STATE OF VERMONT

SUPERIOR COURT
FRANKLIN UNIT

CRIMINAL DIVISION
Dkt. No. 85-1-15 Frcr

STATE OF VERMONT

v.

PHILLIP J. RUSSETT,
Defendant

OPINION AND ORDER
RE: MOTION TO SUPPRESS AND DISMISS

This matter came before the Court for hearing on April 14, 2015 and February 3, 2016 on Defendant's Motion to Suppress and Dismiss (filed Feb. 18, 2015). Defendant was present and represented by his attorney Robert Behrens, Esq. The State was represented by Franklin County State's Attorney Jim Hughes.

Defendant is charged with one count of baiting deer in violation of 10 V.S.A. App. § 37-10. Defendant moves to suppress all evidence obtained by the state game warden on December 9 and 13, 2014, and to dismiss upon the State's failure to make a prima facie case.

At the hearing on April 14, 2015, the Defense argued that the motion should be granted due to the State's failure to file a timely response as well as failure to provide the defense with a witness list. The Court called for a response to Defendant's motion within 10 days of March 6, 2015. The State's response was filed on April 10, 2015. Notably Defendant objects to all the testimony of the game warden.

FINDINGS OF FACT

Based upon the credible evidence adduced at hearing, the Court finds as follows:

Warden Carl Wedin was on duty as a Fish and Game Warden on December 8, 2014 when he was alerted to a purportedly baited area by an anonymous phone call. The warden was told there was a bait pile near a shooting shack off Deming Road between the St. Onge and Larivier hunting camps in the town of Enosburg.

Deming Road is a town road which goes to Deming Farm, runs past the farm, and up a hill to a house. There is an unmaintained road thereafter that accesses camps and goes into a wooded area. The road is maintained by the camp owners. There are three camps on the road, which has a right of way to each of them. Each camp owner has a 50 foot right of way to access their respective camps.

The warden was familiar with the area described by the caller. He called Clark Iron, who he believed was the owner of the Larivier camp. Mr. Iron told the warden he was not the owner the camp. The warden spoke to him about accessing the property.

The warden learned from Mr. Iron that Marc Larivier owned one camp; another was owned by the St. Onge family and by the date of hearing the warden knew that the third was owned by Defendant. The warden knew there was a third camp but was not aware that the Defendant owned it when he accessed the property the first time.

The warden had been in the area five to six years prior investigating the illegal taking of deer. He had met Mr. Larivier the previous year and had been given permission to use the road and to access his property to pursue the duties of a game warden.

The warden had also spoken to Randy St. Onge on a couple of occasions, who also indicated the warden could go onto his property as he needed. On December 8, 2014, the warden called Randy St. Onge and again received permission to go on the property. On both December 9 and 13, 2014 the warden went to the location.

On his first visit, the warden parked his truck at the end of the maintained portion of the road until he reached a gate at the access point to the unmaintained road. See Def.'s Ex. A (road that accesses the gate and the camp). It was daytime and overcast but otherwise clear and the warden could see "fine." As the warden proceeded up the hill he noticed a posted sign next to the gate, which was closed but not locked. The warden did not see a sign to the left, Def.'s Ex. H, on the day he went up. See also Def.'s Exs. D, F.

Because the warden was told that he could access the property, he opened the gate and proceeded past the gate on foot, continuing up the unmaintained road that leads to the camps. A chain held the gate shut and the warden lifted it. The warden knew he was entering onto a private road owned by the Lariviers and the St. Onges. The warden did not seek permission to enter Defendant's land because he did not know he was an owner of the land at the time. The warden had no idea where the land boundaries were.

There was snow on the ground and he saw several footprints on the roadway "here and there." Because the information he received on the phone was so general, he did not have a lot

of information from which to determine the bait location. He decided to follow tracks in the road to see where they led.

The warden did not see any other signs on his way to the camp.

