

NO. COA14-50

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2015

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 10 CRS 225; 5855-56

JASON KEITH WILLIFORD

Appeal by defendant from judgments entered 7 June 2012 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Law Offices of John R. Mills NPC, by John R. Mills, for defendant-appellant.

CALABRIA, Judge.

Jason Keith Williford ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first degree murder, first degree rape, and misdemeanor breaking and entering. We find no error.

I. Background

Late in the evening on 5 March 2010, defendant broke into the home of John Geil ("Geil") in Raleigh, North Carolina. On

that date, Kathy Taft ("Taft") and her sister, Dina Holton ("Holton"), were staying in Geil's home while Taft recovered from a recent surgery. Geil was out of town, and so the two women were in his home alone.

Defendant entered Taft's bedroom and struck her in the head with a blunt object multiple times. He then removed her clothing and raped her before exiting the home. Holton heard noises in the house during the night, but did not discover what had happened to Taft until the next morning.

In the morning on 6 March 2010, Holton went to the bedroom where she had last seen Taft, and she discovered Taft completely nude and bleeding from the head. Holton called 911, and emergency medical services transported Taft to the hospital. At the hospital, a nurse noticed signs of trauma around Taft's vagina and blood on her anus. As a result, hospital personnel collected a rape kit in order to obtain DNA samples. Taft underwent emergency neurosurgery, but ultimately died from her head wounds on 9 March 2010.

The DNA samples from the rape kit were tested and determined to contain male DNA. As a result, law enforcement officers from the Raleigh Police Department ("RPD") canvassed the area around Geil's home and attempted to obtain DNA samples

from male residents. When RPD Detective Zeke Morris ("Det. Morris") reached the home of defendant, who lived nearby, defendant did not invite Det. Morris inside, as all of his neighbors had done, but only spoke briefly with him. Det. Morris returned later to seek a sample of defendant's DNA, and defendant refused to provide the sample.

After defendant's refusal, members of the RPD Fugitive Unit began conducting surveillance on him in an attempt to obtain his DNA. On 15 April 2010, RPD Officer Gary L. Davis ("Officer Davis") parked his unmarked vehicle in a parking lot directly adjacent to defendant's multi-unit apartment building while defendant was shopping at a nearby grocery store. When defendant returned, Officer Davis observed defendant smoking a cigarette as he exited his vehicle. Defendant then finished the cigarette and dropped the butt onto the ground in the parking lot. Shortly thereafter, RPD Officer Paul Dorsey ("Officer Dorsey") entered the parking lot. Officer Dorsey approached defendant and spoke to him in order to distract him while Officer Davis retrieved the cigarette butt. After securing the butt, the officers left the apartment building.

Subsequent DNA testing revealed that defendant's DNA was a match for the DNA collected from the rape kit and from the crime

scene. Consequently, defendant was arrested and indicted for first degree murder, first degree rape and first degree burglary. On 16 December 2010, the State notified defendant that it intended to rely upon evidence of aggravating circumstances and seek a sentence of death for the charge of first degree murder.

On 26 August 2011, defendant filed a motion to suppress the DNA evidence which was collected from the cigarette butt recovered from the parking lot. In his motion, defendant contended that the cigarette butt was discarded in an area which constituted the curtilage of his apartment and that defendant never surrendered his privacy interest in the cigarette butt. Defendant argued that under these circumstances, Officer Davis's retrieval and subsequent analysis of the cigarette butt without a warrant violated his constitutional rights.

Defendant's motion was heard on 20 February 2012. On 9 March 2012, the trial court entered an order denying the motion to suppress. The court concluded that the parking lot where Officer Davis recovered the cigarette butt was outside the curtilage of defendant's apartment and that defendant had voluntarily discarded it.

Defendant was tried by a jury beginning 16 May 2012 in Wake County Superior Court. On 1 June 2012, the jury returned verdicts finding defendant guilty of first degree murder, first degree rape, and the lesser-included offense of misdemeanor breaking and entering. On 7 June 2012, the jury recommended that defendant be sentenced to life imprisonment without the possibility of parole. Based upon this recommendation, the trial court sentenced defendant to life without parole for the first degree murder charge. Defendant also received a consecutive sentence of a minimum of 276 months to a maximum of 341 months for the first degree rape charge and a concurrent sentence of 45 days for the misdemeanor breaking and entering charge. Defendant appeals.

II. Motion to Suppress

Defendant argues that the trial court erred by denying his motion to suppress the DNA evidence obtained from the discarded cigarette butt. Specifically, defendant contends: (1) that the cigarette butt was discarded in the curtilage of his dwelling; (2) that he never abandoned his possessory interest in the cigarette butt; and (3) that the DNA on the cigarette butt was improperly tested without a warrant. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Since defendant does not challenge any of the trial court's findings, "our review is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005).

