

Motion to suppress DENIED. Based on the affidavit of Royce Lancaster this Court concludes that the Defendant operated a motor vehicle while having a breath alcohol test in excess of .08 based on testing administered in conformity with the regulations promulgated by the Vermont Department of Health.

Judgment for the State in the civil suspension proceeding.

Notes to Text:

* This Court recognizes that Agent Laval-lee had the special circumstances unique to alien and contraband smuggling in mind

when he stopped Mr. Gerber's car, which allows this particular stop to be coun-tenanced.

Joseph Malgeri, Deputy Orleans Sate's At-torney, Newport, for State
David Williams, Sleigh & Williams, St. Johnsbury, for defendant

**SEARCH & SEIZURE –
FLASHLIGHT SEARCH –
UNINVITED PRESENCE AT HOME**

Docket Nos. 16-1-08 Bncr and 1-1-08 Bncs

STATE OF VERMONT

v.

JAMES HARTE

Bennington District Court

July 9, 2008

HAYES, J. The defendant has moved to suppress all of the evidence obtained by the police after they entered onto the defendant's residence property, arguing that the entry, and observations/seizures of evidence, were unsupported by warrant, exigent circumstan-ces, or consent, and therefore violated his rights under the U.S. and Vermont Constitu-tions. He has also moved to dismiss the charge of driving under the influence for lack of prima facie case, arguing that there is insufficient evidence to demonstrate that he was under the influence of intoxicants at the time of operation, and has moved to dismiss the charge of resisting arrest, arguing that there is insufficient evidence to demonstrate that he acted intentionally. The State op-poses all of these motions.

Findings of Fact

An evidentiary hearing was held on the motion on April 17, 2008. Based upon the preponderance of the evidence presented, the court makes the following findings of fact.

On December 24, 2007, Officer John Zink of the Bennington Police was dis-patched to the Short Stop gas station and convenience store at the intersection of South and Depot Streets because of a complaint of a hit and run accident. When he arrived there, he saw a vehicle in the parking lot, with visible body damage. He met with the owner of the vehicle, Kelly Gardner, who told him that a man in a red SUV had backed into her vehicle and then driven away. She reported that she had approached and remonstrated with him after he hit her vehicle, but that he ignored her and drove away. She was able to provide his license plate number. Another witness at the gas station confirmed that she had seen the collision, noted the plate number (matching that reported by Ms. Gardner), and saw the vehicle drive away.

Officer Zink "ran" the plate number through the DMV database, and learned that it was registered to the defendant, whose residence address was on Main Street. After assisting Ms. Gardner with an accident report, he drove to the defendant's residence, into the driveway, and parked adjacent to the garage in the rear of the house. There was nothing blocking the driveway, and there

were no signs barring entry. Police records show that the accident report was received at about 5:15 p.m., and that Officer Zink was at the defendant's home at about 6:08 p.m. When he arrived at the defendant's home, he looked into the garage windows, and saw a red SUV. He shone his flashlight through the window (it was dark outside), and saw that the plate number matched that reported by Ms. Gardner and the other witness, and that the vehicle appeared to have some damage on the rear driver's side bumper.

The defendant's home has a front door facing Main Street, and also a back door, which the defendant typically uses when he drives in. Tradespeople typically use the front door.

After peering into the defendant's garage, Officer Zink approached the back door of the defendant's home. The rear entrance to the home was up a small staircase, where there was a door to an enclosed "mudroom" type back porch, and then yet another doorway leading directly into the kitchen. The ex-terior door into the porch was closed, and the door into the kitchen was standing ajar when Officer Zink approached. Officer Zink saw lights on inside, and could hear noise indicat-ing that someone was inside. He knocked repeatedly, with no response. The defendant then walked past the kitchen door, looked out onto the porch, and noticed Officer Zink standing there. He came to the door and first asked him what he was doing there, and then, without pause, ordered him to get off of his property. Officer Zink explained that he was there to investigate a motor vehicle accident. The defendant again ordered him to leave, with a raised voice. The officer stated that he needed information from the defendant. He did not leave, nor did he make any move to do so. The defendant did not shut the door and return inside. He continued to talk to the officer.

Officer Zink was able to observe signs that the defendant was highly intoxicated during the conversation described above. The defendant was having difficulty walk-ing, had bloodshot and watery eyes, slurred speech, and smelled of intoxicants.

Officer Zink asked him if he had been drinking, and the defendant told him that he had been drinking all day, and that his cat had just died. When Officer Zink asked if he had been drinking since he arrived home, he said he had 3 or 4 beers.

