impliedly open to the public. Although officers initially used a sidewalk and went to the back door, they all went beyond this scope when they stepped off the deck/landing onto the ground inside of a fenced in area, laid on the ground, moved a trashcan, used flashlights; and, on several occasions, looked inside multiple basement windows of the residence.

These actions and the location of officers while on the property are clearly beyond the area where a reasonably respectful citizen may go. See id. These officers did not confine themselves to “areas where the public is impliedly welcome.” Id. at Para. 31. The actions of the officers far exceeded the “knock and talk” that is allowable. See Rogers v. Pendleton (2001), 249 F. 2d 279. As a result, the officers involved in the case at hand conducted a warrantless search in violation of the Defendant’s Fourth Amendment rights and in violation of Article I, Section 14 of the Ohio Constitution.

Creation of Exigent Circumstances

Although the Court has held that the officers conducted an unreasonable search of the Defendant’s residence by searching the area outside of the back door and adjacent basement windows, it is still necessary to deal with the issue of exigent circumstances. In the case at hand, the testimony of the officers shows that the exigency was created

when Agent St. Clair noticed that the marijuana plants observed hanging from the rafters were no longer there. This led the officers to believe that marijuana was being destroyed. This was subsequent to the officers stepping off of the small deck/landing area and laying on the ground looking in the basement windows on multiple occasions.

The Defense has cited US v. Chambers, 395 F.3d 563(6<sup>th</sup> Cir. 2005) and State v. Jenkins (1<sup>st</sup> Dist. 1995), 104 Ohio App. 3d 265 as the controlling law on the issue of exigent circumstances and police created exigencies. Both of these cases have been abrogated by the Supreme Court of the United States in Kentucky v. King (2011), 131 S. Ct. 1849. In the Kentucky v. King case, the Supreme Court took the appeal for the purpose of defining the doctrine of police created exigencies due to differing rules being used by the different circuits. Id. In this case the Court held:

The proper test follows from the principle that permits warrantless searches: warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Thus, a warrantless entry based on exigent circumstances is reasonable when the police did not create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. A similar approach has been taken in other cases involving warrantless searches. For example, officers may seize evidence in plain view if they have not violated the Fourth Amendment in arriving at the spot which the observation of the evidence is made, see Horton v. California, 496 U.S. 128.

Id. at 1858.

Essentially, Kentucky v. King sets out a three part test in determining whether the police created exigency doctrine applies: (1) is there an exigency or exigent circumstances to allow a warrantless search; (2) did the police create the exigency through their conduct;

and (3) was the conduct of the police that created the exigency a violation, or threat thereof, of the Defendant's Fourth Amendment rights. See id.

In the case at hand, the Defendant has not denied the existence of exigent circumstances. As the Defendant has not contested the existence of an exigency, this Court will find that exigent circumstances did in fact exist.

The testimony of the officer coupled with the video evidence shows that the exigent circumstances initially occurred after the officers had laid on the ground and peered through the basement windows. When the officers initially looked in the windows marijuana was hanging from the rafters. When they again looked through the windows, the marijuana was no longer there. Therefore, the actions of the officers did in fact create the exigency.


As this Court found earlier, the officers' actions in stepping off the deck, laying on the ground, moving a trashcan, and using flashlights to look into basement windows was a violation of the Fourth Amendment, the third prong of the Kentucky v. King doctrine has been satisfied. By conducting an unreasonable, warrantless search of the curtilage of the Defendant's residence, the police created the exigent circumstances. As a result, the warrantless search of the Defendant's residence on October 26, 2011 was in violation of the Fourth Amendment to the United States Constitution and in violation of Article I, Section 14 of the Ohio Constitution.

#### CONCLUSION

The officers violated the Fourth Amendment by conducting a search of the curtilage without a warrant. The actions of the officers went far beyond that of a knock and talk and well beyond that of a reasonably respectful citizen. Further, the actions of the officers cannot be saved by the exigent circumstances exception as the officers created the exigency through conduct that was blatantly in violation of the Fourth Amendment.

It is therefore ORDERED, ADJUDGED and DECREED that Defendant's Motion to Suppress is hereby GRANTED. All evidence of the search of Defendant's residence on October 26, 2012 is HEREBY SUPPRESSED.

**The Clerk of Courts shall send copies of this Decision to all parties of record or their counsel by regular U.S. Mail.**



Judge Bruce Winters