A. Curtilage

Defendant first argues that Officer Davis's seizure of the cigarette butt violated his constitutional rights because it occurred within the curtilage of his apartment. "Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). "Because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is 'afforded the

most stringent Fourth Amendment protection.'" *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 49 L. Ed. 2d 1116, 1130, 96 S. Ct. 3074, 3084 (1976)).

"The United States Supreme Court has . . . defined the curtilage of a private house as 'a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.'" *State v. Washington*, 134 N.C. App. 479, 483, 518 S.E.2d 14, 16 (1999) (quoting *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 90 L. Ed. 2d 226, 235, 106 S. Ct. 1819, 1825 (1986)). The United States Supreme Court has further established that the "curtilage question should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, 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." *United States v. Dunn*, 480 U.S. 294, 301, 94 L. Ed. 2d 326, 334-35, 107 S. Ct. 1134, 1139 (1987).

Although this Court has previously utilized the *Dunn* factors to determine whether certain areas are located within a property's curtilage, see, e.g., *State v. Washington*, 86 N.C.

App. 235, 240-42, 357 S.E.2d 419, 423-24 (1987), we have never done so in the specific context of multi-unit dwellings. A federal appeals court which considered this issue in that context noted that "[i]n a modern urban multi-family apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control." *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976). This is because "none of the occupants can have a reasonable expectation of privacy in areas that are also used by other occupants." *State v. Johnson*, 793 A.2d 619, 629 (N.J. 2002) (internal quotation and citation omitted).

Thus, in *United States v. Stanley*, the United States Court of Appeals for the Fourth Circuit held that "the common area parking lot on which [the defendant]'s automobile was parked was not within the curtilage of his mobile home." 597 F.2d 866, 870 (4th Cir. 1979). In reaching this conclusion, the *Stanley* Court relied upon the following factors: (1) that "[t]he parking lot was used by three other tenants of the mobile home park;" (2) that the parking lot "contained parking spaces for six or seven cars. No particular space was assigned to any tenant;" and (3) that "[a]lthough on the day of the search the Cadillac was parked in a space close to [the defendant]'s home, that space

was not annexed to his home or within the general enclosure surrounding his home." *Id.* Other courts have also reached the same conclusion based upon similar facts. See, e.g., *Cruz Pagan*, 537 F.2d at 558 ("In sum, we hold that the agents' entry into the underground parking garage of El Girasol Condominium did not violate the fourth amendment. . . ."); *United States v. Soliz*, 129 F.3d 499, 503 (9th Cir. 1997) (Common parking area in an apartment complex which "was a shared area used by the residents and guests for the mundane, open and notorious activity of parking" was not curtilage.), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895, 913 n.4 (9th Cir. 2001) (en banc); *Commonwealth v. McCarthy*, 705 N.E.2d 1110, 1114 (Mass. 1999) ("Because the defendant had no reasonable expectation of privacy in the visitor's parking space, the space was not within the curtilage of the defendant's apartment."); and *State v. Coburne*, 518 P.2d 747, 757 (Wash. Ct. App. 1973) ("The vehicle was parked in an alley parking lot available to all users of the apartments. The area where the car was parked is not a 'curtilage' protected by the Fourth Amendment."). But see *Joyner v. State*, 303 So.2d 60, 64 (Fla. Dist. Ct. App. 1974) (holding that "parking areas usually and customarily used in common by occupants of apartment houses, condominiums and other

such complexes with other occupants thereof constitute a part of the curtilage of a specifically described apartment or condominium or other living unit thereof").

In the instant case, the trial court's unchallenged findings indicate that the shared parking lot where defendant discarded the cigarette butt was located directly in front of defendant's four-unit apartment building, that the lot was uncovered, that it included five to seven parking spaces used by the four units, and that the spaces were not assigned to particular units. The court further found that the area between the road and the parking lot was heavily wooded, but that there was no gate restricting access to the lot and there were no signs which suggested either that access to the parking lot was restricted or that the lot was private. Applying the *Dunn* factors to these findings, we conclude that the parking lot was not located in the curtilage of defendant's building. While the parking lot was in close proximity to the building, it was not enclosed, was used for parking by both the buildings' residents and the general public, and was only protected in a limited way. Consequently, the parking lot was not a location where defendant possessed "a reasonable and legitimate expectation of privacy that society is prepared to accept." *Washington*, 134 N.C. App.

at 483, 518 S.E.2d at 16 (internal quotation and citation omitted). Thus, defendant's constitutional rights were not violated when Officer Davis seized the discarded cigarette butt from the parking lot without a warrant. This argument is overruled.

