2015 IL App (5th) 130601-U

NOS. 5-13-0601 and 5-13-0602 (consolidated)

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Crawford County.
	)	
v.	)	Nos. 13-CM-167 & 13-CM-168
	)	
JOSHUA S. HANNA and	)	
TRENT A. SCOTT,	)	Honorable
	)	Christopher L. Weber,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Cates and Justice Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's ruling that the campfire area was within the curtilage of the cabin; that the defendants, as overnight guests, possessed a reasonable expectation of privacy with the campfire area; and that the officers' warrantless search and arrest occurred without probable cause or exigent circumstances was not against the manifest weight of the evidence.

¶ 2 On September 14, 2013, the defendants, Joshua Hanna (Hanna) and Trent Scott (Scott), were arrested for the unlawful consumption of alcoholic liquor while visiting Hanna's father's river cabin. On October 21, 2013, the defense filed a motion to suppress evidence and quash the arrests. On November 6, 2013, a suppression hearing was held regarding the defendants' motion. On November 21, 2013, the trial court granted the

motion to suppress the evidence of underage drinking and quash the resulting arrests. For the following reasons, we affirm the trial court's ruling.

¶ 3 On September 14, 2013, the defendants, both 20 years old at the time, were arrested for underage drinking while visiting Hanna's father's river cabin. Hanna testified that his father gave him a spare key and permission to stay the night at the cabin with friends. The cabin is located on land owned by the defendants' attorney, Jon Anderson (Anderson), and is situated on a private gravel lane jointly owned by the Pifer brothers and Anderson. The cabin is not visible from the public township road, which is a half mile north of the cabin.

¶ 4 At approximately 10:25 p.m., Deputy Lowrance, accompanied by auxiliary officer Dan Cheadle, turned south onto the private gravel lane from the public township road driving a marked patrol car. Deputy Lowrance testified that as he drove down the lane, he recognized Hanna, who he knew was 20 years old, accompanied by a male and a female around a campfire. Deputy Lowrance further testified that as he drove by the cabin he saw beer cans and a wine bottle, and heard Hanna state "it's a cop." Deputy Lowrance made a U-turn at the end of the private gravel lane and then drove back past the Hannas' cabin a second time. At this time, the defendants and the female were no longer sitting around the campfire. Deputy Lowrance drove the patrol car to the entrance of the private gravel lane, parked the car, and then walked back a half mile to the Hannas' cabin on foot. Once Deputy Lowrance and Officer Cheadle reached the cabin, they stood on the private gravel lane and observed the defendants consuming from "Busch Light" brand beer cans around the campfire. The officers then turned on their flashlights as they

entered the property, passing by a 10-inch square sign affixed to the front of the cabin that read "no trespassing," and approached the defendants and the female. Deputy Lowrance testified that he did not see the sign as he walked by the cabin. Deputy Lowrance testified that he interrogated the defendants and the female. He inquired into each individual's age, how and where they obtained the beer, and why they ran and hid when he drove by the cabin earlier. Shortly thereafter, Sergeant Cravens arrived as backup. The defendants and the female were administered portable breath tests. The female received a negative breath test and was not arrested. The defendants, however, had elevated blood-alcohol levels. At no point were the defendants handcuffed or read their *Miranda* warnings before they were arrested and placed in the patrol car.

¶ 5 On November 21, 2013, the trial court granted the defendants' motion, finding that the campfire was within the curtilage of the cabin; the defendants, as overnight guests on the property, possessed a reasonable expectation of privacy around the campfire; and the officers' warrantless search and arrest occurred without probable cause or exigent circumstances. Notice of appeal followed.

¶ 6 In reviewing a ruling on a motion to quash arrest and suppress evidence, this court applies a two-part standard of review. *People v. Hopkins*, 235 Ill. 2d 453, 471 (2009). A reviewing court gives great deference to a trial court's factual findings and will reverse those findings only if they are found to be against the manifest weight of the evidence. *Id*. However, a reviewing court will review *de novo* the court's ultimate ruling on a motion to suppress evidence. *Id.*

