NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

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June 10, 2018

LETTER OPINION

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RE: *Commonwealth of Virginia v. Shomari Carroll*
Case No. FE-2018-374

Dear Counsel:

The Court has before it the question of which portions of a residential driveway may be considered part of the curtilage barring warrantless arrest thereon absent exigent circumstances. This Court concludes the area between the pergola, an annexation to the home, and the border of the driveway delineating where access is unnecessary to reach

the front door of the abode constitutes the curtilage covered by the protections of the Fourth Amendment's reasonable expectation of privacy test, thereby necessitating a warrant or exigent circumstances in order to effect an arrest within such confines. This Court holds the arrest of the Defendant was, therefore, unlawful in the location wherein effectuated. The Court does not, however, dismiss this cause at this time, for the Court does not have before it the question of whether the Defendant's pre-arrest identification is nevertheless sufficient so that the prosecution may proceed, albeit with a more restricted set of evidence. The Court thus grants the Defendant's Motion to Suppress the fruits of his arrest flowing from the point in time at which he was placed in handcuffs, without passing on whether his identity may be otherwise established at trial.

BACKGROUND

On September 29, 2017, at approximately 1:21 a.m., a person later identified by police as Mr. Shomari Carroll was observed leaving the P. J. Skidoos restaurant by Officer James Lewis of the Fairfax City Police Department. The motorcyclist mounted his motorbike and performed a "burnout" in the parking lot of the establishment, that is where the rear wheel of the motorcycle is spun so as to burn rubber and create smoke while the bike remains stationary through application of the brake to the front tire. The motorcycle had a distinctive motif of painted flames. The motorcyclist then departed the parking lot at a high rate of speed. Officer Lewis activated his emergency equipment and gave chase, pursuing the vehicle as he observed it turn onto southbound Chain Bridge Road; the Officer intended to charge the driver with reckless driving. At Providence Way, the

motorcyclist pulled over and the officer silenced his siren but kept his emergency lights engaged. Officer Lewis shined his spotlight on the motorcyclist, who looked back briefly. Upon the motorcyclist commencing to move again, Officer Lewis reactivated his siren in an attempt to persuade the suspect to stop. The motorcyclist then made a slow U-turn, reversing direction by turning north on Chain Bridge Road. The motorcyclist crossed over the double yellow line into an oncoming traffic lane to pass another vehicle, thereby encountering Sgt. Matthew Craig Lasowitz of the Fairfax City Police Department approaching in his direction, who then had to swerve to avoid hitting the suspect. The motorcyclist proceeded to make a right turn onto Fairfax Boulevard, passing a red traffic control light without coming to a complete stop. Officer Lewis was then instructed to discontinue his pursuit by Sgt. Lasowitz.

Officer Lewis returned to P. J. Skidoos where the owner of the establishment provided a copy of a receipt alleged to belong to the patron pursued by the Officer. The patron left after his credit card was declined. Sgt. Lasowitz, accessing a police database, developed the identity of a suspect fitting the description of the motorcyclist with an address in Fairfax. Officer Lewis then searched for an associated Arizona driver's license number, which yielded a Department of Motor Vehicles photograph of the suspect along with information that his operator's license was suspended. That person's name was Shomari Carroll. Despite having ample time to do so in the absence of any exigency, the police did not then seek to obtain a warrant for the arrest of the Defendant.

Sgt. Lasowitz, Officers Lewis and Green, proceed to the address listed for Mr. Carroll, and knocked on the front door. After several minutes of knocking, Mr. Carroll

emerged from the side of the house from underneath a pergola and onto the edge of the uncovered driveway. He was dressed in dark grey sweat pants, no shirt, and no shoes. The officers surrounded him and asked his name. Mr. Carroll provided his name and at first denied having driven the motorcycle. Mr. Carroll was handcuffed and placed under arrest for reckless driving and speeding to elude the police. Officer Lewis did not recall why he failed to read Mr. Carroll his Miranda warnings at the time of arrest and acknowledged instead he continued questioning the suspect about the incident. Mr. Carroll thereafter admitted he was the operator of the motorcycle, was aware of the Officer's pursuit but did not stop because he was scared, and further conceded he placed himself and the police in danger as a result of his actions.

Mr. Carroll challenges the legality of his warrantless arrest and questioning without being Mirandized thereafter, seeking to suppress the fruits flowing from his detention.