The warden observed a camp on the left and one on the right. Footprints, which he followed, led away from and back to the road. There were no boundaries along that road, only the initial gate. The warden testified that there were not any trespassing or posted signs where he was going. The first camp on the left belongs to Defendant. See Def.'s Ex. J (depicting camp and Defendant pointing to a sign to the left on a tree which appears to be a POSTED sign). The warden did not see the sign depicted in Defendant's exhibit J on December 9, 2014. No signs indicated who owned the property along the road. He observed no sign on Mr. Larivier's property.

The warden followed the footprints in the snow which led down a hill and to an elevated shooting blind. The warden observed no other signs as he walked to the hunting blind. He did look to both sides of the road, though "not hard." He observed prints that led up the step and prints that led around the blind to a food plot. There was minimal snow. From the shooting blind the warden observed what appeared to be corn on the ground. He followed the boot prints into the food plot and discovered a spill of food midway through and on the far side of the open area of the food plot which was two to three inches off the ground and two to three feet across. The food spill was approximately "a five gallon bucket full."

The warden looked for trail cameras. He then took photos of the corn and the blind and looked for a name and address on the blind. After he took photos he walked back the same way he came in. The warden observed no signs on the way out. He exited through the same gate and closed it behind him.

The warden returned to the property a few days later. It was the last day of muzzle loader season, December 13, 2014. Snow had fallen the prior day and into the morning. He returned to the same area to verify whether anyone was hunting there. One set of boots print led toward the gate. The warden followed the boot prints through the gate to the road and through a clearing where he had previously observed the footprints a few days earlier. The area appeared the same; he observed no other signs posted and the gate was not locked.

As the warden walked up the road he still observed no boundaries or any trespassing signs. He followed the tracks to the shooting blind.

The warden knocked on the door to the shack and encountered Defendant. He was wearing camouflage and holding a muzzle loader facing the food plot and corn. The warden also observed a commercial bag of rabbit pellets inside the door.

The warden asked Defendant if he knew why the warden was there. Defendant said he did not. The warden asked Defendant why he had a bag of rabbit pellets there. Defendant said that he puts them out after deer season. The warden inquired whether he knew there was corn there. Defendant said he did not know anything about it.

The warden showed Defendant where the corn was. Defendant said that he owned the land and somebody must have gone on his property to put the corn there. Defendant also said that the property had signs and was posted. The warden replied that the only sign was on the gate. Defendant said someone must have taken the signs down.

When the warden went up the road to the hunting shack he denied passing a house. The warden did not know whose property he was on when he left the road. It was his understanding that the road was owned equally by three camp owners. He knew the Larivier camp was on the right and that the St. Onge property was at the end of the road on the left, but did not know where the land boundaries were. He did not know the first camp on the left was Defendant's.

The hunting shack is at the end of the road, beyond Defendant's camp. When the warden walked past the house, the blind was a couple of hundred yards away on the same side of the road. The blind is 180 to 200 yards from the private road and cannot be seen from the road.

Mr. Larivier testified and corroborated that he knows the warden and has granted him permission to access the road past the gate. In the past he had informed the warden that he was always welcome up there. In 2014 he reaffirmed that invitation when the warden called his home and indicated he needed access to the road because he had received an anonymous call that someone had been baiting deer in the area. Mr. Larivier said he had no problem and told the warden to "go on up there." Mr. Larivier did not think he was giving the warden permission for only a single day. The warden had been on the road before and therefore Mr. Larivier concluded he knew where his property was on the road. But at the time, they did not have a conversation about where Mr. Larivier's property was located. Although Defendant's name and ownership of his property may have come up on December 8, the extent of that discussion is unknown to the Court.

In Defendant's exhibit E, there are depicted two signs near the gate. One says "private property keep out," which Mr. Larivier had installed several years ago and the other says "no hunting," which he did not install.

Defendant's girlfriend testified credibly that she has been coming to the property which Defendant owns for three years and goes up there a couple of times a month to cut wood, walk, and maintain the property. She helped post the property, which they do every August. They put up signs and make sure the signs are not taken down by the wind, weather, or people ripping them. She was on the property in August 2014, four months prior to the incident. The property is seventy acres and is posted with at least 40 to 50 signs. She took the photos identified as Defendant's exhibits A, D, H, and J.