At Officer Zink's request, the defendant went out to the garage with him to collect his automobile related paperwork from the vehicle. Sgt. Dean arrived in his police vehicle as the two walked toward the garage. As Sgt. Dean drove in, the defendant made a negative comment, complaining that "more

police" were now involved. He also said, "All right, you got me. I did hit that car, and I drove away."

Mr. Harte was very upset and angry that there were now two unwanted police officers at his home, and was yelling and screaming. He pointed his finger toward Sgt. Dean's face. He was screaming and swearing, and gesturing with his hand toward Sgt. Dean to the point where Officer Zink feared he might strike Sgt. Dean. He therefore sprayed the defendant in the face with pepper spray. The defendant then began to "thrash around," and Sgt. Dean struck him with his baton. The defendant then fell to the floor of the garage, where Sgt. Dean restrained him and placed him in handcuffs. Neither Officer Zink nor Sgt. Dean informed the defendant that he was under arrest, or that he was about to be ar-rested, before Officer Zink sprayed him with pepper spray.

The officers took the defendant to the police station, where he was processed for leaving the scene of an accident and for driv-ing under the influence. During processing, he repeated that he had several beers after arriving home from the convenience store, and denied drinking before that, but then later said he did drink three or four beers before going out.

Conclusions of Law

Motion to Suppress

The defendant argues that the evidence against him that was obtained after the police came to his home must be suppressed, for two reasons. First, he alleges that Officer Zink violated the defendant's rights by using his flashlight to peer into his closed garage, through the windows, to view the damage to his motor vehicle and to confirm its presence and license number. Second, he alleges that Officer Zink entered his mudroom-porch area, without permission or warrant, and that this entry was improper.

Flashlight assisted examination of garage through window

The area behind the defendant's home, and adjacent to the garage is clearly within the curtilage of the house, that is, the "area outside the physical confines of a house into which the 'privacies of life' may extend." *State v. Rogers*, 161 Vt. 236 (1993) (citation omitted). It is therefore entitled to the same constitutional protection from searches and seizures as the home itself. *Id.* However, "there is no invasion of privacy - and there-fore no search - when government observes that which is willingly exposed to the public," so a homeowner must take steps to protect his property from public entry and view if he wishes it to be constitutionally protected. *State v. Bryant*, 2008 VT 39, ¶ 13. "Where the indicia, such as fences, barriers

or "no trespassing" signs reasonably indicate that strangers are not welcome on the land, the owner or occupant may reasonably expect privacy." *State v. Kirchoff*, 156 Vt. 1 (1991).

In this case, the defendant's driveway and the area behind his home did not have any signs warning against trespass, or any barriers to prevent visitors from pulling in and parking. Indeed, the defendant acknowledged that it was his regular practice to park behind the house and enter through the rear door. The court notes that this is very common practice in Vermont, and that many homes' front doors are used only on special occasions. Friends and family typically enter through the kitchen or back door.

The use of a flashlight to illuminate the interior of the garage also did not violate the defendant's rights. Shining a flashlight to illuminate the interior of a vehicle or building does not constitute a search that triggers Fourth Amendment protections. *United States v. Dunn*, 480 U.S. 294, 305, 107 S.Ct. 1134, 1141-42, 94 L.Ed.2d 326 (1987); *Texas v. Brown*, 460 U.S. 730, 739-40, 103 S.Ct. 1535; 1541-42, 75 L.Ed.2d 502 (1983).

When the circumstances of a particular case are such that the police officer's observation would not have constituted a search had it occurred in daylight, then the fact that the officer used a flashlight to pierce the nighttime darkness does not transform his observation into a search. Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned The plain view rule does not go into hibernation at sunset.

Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 1970).

The defendant's motion to suppress evidence resulting from Officer Zink's entry onto the defendant's back yard area, approaching his garage and peering through the windows, with a flashlight, must therefore be denied.

Approach to home and failure to leave upon request

The officer next approached the home, knocked repeatedly, and then, when he obtained an answer, was told by the homeowner, in no uncertain terms, repeatedly, that he was not welcome and that he should leave. Nonetheless, inexplicably, and without any warrant for arrest or for search, the officer did not leave.

The defendant asserted his rights to possession of his home in no uncertain terms, and made it unequivocally, rudely clear that he wished to have his rights to privacy respected. The officer failed to respond to this clear assertion of the defendant's Fourth Amendment and Article II based rights. There can be no question that the defendant's language was a clear expression of an "expectation of privacy" and a "desire to exclude the public." *Bryant, supra*, at ¶ 11.

Upon receiving this clear communication, the officer had no right to continue his

contact with the defendant, and indeed, had an obligation to abide by the defendant's request that he leave the premises, though of course he could also have secured the premises while seeking a warrant for search or for arrest. Any evidence that resulted from his failure to abide by the defendant's clearly expressed wishes must, therefore, be suppressed. This includes all evidence that was obtained from the defendant or at his home after the officer ignored the defendant's repeated orders for him to leave.

Motions to Dismiss

The defendant also argues that the

evidence is insufficient to support the charges of driving under the influence and resisting arrest. Based upon the ruling above, granting the motion to suppress, this issue need not be addressed, as the evidence supporting both charges is suppressed.

Based upon this decision, judgment must be entered for the defendant in the civil suspension case,

**Michael Munson, Deputy Bennington State's Attorney, Bennington, for State
Brad Myerson, Manchester Center, for defendant**

TAXATION – PROPERTY TRANSFER – EXEMPTION FOR LLC FORMATION

Docket No. 425-10-07 Bncv

NORTHSHIRE BOOKSTORE PROPERTIES, LLC

v.

VERMONT DEPARTMENT OF TAXES

Bennington Superior Court

March 27, 2008

HOWARD, J. Appellant-Taxpayer Northshire Bookstore Properties, LLC (Northshire) appealed from a Determination of the Commissioner of the Department of Taxes (Determination) upholding the Department's assessments of property transfer tax on the transfer of two parcels of real property. Northshire objects, arguing that the property transfers at issue were exempt from tax under 32 V.S.A. § 9603(24) which holds that transfers made to a limited liability company (LLC) "at the time of formation" are exempt from taxation. The Department, and the Commissioner on appeal, concluded that since the two parcels of property were not transferred until the Operating Agreement was finalized approximately six months after a Certificate of Organization was issued by the Secretary of State, the property was not transferred at the time the LLC was formed, and thus the property tax exemption in § 9603(24) did not apply. As such, the primary issue on appeal is whether a transfer of property subsequent to the issuance of a Certificate of Organization but contemporaneous with the finalization of an Operating Agreement satisfies § 9603(24)'s requirement that such transfer occur "at the time of formation." Since the Court concludes that an LLC is formed at the time articles of organization are filed, the claimed tax exemption does not apply, and the Determination is **AFFIRMED**.

Standard of Review

The court reviews this case "on the basis of the record established before the Commissioner." *State Dep't of Taxes v. Tri-State Indus. Laundries, Inc.*, 138 Vt. 292, 294 (1980). "[J]udicial review of agency findings is ordinarily limited to whether . . . there

is any reasonable basis for the finding." *Tri-State Industrial Laundries*, 138 Vt. at 294; accord *Bigelow v. Dep't of Taxes*, 163 Vt. 33, 35 (1994) (findings not set aside unless "clearly erroneous"). "[W]e must afford deference to the Commissioner's determination. . . ." *Morton Buildings, Inc. v. Dep't of Taxes*, 167 Vt. 371, 374 (1998); accord *Tri-State Industrial Laundries*, 138 Vt. at 294 (Commissioner's determination presumed "correct, valid and reasonable, absent a clear and convincing showing to the contrary").

Background

The dispositive facts are undisputed. Edward and Barbara Morrow are the majority owners of the Northshire Bookstore, located in Manchester Center, Vermont. In an effort to keep the bookstore economically viable, Mr. and Mrs. Morrow sought investors and funding to expand the bookstore. Part of the expansion included acquiring two adjacent parcels of real property. It was decided that this newly acquired real estate would be transferred to and held by a limited liability company called Northshire Bookstore Properties, LLC. Articles of Organization for such LLC were filed with the Secretary of State's Office on November 6, 2002, but the LLC's Operating Agreement was not finalized until six months later in May 2003. At that time the two parcels of real estate were transferred to the LLC and on May 23, 2003, the LLC filed a Vermont Property Transfer Tax Return declaring the transfer exempt from tax pursuant to 32 V.S.A. § 9603(24).

The Department denied Plaintiff the exemption on the grounds that the property transfer did not occur at the time the LLC was formed. Recognizing that there is no statute or regulation defining that which is considered to be "at the time of formation", the Department maintains an unwritten practice that it will treat transfers made within ninety days from the issuance of the LLC's Certificate of Organization by the Secretary of State to still be considered done "at the time of formation." Since Plaintiff's property transfer did not occur until approximately six months after the Certificate was issued, the Department billed Plaintiff a total of \$15,120 in tax plus interest and penalty for the transfer of both parcels of real estate.

On appeal to the Commissioner, the designated hearing officer affirmed, concluding that the date of formation of an LLC