ANALYSIS

Which areas of a residential driveway constitute the curtilage for Fourth Amendment purposes implicates a plethora of precedent, at first blush, seemingly situationally dependent in application. Closer consideration, however, discloses the applicable precedent is united by the consistent concept that Fourth Amendment protections are enforced where the area adjacent to a home implicates a reasonable expectation of privacy. Where police access is involved, the Supreme Court of Virginia has guided that unless such access to the environs of an abode is circumscribed by

apparent restrictions, the police have the right to traverse parts of the curtilage to contact occupants of a dwelling:

> [A] number of federal and state courts have held that a resident of a dwelling impliedly consents to a police officer entering the curtilage to contact the dwelling's residents. This implied consent has the effect of deeming such an entry into the curtilage a reasonable intrusion into an area otherwise protected by an expectation of privacy under the Fourth Amendment. *See, e.g., United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006); *United States v. Taylor*, 90 F.3d 903, 909 (4th Cir. 1996); *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964); *State v. Christensen*, 953 P.2d 583, 587 (Idaho 1998); *City of Eugene v. Silva*, 108 P.3d 23, 27 (Or. Ct. App. 2005). Implied consent can be negated by obvious indicia of restricted access, such as posted "no trespassing" signs, gates, or other means that deny access to uninvited persons. *See, e.g., Christensen*, 953 P.2d at 587-88.

Robinson v. Commonwealth, 273 Va. 26, 34-35, 639 S.E.2d 217, 222 (2007). *Robinson* suggests that access to areas of the curtilage not necessary to gain access to the front entrance of Mr. Carroll's home are therefore not impliedly permitted.[1]

United States Supreme Court jurisprudence contains a strong tradition of protection from warrantless seizure of a person in his home or upon curtilage thereof, as recently accentuated in *Collins v. Virginia*, No. 16-1027, 2018 U.S. LEXIS 3210, at *10-11 (May 29, 2018):

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[1] *Robinson* was of significant factual difference from the instant case for the Supreme Court of Virginia therein found probable cause *and exigent circumstances* for the police to access the back yard of that home while criminal offenses were in progress. Under *Collins*, however, the rationale provided in cases such as *Vaughn v. Commonwealth*, 53 Va. App. 643, 651-52, 674 S.E. 2d 558, 562 (2007), aff'd in part, vacat'd in part, 279 Va. 20, 688 S.E. 2d 283 (2010) (holding in part the issue of the implied consent to police searches for alternate entrances should not have been reached by the Court of Appeals of Virginia for it was unpreserved), that police could search for other entrance doors by accessing the side or rear of Mr. Carroll's home, is constricted by the fact the police would have had to thereby reach such areas by traversing through the pergola, to which a reasonable expectation of privacy attached as an annexation to the home, and thus constituting an obvious impediment restricting access and negating implied consent for such route to the police.

> [T]he Fourth Amendment's protection of curtilage has long been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U. S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). [*11] "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Ibid.* (quoting *Silverman* v. *United States*, 365 U. S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)). To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home'"—to be "'part of the home itself for Fourth Amendment purposes.'" *Jardines*, 569 U. S., at 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (quoting *Oliver* v. *United States*, 466 U. S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U. S. 207, 212-213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).
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> When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *Jardines*, 569 U. S., at 11, 133 S. Ct. 1409, 185 L. Ed. 2d 495. Such conduct thus is presumptively unreasonable absent a warrant.

The Court in *Collins* set a factual scene for the curtilage in that case, similar, but not identical, to the curtilage of the instant case:

> According to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Officer Rhodes searched the motorcycle, it was parked *inside this partially enclosed top portion of the driveway that abuts the house*.

Collins, No. 16-1027, 2018 U.S. LEXIS 3210, at *11-12 (emphasis added).

The area held to be subject of unlawful search in *Collins* differs from the area in the case at bar in that the defendant in this case was not standing in "a partially enclosed"

portion of the driveway but rather a few steps forward of the pergola from which he emerged. As in *Collins*, the Defendant's driveway continues past the walkway to the front door; a visitor to the home would have to turn left onto the walkway from the driveway to access the front door before reaching the location where Mr. Carroll was placed under arrest. The paved driveway continues past the walkway turn, up to and through an area shaded by an overhead pergola, and to rear steps leading up to the backyard. The pergola defines an enclosed space, is roofed, with vines running along the front side. Inside the pergola area, the paved driveway is bound on the left side by the house wall, on the rear by the back steps and a wall, and on the right side by a latticework wall. The right side of the pergola is held up by a wooden column, with wooden lattice running back therefrom and enclosing the paved driveway. In front of the pergola on the right side the homeowner stores trash cans, an activity of home life. The left side of the pergola is held up by a wooden column atop a brick knee wall. In front of the knee wall is a planted area of rock and stone. In front of the planted area is the walkway to the front door. Police body camera video discloses the Defendant was standing well behind the turn of the front walkway, next to the planted area of rock and stone, but only steps forward of the knee wall and pergola, at the time he was arrested.

Implicated in the instant case is, therefore, need to determine whether the Defendant's location was a place wherein he would have a reasonable expectation of privacy.

> [I]t is a "settled rule that warrantless arrests in public places are valid," but, absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause. *Payton* v. *New York*, 445 U. S. 573, 587-590, 100 S. Ct.

> 1371, 63 L. Ed. 2d 639 (1980). That is because being "'arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.'" *Id.*, at 588-589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (quoting *United States* v. *Reed*, 572 F. 2d 412, 423 (CA2 1978)).