¶ 7 Where the government physically occupies private property for the purpose of

obtaining information, that is a "search" within the meaning of the fourth amendment. *People v. LeFlore*, 2013 IL App (2d) 100659, ¶ 16. The fourth amendment's protection against unreasonable searches extends not only to a person's home but also to the area immediately adjacent to the home, commonly referred to as the curtilage. *People v. Nielson*, 187 Ill. 2d 271, 280 (1999). Because the curtilage is part of the home, searches and seizures in the curtilage without a warrant are presumptively unreasonable. *Oliver v. United States*, 466 U.S. 170, 180 (1984). " '[T]he determination that a particular search did (or did not) occur within the curtilage must be reviewed *de novo* on appeal.' " *United States v. Perea-Rey*, 680 F.3d 1179, 1184 (9th Cir. 2012) (quoting *United States v. Johnson*, 256 F.3d 895, 913 (9th Cir. 2001)).

¶ 8 The trial court found that the campfire, which the officers occupied, was part of the curtilage of the Hannas' cabin, and we agree. We examine four exhaustive factors to determine whether an area is within the curtilage of a home: (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 uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, 480 U.S. 294, 307 (1987). " 'These factors do not yield a definite answer; rather they guide [us] in determining whether the area is so intimately connected to the home that it should fall under the umbrella of the Fourth Amendment's protection.' " *Perea-Rey*, 680 F.3d at 1184 (quoting *Johnson*, 256 F.3d at 911). Applying these factors to the campfire area, we have little difficulty in concluding that the campfire was an extension of the living space, thus within the curtilage of the cabin.

¶ 9 First, undisputed evidence satisfies the proximity factor, as the campfire was within 20 feet of the cabin, thus it does not sit as a distinct portion on the land away from the cabin. Second, the State contends that no evidence shows the campfire was continuously used or was a place used to cook food. The trial court stated in its order, "it appears to be used to cook food, sit around and relax, et cetera." Although evidence of cooking food was not presented, we conclude that the trial court's reasoning indicates the campfire was used to socialize, as the officers observed the defendants consuming from "Busch Light" brand beer cans and talking around the campfire that evening. Based on the record, we agree the campfire area was intimately tied to the cabin in terms of the nature of its uses.

¶ 10 Next, a point of contention exists among two factors−enclosure and protection from people passing by. To support its argument that the campfire was not curtilage, the State argues that regardless of the cabin's remote location, the campfire was visible from the private gravel lane, and that no effort was made to enclose the campfire from the public's observation. Thus, the State contends that the defendants lacked a reasonable expectation of privacy where the officers could view their actions from a lawful vantage point on the "access road." The State argues the access road was traversed by the public, including other cabin owners, and that "any member of the public passing by on the access road, could have seen the defendant[s] sitting drinking by the campfire, just as Deputy Lowrance did." However, we conclude that a private river location would presumably negate a cabin owner's usual desire to install a privacy fence to enclose a campfire from the public's observation. Furthermore, the campfire was located on the

cabin's south side, with the cabin situated between the campfire and the public township road. Thus, given the cabin's remoteness, the secluded nature of the cabin, and the positioning of the campfire, we conclude that the trial court did not err in finding that the campfire was within the curtilage of the cabin.

¶ 11 Next, we focus on the defendant's fourth amendment protections. The State contends that the trial court erred in finding that the officers could not drive on the access road without a search warrant or exigent circumstances since the access road was located on private land. We disagree. First, it is undisputed that the private gravel lane was private property jointly owned by the Pifer brothers and Anderson, and that the cabin was located in a remote, secluded area. Next, it is undisputed that there were no complaints regarding the defendants' conduct or another matter in the area that would have caused Deputy Lowrance to drive down the private gravel lane to investigate. In fact, the defendants were the only individuals occupying a cabin in the area that evening.

¶ 12 In addition, we agree with the trial court that Deputy Lowrance's patrol of the railroad bridge did not require him to drive south a half mile from the public township road down the private gravel lane. The State attempts to argue that the private gravel lane is akin to a public thoroughfare regularly traversed by the public. Although the State is correct in stating that officers can rightfully view what is in plain view while traversing public thoroughfares, the evidence does not support the State's argument. See *Perea-Rey*, 680 F.3d at 1186. The gravel lane was private and not a public thoroughfare. Thus, we find that the trial court did not clearly err in concluding that Deputy Lowrance went upon private property without probable cause and that no exigent circumstances required the

officers to act without a warrant. In particular, we do not find the State's argument convincing that Deputy Lowrance believed a potential crime had been committed when he observed beer cans lying around the campfire as he initially drove past the Hannas' cabin, which he states prompted him to park the patrol car and walk back on foot. Further, there were no exigent circumstances such that prompt police action was needed to protect persons within the cabin and surrounding area, or that delay to obtain a warrant would have impeded an investigation or permitted the defendants to escape, or that the defendants were violent or armed.