B. Possessory Interest

Defendant next contends that even if the parking lot was not considered curtilage, he still maintained a possessory interest in the cigarette butt since he did not put it in a trash can or otherwise convey it to a third party. However, it is well established that "[w]here the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure." *State v. Cromartie*, 55 N.C. App. 221, 224, 284 S.E.2d 728, 730 (1981) (internal quotations, citation, and brackets omitted). Moreover, "[w]hen one abandons property, '[t]here can be nothing unlawful in the Government's appropriation of such abandoned property.'" *Id.* at 225, 284 S.E.2d at 730. (quoting *Abel v. United States*, 362 U.S. 217, 241, 4 L. Ed. 2d 668, 687, 80 S. Ct. 683, 698 (1960)). In the instant case, we have already

determined that defendant had no reasonable expectation of privacy in the parking lot, and thus, by dropping the cigarette butt in the lot, he is deemed to have abandoned any interest in it. This argument is overruled.

C. DNA Testing

Finally, defendant argues that even if law enforcement lawfully obtained the cigarette butt, they still were required to obtain a warrant before testing the butt for his DNA because defendant had a legitimate expectation of privacy in his DNA. Defendant cites *Maryland v. King*, ___ U.S. ___, 186 L. Ed. 2d 1, 133 S. Ct. 1958 (2013) in support of his argument. In *King*, the United States Supreme Court considered whether the warrantless, compulsory collection and analysis of a DNA sample from individuals who had been arrested for felony offenses violated the Fourth Amendment. *Id.* at ___, 186 L. Ed. 2d at 17, 133 S. Ct. at 1966. The Court held that this warrantless search was reasonable because of the state's significant interest in accurately identifying the arrestee. *Id.* at ___, 186 L. Ed. 2d at 32, 133 S. Ct. at 1980.

King is inapplicable to the instant case. In *King*, the defendant's DNA sample had been directly obtained by law enforcement in a compulsory seizure that was indisputably a

Fourth Amendment search. The *King* Court only decided whether that search was reasonable. In contrast, in this case, defendant had abandoned his interest in the cigarette butt, without any compulsion from law enforcement, and thus, we must first determine whether the extraction of defendant's DNA from the abandoned butt constituted a search at all. This Court has specifically held that "[t]he protection of the Fourth Amendment against unreasonable searches and seizures does not extend to abandoned property." *State v. Eaton*, 210 N.C. App. 142, 148, 707 S.E.2d 642, 647 (2011). While we have not yet applied this general principle to the retrieval of DNA from abandoned property, courts in other jurisdictions have relied upon it to conclude that the extraction of DNA from an abandoned item does not implicate the Fourth Amendment. See, e.g., *People v. Gallego*, 117 Cal. Rptr. 3d 907, 913 (Cal. Ct. App. 2010) ("By voluntarily discarding his cigarette butt on the public sidewalk, defendant actively demonstrated an intent to abandon the item and, necessarily, any of his DNA that may have been contained thereon. ... On these facts, we conclude that a reasonable expectation of privacy did not arise in the DNA test of the cigarette butt, and consequently neither did a search for Fourth Amendment purposes."); *Raynor v. State*, 99 A.3d 753, 767

(Md. 2014) (“[W]e hold that DNA testing of . . . genetic material, not obtained by means of a physical intrusion into the person’s body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public—visage, apparent age, body type, skin color.”); and *State v. Athan*, 158 P.3d 27, 37 (Wash. 2007) (en banc) (“There is no subjective expectation of privacy in discarded genetic material just as there is no subjective expectation of privacy in fingerprints or footprints left in a public place. . . . The analysis of DNA obtained without forcible compulsion and analyzed by the government for comparison to evidence found at a crime scene is not a search under the Fourth Amendment.”). We find these cases persuasive, and thus, we hold that once defendant voluntarily abandoned the cigarette butt in a public place, he could no longer assert any constitutional privacy interest in it. Accordingly, the extraction of his DNA from the butt did not constitute a search for purposes of the Fourth Amendment. This argument is overruled.

III. Judgment

Defendant argues that his judgment includes a clerical error, in that the trial court failed to check the “Class A

Felony" box in the portion of the judgment that explains why defendant was sentenced to life imprisonment without parole. However, the judgment indicates that defendant was sentenced for a Class A felony in two other locations. Thus, we find it unnecessary to remand this case for the judgment to indicate, for a third time, that defendant was sentenced to life imprisonment based upon a conviction for a Class A felony.

IV. Conclusion

Pursuant to the factors in *Dunn*, the shared parking lot located in front of defendant's four-unit apartment building was not part of the curtilage of defendant's apartment. Since defendant did not have a reasonable expectation of privacy in the parking lot, he abandoned his cigarette butt by discarding it there. After defendant voluntarily abandoned the cigarette butt, its subsequent collection and analysis by law enforcement did not implicate defendant's constitutional rights. Defendant received a fair trial, free from error.

No error.

Judges ELMORE and STEPHENS concur.