

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CASE NO. ST-2015-CR-0000234
Plaintiff,	)	
vs.	)	V.I. Code Ann. tit. 14, §§ 444(1), 11(a);
	)	1081, 1083(1), 11(a); 1266, 11(a); 2101(a)
MICHAEL B. GEORGE,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion to Dismiss Counts IV and Suppress Evidence Recovered Outside of #10-A Estate Carolina, filed on June 2, 2016. On July 5, 2016, the Court held a suppression hearing. The Court heard testimony from the following witnesses: 1) Detective Kenneth Small, Jr.; 2) Detective Alex Dorsett; and 3) Defendant Michael George. Having considered the premises, the Court will deny Defendant's Motion on the grounds that Defendant had no reasonable expectation of privacy in the wall area outside his kitchen door, which faced the backyard of the apartment.

BACKGROUND

Defendant Michael B. George lives in an apartment located in one of three residential buildings located at 10-A Estate Carolina St. John, Virgin Islands. The main building is a two-story structure with four apartments including Defendant's apartment located in the bottom right corner of the apartment building. There are also two other buildings-one in the front yard, which has one apartment and one in the backyard, which has two apartments. All three structures are in close proximity to each other.

On or about June 11, 2015, in St. John, United States Virgin Islands, officers arrived at Defendant's apartment pursuant to a search warrant issued by this Court. The search warrant provided the following:

Information upon oath having been this day laid before me that probable cause exists that certain physical evidence and/or fruits of the crime contraband, regarding the crimes of Burglary in the 1st degree, in violation of 14 V.I.C. §442(3) Grand Larceny, in violation of 14 V.I.C. § 1083(1), Destruction of Property, in violation of 14 V.I.C. § 1266, will be found at the address of 10-A Estate Carolina, St. John, Virgin Islands, **in the apartment at the bottom right corner.**

YOU ARE THEREFORE HEREBY COMMANDED FORTHWITH to **search that bottom right corner apartment** at the address of 10-A Estate Carolina, St. John, Virgin Islands.¹

Detective Alex Dorsett (“Detective Dorsett”) testified that upon exiting the kitchen door of the apartment, he opened the back door and saw a Crown Royal² bag lodged between septic pipes and the Water and Power Authority (WAPA) “box” for the entire building. Detective Dorsett opened the bag and saw the jewelry inside. Detective Dorsett then placed the bag in the same spot. Forensics arrived on the scene and took pictures of the bag.³ Thereafter, Defendant was charged pursuant to a four count Information: Count I- Third Degree Burglary in violation of V.I. CODE ANN. tit. 14, § 444(1) and 14 V.I.C. § 11(a); Count II- Burglary in the First Degree in violation of 14 V.I.C. §§ 1081, 1083 and 14 V.I.C. § 11(a); Count III-Destruction of Property in violation of , 14 V.I.C. § 1266 and 14 V.I.C. § 11(a); Count IV- Possessing Stolen Property in violation of 14 V.I.C. § 2101(a).

Defendant challenges the Information with respect to Count IV regarding the possession of stolen property on the grounds that the evidence was seized outside the scope of the search warrant.⁴ The People oppose the Motion arguing two divergent positions: (a) that the area in question was “an actual part of the apartment and thus included within the scope of the warrant,” and, in the alternative, (b) the “Crown Royal bag was in plain view and in a common area, and thus not subject to provisions of the warrant.”⁵

MOTION TO SUPPRESS STANDARD

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures.⁶ The Fourth Amendment is made applicable to the Virgin Islands pursuant to section 3 of the Revised Organic Act of 1954.⁷ “Generally, for a seizure to be reasonable under the Fourth Amendment, it must be effectuated with a warrant based on probable cause.”⁸ Warrantless searches, however, “are *per se* unreasonable under the Fourth Amendment subject to a few specifically established and well delineated exceptions.”⁹

¹ Mot. to Dismiss Counts IV and Suppress Evidence Recovered Outside of #10-A Estate Carolina (“Motion to Dismiss”), 2, June 2, 2016 (emphasis added).

² Crown Royal is a brand of a blended Canadian whiskey and is often packaged in a purple bag.

³ Detective Kenneth Small testified that Forensics arrived on the scene and took pictures of the Crown Royal bag prior to the bag being removed by any of the responding officers.

