2014 IL App (1st) 133106-U

SECOND DIVISION
February 10, 2015

No. 13-3106

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 CR 2575
	)	
ALBERTO HINOJOSA,	)	Honorable John T. Doody, Jr. and
	)	Honorable Mary Roberts
Defendant-Appellant.	)	Judges Presiding

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: The case is remanded to the trial court for an evidentiary hearing. The trial court must determine whether a detached garage on defendant's property was within the curtilage of his home, or whether other Fourth Amendment considerations warrant the suppression of evidence.

¶ 2 Defendant Alberto Hinojosa was convicted of possession of a controlled substance with intent to deliver. Prior to trial, the trial court denied defendant's motion to suppress evidence in which defendant argued that the evidence seized from his residence was obtained in violation of

the Fourth Amendment. We remand with instructions that the trial court hold an evidentiary hearing.

¶ 3 BACKGROUND

¶ 4 On January 14, 2011, after receiving information from an unnamed source, agents from the Drug Enforcement Administration went to 1648 Highland Avenue, Berwyn, Illinois in furtherance of a drug trafficking investigation. The agents conducted a "trash pull" from a trash can in an alley behind the residence. In the garbage, the agents observed clear and green plastic wrap, tape, and dryer sheets which they believed were used to package or conceal narcotics. The agents also observed mail among the trash that was addressed to Defendant Alberto Hinojosa and Blanca Hinojosa. Defendant was not present at the residence. Through their investigation, the agents also learned that defendant had recently purchased a money counter. The agents contacted local police and requested that a canine unit be dispatched to the residence. The canine conducted a sniff on the contents of the trash can and gave a positive indication for the presence of narcotics. The canine also sniffed around the seam of a detached garage that abutted the alley and gave another positive indication for narcotics. The garage was set back five or six feet from the public alley on defendant's property. When defendant arrived at the residence, the agents requested his consent to search the premises and defendant declined.

¶ 5 Special Agent David Reynolds took the information outlined above and presented it to a judge in the Circuit Court of Cook County seeking a search warrant for the premises. The judge approved the request for a search warrant. The agents returned to the Berwyn residence and conducted a search of the premises, including the garage. They recovered 20 kilograms of cocaine, $280,000 in cash, sixteen guns, two scales, plastic baggies, and a money counter, among

other things. No evidence was ultimately recovered from the garage. Defendant was arrested, charged with possession of a controlled substance with intent to deliver, tried, and convicted. Defendant appeals and argues that: (1) the canine sniff of the detached garage constituted a warrantless search in violation of the Fourth Amendment; and (2) the trial judge should have conducted a hearing pursuant to *Franks v. Delaware* in consideration of certain misrepresentations and omissions attributable to the affiant when applying for the search warrant.

¶ 6 ANALYSIS

¶ 7 Although the appellant does not set forth the standard of review as is required (Illinois Supreme Court Rule 341(h)(3)), when reviewing a motion to suppress evidence, we review the trial court's factual findings for clear error and its legal findings *de novo*. *People v. Cummings*, 2014 IL 115769, ¶ 13.

¶ 8 The fourth amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. The purpose of the Fourth Amendment is to safeguard individuals from arbitrary government action. *King v. Ryan*, 153 Ill.2d 449, 457 (1992). Before the government may conduct a "search" it generally must obtain a warrant supported by probable cause. *People v. Jones*, 215 Ill.2d 261, 269 (2005).

¶ 9 Defendant argues that the government violated his Fourth Amendment rights when the officers effectuated a warrantless dog sniff of his garage. Defendant contends that the detached garage was within the home's curtilage so that it is deemed to be "part of the home itself for Fourth Amendment purposes" (citing *Florida v. Jardines*, -- U.S. --, 133 S.Ct. 1409, 1414-15 (2013)). According to defendant, the instrument of the government, the canine, trespassed into the curtilage

of his property and conducted a warrantless search.

¶ 10 Defendant relies primarily upon *Jardines* to support his position that a Fourth Amendment violation occurred here. In *Jardines*, the United States Supreme Court held that law enforcement officers' use of a drug-sniffing dog on the front porch of a home to investigate an unverified tip that marijuana was being grown in the home was a trespassory invasion of the curtilage. *Jardines*, -- U.S. --, 133 S.Ct. at 1415. The Court held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Id*. at 1417-18. Accordingly, because there was no warrant at the time the canine sniff occurred, the Court found that a Fourth Amendment violation occurred and held that the evidence recovered after the search warrant was issued had to be suppressed. *Id*.

¶ 11 This case is not on all fours with *Jardines* as defendant contends because the garage at issue here was not part of the residence itself. The garage was detached. Courts throughout the country have recognized that when a garage is not attached to the home, it typically receives less protection under the Fourth Amendment. See, e.g., *Nikolas v. City of Omaha*, 605 F.3d 539, 546 (8th Cir. 2010); *U.S. v. Mendoza*, 438 F.3d 792, 795-96 (7th Cir. 2006); *U.S. v. Gerard*, 362 F.3d 484, 488 (8th Cir. 2004). In *United States v. Vasquez*, 909 F.2d 235, 238 (7th Cir. 1990) for example, the Court of Appeals for the Seventh Circuit explained that when a police dog sniffs the outside of an unattached garage from a public alley, there is no Fourth Amendment violation. But *Vasquez* and the other foregoing cases pre-date *Jardines*. *Vasquez* was decided on the basis that a dog sniff was not a search at all. *Vasquez*, 909 F.2d at 238. *Jardines*, however, refocused the constitutional analysis on whether the government physically entered and occupied the curtilage of a home in order to conduct a warrantless search. *Jardines*, 133 S.Ct. at 1417-18. Thus, whether

the garage in this case is found to be within the curtilage is highly material and may be determinative.