¶ 13 The State also argues that the "open fields" doctrine applies when the officers traversed the private gravel lane. However, we have no occasion to consider the State's argument, regardless of how convincing, as the State did not raise this theory in the trial court, and the trial court did not address it. As a matter of law, a party cannot try a case on one theory in the trial court and on another theory on review. *Kravis v. Smith Marine, Inc.*, 60 Ill. 2d 141, 147 (1975). To allow a party to do so would weaken the adversarial process and the system of appellate jurisdiction, and would also prejudice the opposing party, who did not have an opportunity to respond to that theory before the trial court. *Id.* at 148.

¶ 14 After a careful review of the record, we conclude that although the State did argue before the trial court that Deputy Lowrance "observed in plain view the defendants possessing alcoholic beverages and consuming a beverage from those containers," the State relied solely on *City of Champaign v. Torres*, 214 Ill. 2d 234 (2005), to argue that no reasonable expectation of privacy existed on the lane. *Torres* does not discuss either

the plain view or "open fields" doctrines, but rather the Illinois Supreme Court reasoned that a mere partygoer did not have standing to challenge a search of the apartment where the party was held. *Id.* at 245-46. The State's argument before the court was that the fourth amendment provided no protection to non-property owners. However, it is well-settled that property ownership does not determine the reach of the fourth amendment's protections. See *Katz v. United States*, 389 U.S. 347, 354-59 (1967).

¶ 15 Further, after closing arguments, the trial court asked the State to provide the court with authority for his arguments:

> "THE COURT: Okay. Were you quoting from a case?
>
> MR. HARTRICH: I was referencing a case *City of Champaign vs. Torres*, 214 Ill. 2d 234. I think I paraphrased it more or less."

The trial court then welcomed the submission of additional authority within seven days of the suppression hearing. The State failed to submit additional authority, relying solely on *Torres.* Thus, the State has forfeited this argument on appeal.

¶ 16 Next, the State argues that the trial court erred in concluding that the officers needed a search warrant based on probable cause or exigent circumstances to approach the defendants in the campfire area. We disagree. It is recognized that the fourth amendment protects people—and not simply "areas"—against unreasonable searches. *Katz*, 389 U.S. at 353. The Supreme Court extended the protection against searches and seizures to places outside the home where a person had a "reasonable expectation of privacy." *Id.*

¶ 17 Although a warrant is not required to observe readily visible items within a home

or its curtilage, and " 'officers [need not] shield their eyes when passing by a home on public thoroughfares,' " a warrant is required to enter the home or its curtilage. *Perea-Rey*, 680 F.3d at 1186 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). The ability to observe part of the curtilage does not authorize law enforcement, without a warrant, to then enter the curtilage to conduct searches or seizures. *Id.*

¶ 18 Here, the officers could observe the curtilage from the private gravel lane and could have legally used those observations as the basis for a warrant application. The ability to see into the curtilage or home does not, absent an exception to the warrant requirement, authorize a warrantless entry by law enforcement. *Id*. Under Illinois law, a warrantless search or seizure is deemed unreasonable *per se* unless it comes within a specific, well-delineated exception: search by consent; search incident to lawful arrest; or search based on probable cause coupled with exigent circumstances. *People v. McGee*, 268 Ill. App. 3d 32, 40 (1994). Because the officers did not have a warrant, their entry in the curtilage was presumptively unreasonable in violation of the defendants' fourth amendment rights. Thus, as previously analyzed above, no probable cause or exigent circumstances justified the officers' search and seizure of the defendants at the campfire. Thus, the trial court did not err in ruling that the officers' warrantless search of the curtilage violated the fourth amendment.