⁴ Mot. to Dismiss, 3, June 2, 2016.

⁵ People’s Resp. to Def. Mot. to Dismiss, 1, June 15, 2016.

⁶ U.S. CONST. amend. IV.

⁷ *Simmonds v. People of the Virgin Islands*, 53 V.I. 549, 555 (VI. 2010).

⁸ *United States v. Robertson*, 305 F.3d 164, 167 (3d Cir. 2002) (citing *Katz v. United States*, 389 U.S. 347, 356-57 (1967)).

⁹ *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Horton v. California*, 496 U.S. 128, 133 (1990) (opining that the general rule is that warrantless searches are presumptively unreasonable).

Initially, the accused has the burden of proving that the evidence should be suppressed.¹⁰ However, once it is proven that the search or seizure was effected without a warrant, the burden shifts to the People to prove by clear and convincing evidence that the governmental activity fell within some recognized exception to the warrant requirement. Along those lines, the People have the burden of proving that each individual act constituting a search or seizure under the Fourth Amendment was reasonable.¹¹

ANALYSIS

The concept of curtilage “originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself.”¹² In *Dunn*, the Supreme Court held that “the Fourth Amendment protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual *reasonably may expect* that the area in question should be treated as the home itself.”¹³ Thus, the “central component of the inquiry is whether the area harbors ‘intimate activity associated with the sanctity of a man's home and the privacies of life.’”¹⁴

Dunn referred to four factors relevant to the curtilage inquiry:

[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.¹⁵

The Court explained that the four factors are meant to serve as useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's “umbrella” of Fourth Amendment protection.¹⁶ Whether a particular area is within the curtilage tends to be a fact specific inquiry.¹⁷

¹⁰ *People v. Archibald*, 50 V.I. 74, 85 (V.I. Super. Ct. 2008); *Government v. Morton*, 15 V.I. 418 (V.I. Super. Ct. 1978); *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980).

¹¹ *People v. Samuel*, Case Nos. SX-09-CR-557; SX-09-CR-556, 2010 WL 7756081, at *3 (V.I. Super Ct. Nov. 12, 2010); *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995).

¹² *United States v. Dunn*, 480 U.S. 294, 300 (1987).

¹³ *Id.* (emphasis added).

¹⁴ *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524 (1886), *abrogated on other grounds*, *Warden v. Hayden*, 387 U.S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967)); *see also California v. Ciraolo*, 476 U.S. 207, 213, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986).

¹⁵ *Dunn*, 480 U.S. at 301.

¹⁶ *United States v. Acosta*, 965 F.2d 1248, 1255-1256, 1992 U.S. App. LEXIS 11534, *22-23 (3d Cir. Pa. 1992)

¹⁷ *See e.g., U.S. v. Montieth*, 662 F.3d 660, 670 n.2 (4th Cir. 2011) (storage shed in backyard within curtilage because it was close to and enclosed in same fence as house) and *U.S. v. Williams*, 581 F.2d 451, 453-54 (5th Cir. 1978); *U.S. v. Wells*, 648 F.3d 671, 677-79 (8th Cir. 2011) (unpaved driveway extending into backyard within curtilage because it was partially fenced in and led to outbuilding shielded from view).

Context is also important in applying the *Dunn* factors. Some courts have acknowledged that certain factors may be less determinative in an urban setting because of the physical differences in the properties.¹⁸

For example, the Third Circuit Court of Appeals held that the weight of the *Dunn* factors is diminished when applied to apartment dwellings.¹⁹ In *Acosta*, police officers arrived at a three story, multi-unit apartment building on the basis of an arrest warrant which did not identify defendants' residence.²⁰ The officers subsequently seized cocaine from defendants' first floor apartment. While one officer entered the common hallway and knocked on the apartment door, another climbed a fence into the backyard and observed defendants throwing drugs out the window. The officers broke down the door, entered the apartment, and recovered drugs in plain view as well as weapons and cash during a protective sweep. After two hearings, the court ruled in open court that it would grant defendants' motions to suppress based on its conclusion that the search violated defendants' Fourth Amendment rights. On appeal, the District Court's decision was reversed.

