

FILED
JUL 23 2012
CLERK
SUPREME COURT

Commonwealth of Kentucky
Supreme Court
No. 2011-SC-000403

RECEIVED
JUL 23 2012
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY

MOVANT

v.

Appeal from Fayette Circuit Court
Hon. James D. Ishmael, Jr, Judge
Indictment No.2010-CR-287

DANNY LEE OUSLEY

RESPONDENT

Movant Reply Brief

Submitted by,

JACK CONWAY

Attorney General of Kentucky

DAVID W. BARR

Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 23rd day of July, 2012, to Hon. James D. Ishmael, Jr., Fayette Circuit Court, Third Division, 120 N. Limestone, Room 534, Lexington, Kentucky 40507; sent via electronic mail to Hon. Ray Larson, Commonwealth Attorney, Suite 300, 116 N. Upper Street, Lexington, Kentucky 40507; and by U. S. mail to Hon. Louis W. Rom, Counsel for Appellant, 175 East Main Street, Suite 600, Lexington, Kentucky 40507.



DAVID W. BARR
Assistant Attorney General

PURPOSE OF REPLY BRIEF

The purpose of this Reply Brief is to reply to the arguments raised by the respondent, Danny Lee Ousley, in his "Brief for Respondent."

ARGUMENT

I.

THE COURT OF APPEALS FAILED TO FOLLOW THE PROPER STANDARD OF REVIEW WHEN IT IGNORED THE TRIAL COURT'S FINDINGS OF FACT--SUPPORTED BY THE RECORD--AND MADE ITS OWN FINDINGS OF FACT.

The location of the trash container at the time of the warrantless searches was in dispute. As respondent notes his "Brief for Respondent," page 2, footnote 1: "There is conflicting testimony about the exact location of the trash container with Detective Ford placing it nearly resting on the defendant's neighbor's house while defendant placed his trash container near his storage unit out of view from his front door." The trial court chose to accept the testimony of Detective Ford and found that the trash container was placed to the front of respondent's residence, resting next to the home of his next-door neighbor.

This crucial finding of fact was supported by substantial evidence and was binding upon the Court of Appeals. Dixon v. Commonwealth, 149 S.W.3d 426, 433 (Ky. 2004); Lickliter v. Commonwealth, 142 S.W.3d 65, 69 (Ky. 2004); Simpson v. Commonwealth, 834 S.W.2d 686 (Ky. App. 1992). The trial court was the finder of fact, not the Court of Appeals. The trial court had the sole responsibility to weigh the evidence before it and judge the credibility of all witnesses. Dunn v. Commonwealth, 286 Ky. 695, 151 S.W.2d 763, 764-765 (1941). The trial court had the sole duty to weigh the probative value of the evidence and had the sole discretion to choose which testimony it finds most convincing. Commonwealth, Dept. of Highways v. Dehart, 465 S.W.2d 720, 722 (Ky. 1971).

Simply stated, the trial court exercised its discretion and found the testimony of Detective Ford more persuasive and credible. The trial court specifically found that the trash container was forward of respondent's home, resting next to the home of his next-door neighbor. This finding was supported by substantial evidence, namely the testimony of Detective Ford. The Court of Appeals improperly ignored this binding finding of fact. The Court of Appeals instead made its own findings of fact, believing the self-serving testimony of respondent. The Court of Appeals exceeded its limited scope of review. The Opinion of the Court of Appeals must be reversed, and the decision of the trial court must be reinstated.

II.

RESPONDENT HAD NO REASONABLE EXPECTATION OF PRIVACY IN A TRASH CONTAINER LOCATED FORWARD OF HIS HOME, ON A DRIVEWAY READILY ACCESSIBLE TO THE PUBLIC.

Respondent argues that he had a reasonable expectation of privacy in the trash container. He cites two cases in support of his argument. Respondent's argued is flawed. His argument is based solely upon the assumption that the trash container was situated as found by the Court of Appeals. However, the Court of Appeals improperly made findings of fact herein.

The trial court's findings of fact are supported by substantial evidence and are binding. With the trash container located forward of his home and resting near or upon his neighbor's home, the issue is whether respondent had a reasonable expectation of privacy in that location.

The trial court applied the proper test. United States v. Dunn, 480 U.S. 294 (1987). See also, Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2009). As the Commonwealth noted in its "Appellant Brief on DR", the trash container was "very clearly" not enclosed. It was

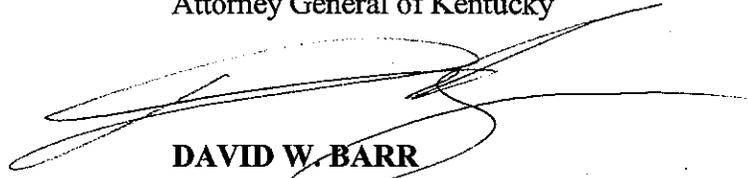
accessible by the public. Anybody who walked to respondent's door from his next door neighbor's home would walk right past the trash container. Those people could put anything in it, or take anything from it. Respondent took no steps to protect the trash container from passers-by. As the trial court noted, the public could "easily" see the trash container from the street. Respondent could have stored the container in his storage shed. But he did not. He could have stored it behind a fence. But he did not. Instead, he left the container where any member of the public could easily see and approach it. Respondent had no reasonable expectation of privacy in the trash container. His Fourth Amendment rights were not violated. The warrantless searches were proper, and the subsequent warrant search of his home was not fruit of the poisonous tree. The Opinion of the Court of Appeals should be vacated and the trial court's ruling reinstated.

CONCLUSION

In summary, the Court of Appeals improperly ignored the trial court's conclusive findings of fact. The Court of Appeals impermissibly substituted its own findings of fact. The Court of Appeals misapplied Dunn and Quintana, supra, to the facts of this case. WHEREFORE, the Commonwealth of Kentucky asks that the Opinion of the Court of Appeals of June 24, 2011 be REVERSED and that the Final Judgment of the trial court be reinstated.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

A handwritten signature in black ink, appearing to read "David W. Barr", is written over the printed name and title of the signatory.

DAVID W. BARR
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky. 40601
(502) 696-5342
Counsel for Appellant