¶ 19 Next, the State characterizes the officers approach of the defendants as a "knock and talk," arguing that any private citizen could have approached the defendants in their situation at the campfire. We disagree. In determining whether a warrantless search is justified, we look to the facts and circumstances known to the officers at the time they

acted to determine if their actions were consistent with an attempt to initiate consensual contact. *Perea-Rey*, 680 F.3d at 1188. To determine whether the officers' conduct was an objectively reasonable search depends upon whether the officers had an implied license to enter the porch, which in turn depends upon their purpose to enter. *Florida v. Jardines*, ___ U.S. ___, ___, 133 S. Ct. 1409, 1417 (2013). Here, the officers' behavior objectively reveals a purpose to conduct a search of the defendants for possible underage drinking.

¶ 20 In *Perea-Rey*, 680 F.3d at 1188, the agent did not enter the yard and then knock on defendant's front door to initiate consensual contact. Instead, the court found there was no consensual "knock and talk" when agents entered the curtilage uninvited and ordered defendant not to move. *Id.* Here, the evidence indicates the officers approached the defendants to further investigate their consumption of alcohol. First, the officers parked their marked patrol car a half mile from the cabin, approached on foot in the dark, and waited to use their flashlights or otherwise announce their presence as law enforcement until after they observed the defendants consume beer. Further, the evidence shows that the officers called for backup, asked several investigatory questions of the defendants, and administrated portable breath tests to all three individuals. Additionally, there is no evidence demonstrating that Deputy Lowrance first inquired whether parental supervision was present, even though he testified to knowing Hanna and having knowledge that Hanna's father owned a cabin in the area. Based on a thorough review of the record, we conclude that the officers did not engage in a consensual "knock and talk," as there is no evidence that the defendants invited the officers onto the property or that the defendants

were free to leave the encounter on their own. Thus, we find the trial court did not err in concluding that the unreasonable warrantless search and arrest violated the fourth amendment.

¶ 21 The State further argues that even assuming the officers' investigation took place on the curtilage, it was a permissible *Terry* stop because the officers had established reasonable suspicion. See *Terry v. Ohio*, 392 U.S. 1 (1968). However, even assuming reasonable suspicion was warranted, "the *Terry* exception to the warrant requirement does not apply to in-home searches and seizures." *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir. 2010). The State's attempt to expand the "knock and talk" exception to allow for *Terry* stops or searches and seizures has been determined as "wholly inconsistent with *Oliver* and *Dunn*." *Perea-Rey*, 680 F.3d at 1189. "If we were to construe the knock and talk exception to allow officers to meander around the curtilage and engage in warrantless detentions and seizures of residents, the exception would swallow the rule that the curtilage is the home for Fourth Amendment purposes." *Id.* We agree.

¶ 22 Further, to support the contention that a *Terry* stop occurred, the State attempts to analogize the facts in *People v. Rivera* with this case by arguing, "Deputy Lowrance reasonably anticipated that a foot pursuit of the persons was likely ***. For this reason, Deputy Lowrance reasonably parked his squad car and returned to investigate." However, we find glaring factual differences between *Rivera* and this case. First, the campfire area, unlike the public tavern, was not a public place but was within the curtilage of the cabin. Second, in *Rivera*, the court determined that the immediate action

of the narcotics officer in running after defendant, a known cocaine trafficker, through a private door to the basement, was a "reasonable response to the rapidly unfolding situation." *People v. Rivera*, 233 Ill. App. 3d 69, 78 (1992). Here, as stated above, the record reveals no such evidence of exigent circumstances. Thus, the officers' conduct was not a *Terry* stop, but a warrantless intrusion into the curtilage and the resulting searches and seizures violated the defendants' fourth amendment rights.

¶ 23 Lastly, the State argues *Miranda* warnings were not required as the detention was a *Terry* stop. However, as previously determined, the encounter was not a *Terry* stop. Thus, where the evidence shows the defendants were subject to custodial interrogation, that is, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," *Miranda* warnings are required. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). As previously determined, the encounter occurred within the curtilage, was not consensual, and evidence supports that the defendants were not free to leave on their own, thus *Miranda* warnings were required.

¶ 24 We find the trial court's ruling was not against the manifest weight of the evidence where the court found the campfire area was within the curtilage of the cabin; the defendants, as overnight guests, possessed a reasonable expectation of privacy within the campfire area; and the officers' warrantless search and arrest occurred without probable cause or exigent circumstances.

¶ 25 For the foregoing reasons the judgment of the circuit court of Crawford County is hereby affirmed.

¶ 26 Affirmed.