One of the questions before the Court of Appeals for the Third Circuit was whether the backyard was considered the curtilage of the first floor apartment.²¹ The Court turned to the record and noted the lease itself did not grant the defendants the right to use the backyard.²² Therefore, the Court concluded that the landlord-tenant relationship did not support an expectation of privacy in the backyard on the part of the defendants.²³ Furthermore, while the landlord gave the defendants permission to use the backyard, the landlord retained the right to grant permission for others to use the backyard.²⁴ Even the landlord used the backyard to store his boat.²⁵ The Court concluded that the fact that defendants had permission to use the backyard did not create any legitimate expectation of privacy in it.²⁶

In *McCaster*, the Court of Appeals for the Eighth Circuit considered whether officers had exceeded the scope of a search warrant for an apartment dwelling.²⁷ Pursuant to a valid warrant authorizing a search of the defendant's apartment, "including garages, outbuildings, and curtilage," police officers found a small quantity of illegal drugs in the defendant's apartment and then proceeded to search a hall closet in a common area at the back of the duplex.²⁸ In the closet, which was shared by the other tenants of the duplex, more than six grams of crack cocaine were found.²⁹

¹⁸ See *Horton v. United States*, 541 A.2d 604 (D.C. App. 1988) (determination will necessarily center on use made of area since fencing will be less significant than in rural area and it may be impossible to shield the area from observation).

¹⁹ *Acosta*, 965 F.2d at 1256.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1257.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *United States v. McCaster*, 193 F.3d 930, 932 (8th Cir. 1999).

²⁸ *Id.*

²⁹ *Id.* at 933.

After considering the motion to suppress, the Court held that even if a hall closet located outside of a defendant's apartment, within a common area of a duplex, did not fall within the scope of a warrant to search the defendant's apartment, officers executing the search warrant were found to have acted reasonably in searching the hall closet.³⁰

The Court reasoned that in order to challenge the constitutionality of the search, McCaster needed to demonstrate that he possessed a legitimate expectation of privacy in the particular area searched.³¹ In order to show a legitimate expectation of privacy in the searched premises, the person challenging the search has the burden of showing both a subjective expectation of privacy and that the expectation is objectively reasonable; that is, one that society is willing to accept.³² Specifically, the Court provided,

Our review of the record shows that McCaster has failed to prove that he had a legitimate expectation of privacy in the hall closet. His assertion that the closet is not within the curtilage of his apartment undermines his assertion of an expectation of privacy in the closet. Moreover, he disavowed any possessory interest in the contents of the closet, failed to show any efforts to exclude others from the space, or any precautions to maintain privacy. The evidence showed that two other tenants, as well as the landlord, had access to the closet. In short, the evidence presented at the suppression hearing supports a finding that McCaster had no reasonable expectation of privacy in the hall closet. Under these circumstances, McCaster has no standing to challenge the search. To hold otherwise would allow a criminal to keep contraband from the legitimate reach of law enforcement by the simple act of storing it in a shared common area.

Finally, even if McCaster had shown an expectation of privacy in the closet, the evidence establishes that it was objectively reasonable for the officers to search the closet in reliance on the warrant. Evidence seized even through a deficient warrant is still admissible if officers executing the warrant were objectively reasonable in relying upon it. We agree that the close proximity of the area to McCaster's living quarters and its enclosure within the duplex unit supports the finding that it was reasonable for the officers to believe that the area fell within the scope of the warrant.³³

In the instant case, Defendant argues that the People exceeded the scope of the search warrant which provided that officers could search “in the apartment at the bottom right corner” and the “bottom right corner apartment.” Therefore, the question before the Court is whether Defendant had a reasonable expectation of privacy in the wall area outside his kitchen door, which

³⁰ *Id.*

³¹ *Id.* (citing *United States v. Nabors*, 761 F.2d 465, 468 (8th Cir. 1985)).

³² *Id.* (citing *See Minnesota v. Olson*, 495 U.S. 91, 96-97, 109 L. Ed. 2d 85, 110 S. Ct. 1684 (1990) (recognizing that an overnight guest has a reasonable expectation of privacy)); *Rakas v. Illinois*, 439 U.S. 128, 130 n. 1 (1978).

