STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0061

State of Minnesota,
Appellant,

vs.

Thomas Lee Boman,
Respondent.

Filed July 7, 2009
Affirmed
Willis, Judge[*]

Marshall County District Court
File No. 45-CR-08-395

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael Williams, Marshall County Attorney, Jeremy A. Klinger, Assistant County Attorney, 423 North Main Street, P.O. Box 159, Warren, MN 56762 (for appellant)

Bradford S. Delapena, Special Assistant Public Defender, P.O. Box 40418, St. Paul, Minnesota 55104 (for respondent)

Considered and decided by Toussaint, Chief Judge; Stoneburner, Judge; and Willis, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

The state challenges the district court's pretrial order suppressing evidence and dismissing a complaint charging respondent Thomas Lee Boman with fifth-degree possession of a controlled substance. *See* Minn. Stat. § 152.025, subd. 2(1) (2006). Because the state failed to show that the bag that was seized and searched without a warrant was outside the curtilage of respondent's residence, we affirm.

FACTS

Deputy Jason Boman[1] of the Marshall County Sheriff's Department testified at an omnibus hearing that on the morning of March 14, 2008, he was called to investigate a black bag that had been found on respondent's property by the fire chief of the Warren Fire Department, who was at the property following a fire earlier that morning. According to Deputy Boman, the fire had been extinguished and fire officials were at the property "to make sure there [were] no flash-ups." Deputy Boman testified that the fire chief "found a bag underneath a pine tree in the backyard" and contacted the sheriff's department to "check it out because there was some suspicious stuff inside the bag."

Deputy Boman testified, "The pine tree was out the back door, which would have been on the east side of the residence. The tree was probably 15 to 20 feet out the back door." Deputy Boman seized the bag from under the tree, marked it as evidence, and turned it over to a deputy in the North Star Drug Task Force. The task-force deputy

[1] The record does not disclose whether there is any relationship between Deputy Boman and respondent.

contacted respondent, who admitted that the bag and its contents belonged to him. The bag contained a small plastic bag, a razor blade, a mirror, and a rolled-up dollar bill. Analysis of the contents of the plastic bag showed that it contained .01 grams of methamphetamine.

Respondent was charged with fifth-degree controlled-substance crime. He moved to suppress the drug evidence, claiming that the black bag and its contents were unlawfully seized from the curtilage of his residence. The district court granted the motion, suppressed the evidence, and dismissed the complaint.

D E C I S I O N

On appeal from the grant of a pretrial motion to suppress evidence, the state must show clearly and unequivocally that the ruling was erroneous and that the order will have a critical impact on its ability to prosecute. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). Respondent concedes that the state has shown critical impact and that the order is appealable. Thus, the only issue is whether the district court erred in its ruling.

"'When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence.'" *State v. Goebel*, 654 N.W.2d 700, 703 (Minn. App. 2002) (quoting *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999)). In cases involving warrantless searches, the state bears the burden of proving that at least one of the exceptions to the warrant requirement applies. *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988). The state's failure to meet this burden requires suppression. *See State v. Voss*, 683 N.W.2d 846, 851 (Minn. App. 2004) (suppressing

firefighters' warrantless search of freezer in basement of defendant's residence after fire had been extinguished upstairs).

Both the United States and Minnesota constitutions protect 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; *see* Minn. Const. art. I, § 10. "This constitutional protection extends to all places where an individual has a reasonable expectation of privacy, including the home and its curtilage." *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 746 (Minn. App. 2004).

The state argues that respondent had no reasonable expectation of privacy in the bag and its contents because they were left in an "open field," outside the curtilage of respondent's residence.[2] The curtilage is the area around a residence that harbors the "intimate activity associated with the 'sanctity of a [person's] home and the privacies of life.'" *State v. Krech*, 403 N.W.2d 634, 636 (Minn. 1987) (quoting *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 1139 (1987)); *see also Garza v. State*, 632 N.W.2d 633, 639 (Minn. 2001) ("A dwelling's curtilage is generally the area so immediately and intimately connected to the home that within it, a resident's reasonable expectation of privacy should be respected.").

Four factors are relevant to determine curtilage: (1) the proximity of the area claimed to be curtilage to the residence; (2) whether the area is included within an

[2] In its memorandum to the district court, the state also argued that the fire chief's search of the bag was justified under the warrant exception authorizing firefighters to enter burning buildings and to remain inside to investigate and fully extinguish the fire. *See Voss*, 683 N.W.2d at 850-51. The state does not pursue this argument on appeal.

enclosure surrounding the residence; (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. *Krech*, 403 N.W.2d at 636-37.

Here, the only evidence presented by the state on these factors was the testimony of Deputy Boman that he was called to respondent's residence because the fire chief "found a bag underneath a pine tree in the backyard [and] tracks coming from the house." The fire chief thought that someone should "check it out because there was some suspicious stuff inside the bag." Deputy Boman testified the pine tree "was out the back door, which would have been on the east side of the residence" and that "[t]he tree was probably 15 to 20 feet out the back door."

The district court concluded that the state failed to meet its burden of proving that the bag was found outside the curtilage of respondent's residence. The court stated that it was "unknown whether the tree was next to the house, behind the house, in the front yard, in the back yard, or down a long, extended driveway." The state asserts that the district court appears to have forgotten Deputy Boman's testimony that the bag was discovered in respondent's back yard, approximately 15 to 20 feet from respondent's residence.

But the district court's ultimate conclusion remains sound: the state failed to present evidence from which the scope of the curtilage could be determined. Evidence relevant to this determination would include the layout of respondent's property, the location of the tree on the property, the proximity of the tree to the driveway or to the street, the existence of any fencing or enclosures near the tree or elsewhere on the

property, or whether the place where the black bag was found was visible to people passing by the residence. Without such evidence, it is impossible to determine whether the spot where the black bag was found was within the curtilage of respondent's residence. *See, e.g.*, *Dunn*, 480 U.S. at 302-03, 107 S. Ct. at 1140 (concluding that a barn lay outside curtilage of a ranch house when record disclosed, from layout of property, that barn was located 50 yards from fence surrounding house and 60 yards from house itself, officials knew that barn was not being used for intimate activities of the home, and the defendant did little to protect the barn area from observation of those standing in the open fields nearby).

Finally, the state argues that respondent abandoned the black bag and its contents, asserting that if respondent had wanted to retain a privacy interest in the bag, he would have taken it with him when he left his residence, particularly because he knew that fire officials were on the property. Taken to its logical conclusion, acceptance of the state's argument would require that a person have actual possession of an item to maintain an expectation of privacy, even if the item clearly belongs to the person and is clearly within the curtilage of the person's residence. That simply is not the law.

We therefore affirm the district court's suppression order and its dismissal of the charge against respondent.

Affirmed.