¶ 12 In this case, the trial court did not make a finding as to whether the garage was in the residence's curtilage before finding that there was no Fourth Amendment violation. Every curtilage determination is distinctive and stands or falls on its own unique set of facts. *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 598 (6th Cir.1998). Questions of curtilage are resolved with specific reference to four factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the subject area is included in an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passers-by. *United States v. Dunn*, 480 U.S. 294, 301 (1987). There is no evidence in the record that pertains to any of the *Dunn* factors. During the hearing on defendant's motion to suppress, the parties did not offer any specific arguments as to why the area at issue should or should not be considered curtilage.

¶ 13 We note that it is the defendant's burden during a motion to suppress to show that there was a Fourth Amendment violation. 725 ILCS 5/114-12(b). The defendant has the primary responsibility on a motion to suppress to demonstrate a factual and legal basis that establishes both that there was a search and that it was illegal. *People v. Berg*, 67 Ill.2d 65, 68 (1977). However, despite the foregoing principles, in light of the Supreme Court's intervening decision in *Jardines*, we think it would be improvident to reach the full merits of the appeal without a further developed record, particularly on the curtilage issue.

¶ 14 Sometimes detached garages are considered to be in the residence's curtilage, *U.S. v. Bennett*, 170 F.3d 632, 639 (6th Cir. 1999), and sometimes they are not, *Nikolas*, 605 F.3d at 546.

The four-factor *Dunn* analysis that is set forth above requires consideration of a variety of facts, but neither party presented argument or evidence pertaining to any of those factors at the suppression hearing. There is no evidence in the record here to show where the garage was located in relation to the residence, whether the garage was in an enclosure along with the home, or whether the garage was used in connection with the residence for activities associated with home life. There are pictures attached to defendant's brief that were admitted into evidence and purport to show the garage, but there is nothing in the record that would guide our review of the pictures to determine that the garage was, as a matter of law, in the curtilage.

¶ 15 In addition, the Illinois Supreme Court has held that an individual may have a Fourth Amendment privacy right in outbuildings that are not considered part of the curtilage. In *People v. Pitman*, 211 Ill. 2d 502 (2004), police searched a barn without a warrant. The trial court suppressed the evidence seized in the search. On the State's interlocutory appeal, the appellate court found that the home's curtilage did not include the barn, and reversed the trial court's suppression order. Our supreme court agreed with the appellate court that the home's curtilage did not include the barn. However, the *Pitman* court reversed the appellate court's judgment and reinstated the order suppressing the evidence seized from the barn. The *Pitman* court explained:

> "[I]f a search occurs outside the home or the home's curtilage *** the Fourth Amendment's guarantee applies only if the property owner has a legitimate expectation of privacy in the area. *** The fourth amendment protects structures other than dwellings, and those structures need not be within the curtilage of the home. ***
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> ***

> Thus, the question remains whether defendant had a legitimate expectation of privacy in the barn. We conclude that he had.
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> Several factors should be examined to determine whether a defendant possesses a reasonable expectation of privacy: (1) ownership of the property searched; (2) whether the defendant was legitimately present in the area searched; (3) whether defendant has a possessory interest in the area or property seized; (4) prior use of the area searched or property seized; (5) the ability to control or exclude others from the use of the property; and (6) whether the defendant himself had a subjective expectation of privacy in the property."
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> ***
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> The circuit court's findings of fact, with the entire record, support the conclusion that defendant had a legitimate expectation of privacy in the barn."
>
> *Pitman*, 211 Ill. 2d at 518-21.

¶ 16 Even if the trial court finds that the garage lies outside the home's curtilage, under *Pitman*, defendant may have a reasonable expectation of privacy in the garage. Therefore, in addition to the curtilage issue, we direct the trial court to consider the *Pitman* factors to determine whether suppression might be warranted as a result of defendant having a legitimate expectation of privacy in the garage.

¶ 17 Accordingly, because the curtilage and privacy issues are highly material if not dispositive for purposes of this appeal, we find that remanding the case is proper for the trial court to consider evidence and determine whether the law enforcement officers entered the curtilage of the residence, whether they violated defendant's legitimate expectation of privacy, and whether they

engaged in an unlawful search. We direct the trial court to conduct an evidentiary hearing on the curtilage and privacy issues and to reconsider its ruling on defendant's motion to suppress in light of the decisions in *Jardines* and *Pitman*.

¶ 18 CONCLUSION

¶ 19 Accordingly, we vacate the trial court's ruling on defendant's motion to suppress evidence and remand the case to the trial court for further proceedings consistent with this order.

¶ 20 Remanded with instructions.