³³ *McCaster*, 193 F.3d at 933.

faced the backyard of the apartment. Applying the *Dunn* factors to the present case, it would appear that the first factor- the proximity of the area claimed to be curtilage to the home—would weigh in favor of finding that the area is included within the curtilage. Specifically, the Crown Royal bag was found within a few steps from the back door of Defendant’s kitchen, which is certainly within close proximity to Defendant’s corner apartment. In addition, there are multiple tenants living in the area that have access to the place where the Crown Royal bag was found.

With respect to the second factor—whether the area is included within an enclosure surrounding the home—the Court finds that it weighs against a finding that the area is within the curtilage of the apartment because it’s unclear from the testimony whether the area is in fact enclosed. Detective Small testified that the area is a shared backyard, but was uncertain as to whether there was a fence. In addition, there are multiple apartments on the property with access to the backyard.

With respect to the third factor—the nature of the uses to which the area is put—the Court finds that it weighs against a finding that the area is within the curtilage of Defendant’s apartment. The facts indicate that the area appears to be accessible by any number of people as argued by Defendant. For example, plumbers may need access to the septic pipes, workers from WAPA may need access to the power “box” and any of the tenants from the six other apartments on the compound could have access to that area. Further, even the landlord could access it.³⁴

With respect to the fourth factor—the steps taken by the resident to protect the area from observation by people passing by—the Court finds that this factor weighs against a finding that the area was within the curtilage of the apartment. There were no facts in the record to indicate that the Defendant took any steps to ensure that the area was particularly hidden. To the contrary, Defendant argues that the area was accessible to residents of all three structures located on the property. In fact, Defendant’s argument that the area was not within the curtilage of his home i.e. within the scope of the search warrant, undermines his argument that he had a reasonable expectation of privacy in that space. For example, in *Bansal*, the Court of Appeals for the Third Circuit stated,

We are puzzled because Bansal's contention that the garage was outside the curtilage actually *decreases* his legitimate expectation of privacy in the building, and presumably places it merely on the "premises" at 23 Garden Avenue, squarely within the terms of the search warrant. In sum, we conclude that if the garage was within the curtilage, as the District Court found, then for Fourth Amendment purposes it was part of the premises at 23 Garden Avenue (the search of which no party disputes was authorized); if it was instead beyond the curtilage, Bansal's expectation of privacy was diminished to the point that no violation could have occurred.”³⁵

³⁴ There was no testimony at the motion hearing as to whether the lease agreement specifically addressed the use of the backyard space.

³⁵ *United States v. Bansal*, 663 F.3d 634, 663 (3d Cir. 2011).

Accordingly, the Court finds that the wall behind Defendant's apartment that abuts the backyard was not within the curtilage as evidenced by the sheer number of people that had access to the area and the fact that the area behind the home was not enclosed. As such, Defendant did not have a reasonable expectation of privacy in that area. Much like *Acosta* and *McCaster*, without such an expectation of privacy in the backyard, the police could have conducted a warrantless search of that area.

CONCLUSION

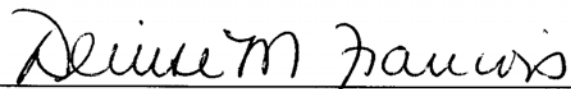
The Court will deny Defendant's Motion to Dismiss on the grounds that Defendant had no reasonable expectation of privacy in the wall area outside his kitchen door, which faced the backyard of the apartment.

Accordingly, it is hereby

ORDERED that Defendant's Motion to Dismiss Counts IV and Suppress Evidence Recovered Outside of #10-A Estate Carolina is **DENIED**; and it is further

ORDERED that a copy of this Order shall be directed to counsel of record.

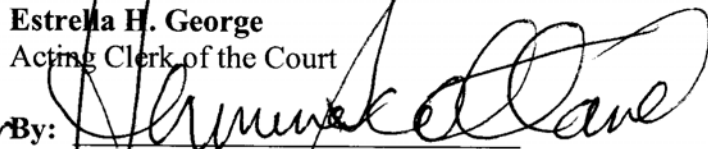
DATED: August 5, 2016



DENISE M. FRANCOIS

Judge of the Superior Court of the Virgin Islands

ATTEST:
Estrella H. George
Acting Clerk of the Court

By: 
Lori Boynes-Tyson
Acting Chief Deputy Clerk 8/5/2016