Collins, No. 16-1027, 2018 U.S. LEXIS 3210, at *15. The U. S. Supreme Court in *Collins*, has largely upended what would normally have been the applicable analysis before in application of Virginia precedent.

> Virginia's proposed rule rests on a mistaken premise about the constitutional significance of visibility. The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible.

Collins, No. 16-1027, 2018 U.S. LEXIS 3210, at *20-21. The location where the Defendant was arrested was clearly visible from the street, a fact no longer dispositive of whether he thereby was devoid of an expectation of privacy. The decision in *Collins* was arguably foreshadowed by the precedentially applied concept that structures attached to or seemingly flowing from a dwelling are part of the constitutionally protected curtilage.

> Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or *annexation* to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.

United States v. Van Dyke, 643 F.2d 992, 994 (4th Cir. 1981) (quoting *Care v. United States*, 231 F.2d 22, 25 (10th Cir. 1956)) (emphasis added and quotation marks omitted).

There would be little question under the logic referenced in *Van Dyke*, a case repeatedly cited with approval by the U.S. Supreme Court, that if the defendant in the instant case was standing under the pergola, instead of in front of it, he would be within

a protected annexation. Here, the Defendant was arrested in the area between the pergola and the walkway to the front door where a visitor to the home would be expected to turn from the driveway. This area is between the pergola annexation referenced in *Van Dyke* and the permissible walking route of ingress for the police delineated in *Robinson.* Neither case is thus by itself a conclusively dispositive example applicable to the instant case. The U.S. Supreme Court in *Collins,* however, tips the scales as to whether the area wherein the Defendant was arrested constitutes part of the protected curtilage.

> Virginia's proposed bright-line rule automatically would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage. See *United States* v. *Ross*, 456 U. S. 798, 822, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982) ("[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion").

Collins No. 16-1027, 2018 U.S. LEXIS 3210, at *21. The location where the Defendant was arrested, not part of a literal majestic mansion, nevertheless serves as the area of the driveway where occupants store their vehicles and objects, and was beyond the reach of the permissive route to the front door referenced in *Robinson*. In our jurisprudence, a person's home is figuratively his castle, the curtilage his constitutionally protected moat.

> At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine *whether an individual reasonably may expect that an area immediately adjacent to the home will remain private*. See, *e.g., United States* v. *Van Dyke*, 643 F.2d 992, 993-994 (CA4 1981); *United States* v. *Williams*, 581 F.2d 451, 453 (CA5

> 1978); *Care* v. *United States*, 231 F.2d 22, 25 (CA10), cert. denied, 351 U.S. 932 (1956).

Oliver v. United States, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742 (1984) (emphasis added). An uninvited stranger, accessing the area where the police apprehended the Defendant, would reasonably be an object of immediate concern by his presence, for such location does not by route serve the purpose of contact or solicitation of the occupants of the dwelling, and instead raises the fear of unwelcome trespass.

> The "'conception defining the curtilage' is . . . familiar enough that it is 'easily understood from our daily experience.'" *Jardines*, 569 U. S., at 7, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (quoting *Oliver*, 466 U. S., at 182, n. 12, 104 S. Ct. 1735, 80 L. Ed. 2d 214). Just like the front porch, side garden, or area "outside the front window," *Jardines,* 569 U. S., at 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495, the driveway enclosure where Officer Rhodes searched the motorcycle constitutes *"an area adjacent to the home and 'to which the activity of home life extends,'"* and so is properly considered curtilage, *id.,* at 7, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (quoting *Oliver*, 466 U. S., at 182, n. 12, 104 S. Ct. 1735, 80 L. Ed. 2d 214).

Collins, No. 16-1027, 2018 U.S. LEXIS 3210, at *12 (emphasis added). The Defendant was arrested in an area immediately adjacent to his home which he could reasonably expect to remain private, to which activity of the home life extends, comprising part of the curtilage within which protections of the Fourth Amendment are guaranteed.

CONCLUSION

The Court has considered the question of which portions of a residential driveway may be considered part of the curtilage barring warrantless arrest thereon absent exigent circumstances. This Court concludes the area between the pergola, an annexation to the home, and the border of the driveway delineating where access is unnecessary to reach the front door of the abode constitutes the curtilage covered by the protections of the

Fourth Amendment's reasonable expectation of privacy test, thereby necessitating a warrant or exigent circumstances in order to effect an arrest within such confines. This Court holds the arrest of the Defendant was, therefore, unlawful in the location wherein effectuated. The Court does not, however, dismiss this cause at this time, for the Court does not have before it the question of whether the Defendant's pre-arrest identification is nevertheless sufficient so that the prosecution may proceed, albeit with a more restricted set of evidence. The Court thus grants the Defendant's Motion to Suppress the fruits of his arrest flowing from the point in time at which he was placed in handcuffs, without passing on whether his identity may be otherwise established at trial.

Consequently, the Court shall enter a separate order incorporating the decision herein.

AND THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER