NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA APPELLATE DIVISION

CHRISTOPHER RANKIN,

Appellant,

Appeal Case No. CRC 09-00030 APANO

vs.

UCN: ~~522008MM033783XXXXNO~~
522009AP000030XXXXCR

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed: 9/24/10.

Appeal from a decision of the
Pinellas County Court
County Judge Susan Bedinghaus

Lynda B. Barack, Esquire
Attorney for Appellant

Bernie McCabe, Esquire
State Attorney
Sixth Judicial Circuit of Florida
Attorney for Appellee

ORDER AND OPINION

PER CURIAM

This matter is before the Court on Defendant's appeal from the Judgment and Sentence of the County Court. This Court has jurisdiction and reverses the Judgment and Sentence.

On December 7, 2008, Officer Klimkoski responded to an apartment to look for a suspect believed to have been involved in a burglary. When he approached the apartment, Officer

Klimkoski stood on an object to look in the front window, which was halfway covered with a cloth. Officer Klimkoski saw the defendant, who was not involved in the burglary, and a minor, Jesse Gumos ("Gumos"), playing "beer pong" in the living room. Officer Klimkoski knew that Gumos was a minor because he had arrested him before. Through the window the officer heard the defendant say, "Do you need a beer?" He then knocked on the door, pretending to be a friend. Defendant and Gumos opened the door, and Officer Klimkoski had the defendant step outside to talk. Defendant admitted to drinking with Gumos and he believed Gumos was eighteen years old. The officer arrested the defendant for Contributing to the Delinquency of a Minor in violation of Fla. Stat. § 827.04.

The trial court denied a Motion to Suppress Officer Klimkoski's testimony regarding observations made through the window. A jury found the defendant guilty and he appeals, arguing that the trial court erred in denying the Motion to Suppress. In reviewing denial of a motion to suppress, the trial court's determinations of historical facts are presumptively correct, while mixed questions of law and fact are reviewed *de novo*. *Connor v. State*, 803 So.2d 598, 608 (2001).

Defendant argues that Officer Klimkoski's observations through the window constituted an unreasonable search and violated his reasonable expectation of privacy. The State denies that the officer's actions were improper and argues that Officer Klimkoski's observations were admissible because the same evidence would have inevitably been discovered when Officer Klimkoski knocked on the door.

We find that Officer Klimkoski's observations through the window violated the defendant's reasonable expectation of privacy. *Olivera v. State*, 315 So.2d 487 (Fla. 2d DCA 1975), *Brock v. U.S.*, 223 F.2d 681 (5th Cir. 1995). Moreover, the observations were not

admissible under the inevitable discovery doctrine, which states that evidence the police would have inevitably discovered through legal means is admissible regardless of whether it was obtained illegally. *Nix v. Williams*, 467 U.S. 431 (1984). However, the Court in *Nix* noted that "inevitable discovery involves no speculative elements." *Id.* at 444. Rather, "[t]he case must be in such a posture that the facts already in the possession of the police would have led to [the] evidence notwithstanding the police misconduct." *Moody v. State*, 842 So.2d 754, 759 (Fla. 2003).

Here, Officer Klimkoski had no evidence in his possession that would have led to discovery of the defendant's crime before looking through the window. He only had evidence regarding an unrelated burglary. Although Officer Klimkoski was going to knock on the door to try to make contact with the burglary suspect regardless of his observations through the window, any assertion that he would have discovered the same evidence observed through the window is pure speculation. What the officer saw and heard through the window is inadmissible and the trial judge erred in denying the Motion to Suppress.

Defendant further argues that the trial court erred in determining that the Motion to Suppress was not dispositive; however, the rule that a defendant may only appeal dispositive rulings applies only when the defendant enters a nolo contendere plea. Fla. R. App. P. 9.140(b)(2)(i). Defendant did not enter such a plea. He went to trial; therefore, whether the alleged error was dispositive is not an issue.

For the foregoing reasons, this Court concludes that the trial judge erred in denying the Motion to Suppress. The State has not shown that the error is harmless.

Additionally, the defendant argues that the trial court erred in assessing a public defender fee in the amount of $350.00 without giving notice and an opportunity to be heard. The State confesses error.

Accordingly, the judgment and sentence is reversed and this cause is remanded for a new trial, and in the event of a conviction, proper notice is to be given the defendant of his right to contest the attorney's fee.

DONE AND ORDERED in Rankin v. State (Appellate Court No. CRC 09-00030 APANO) at Pinellas County, Florida this 23 day of Sept, 2010.

Original order entered on September 23, 2010 by Circuit Judges David A. Demers, Thane B. Covert, and Chris Helinger.

Copies to: Honorable Judge Susan Bedinghaus

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