The Court finds that there is a no trespassing sign on the right side of the gate. See Def.'s Exs. D, E. There is a posted sign on the left. The posted sign in exhibit D which says no hunting is on Defendant's property. Defendant's exhibit H shows the gate and the gate ajar. The posted sign on the left is visible in the picture. Defendant's exhibit J depicts the gate from the road to Defendant's camp. Mr. Larivier verified that over the last five years Defendant had posted his property consistently throughout the summer and winter.

The Court finds that three signs are posted between the gate and where the warden went to the food plot. There are two on the way to the camp and a cracked one between the camp and the deer blind. Defendant's exhibit K depicts the first posted sign through the gate. Defendant's exhibit J depicts Defendant pointing to the second sign posted on the left before the camp. Defendant's exhibit L is a close up of Defendant's exhibit J. The two photos show the area 30 to 40 feet beyond what was depicted in Defendant's exhibit K. Defendant's exhibit M depicts a sign on a big tree facing the road located after an opening which leads to the blind. Defendant's girlfriend also testified that there is another sign between the house and an opening, but there is no photograph exhibit of that sign because it had been torn down. Two signs hang before the camp on the road and after the camp is another just beyond the road where the warden went. The distance between the gate and the opening is 500–600 feet. There is a fence around two sides of Defendant's property. Once through the gate there is no fence, but there is a posted sign.

The posted signs read "POSTED PRIVATE PROPERTY HUNTING, FISHING, TRAPPING OR TRESPASSING FOR ANY PURPOSE IS STRICTLY FORBIDDEN VIOLATORS WILL BE PROESCUTED."

CONCLUSIONS OF LAW

The Fourth Amendment of the United States Constitution and Chapter I, Article 11 of the Vermont Constitution prohibit law enforcement officers from conducting a warrantless search in places where an individual has a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *State v. Kirchoff*, 156 Vt. 1, 4 (1991). While the federal constitution provides no protection against searches of "open fields," our Supreme Court has found a reasonable expectation of privacy in fields "where the landowner has taken steps,

such as fencing or posting, to indicate that privacy is exactly what is sought." *Kirchoff*, 156 Vt. at 8.

In this case, it is of no consequence that the warden did not notice some of the posted signs. The test is an objective one: "Fencing or signs must be posted so that a reasonable person would conclude the land is intended to remain private." *State v. Hall*, 168 Vt. 327, 329 (1998). To any reasonable person, Defendant took appropriate steps to assure his property remained private. The property is posted with 40-50 "posted," no trespassing, and no hunting signs. There is fencing on two sides of the property. Most importantly, Defendant and the other property owners maintain a gate at the entrance to the private road to keep others out. The State argues Defendant did not have a reasonable expectation of privacy because Warden Wedin had permission to enter the gate, but consent merely excuses the warrant requirement. *State v. Zaccaro*, 154 Vt. 83, 87 (1990). The threshold question of whether defendant has an objective, reasonable expectation of privacy in their property does not ebb and flow based on who is seeking to enter the property.

Having established Defendant's expectation of privacy, the issue then shifts to whether Warden Wedin was excused from seeking a warrant. As noted, the warden received permission from two property owners to come through the gate and be on their property. They did not—and could not—give permission for the warden to search Defendant's property. That fact is not necessarily fatal to the State's position. Vermont law recognizes the apparent authority doctrine which in some cases allows a law enforcement officer to search property based on the consent of a third party he mistakenly believed had authority over the place searched, so long as his belief was reasonable. See *State v. Roberts*, 160 Vt. 385, 393 (1993); 2 W. LaFave Crim. Proc. § 3.10(d) (4th ed.). "As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (internal quotations omitted).

Warden Wedin testified that he knew there were at least three camps past the gate, but he only knew the owners of two of them. He knew the Larivier camp was located on the right of the road and the St. Onge camp was down the road a ways and to the left. He did not know the exact property boundaries, but had no reason to believe the property located immediately past the gate and to the left was owned by either the Lariviers or the St. Onges—the only property he had consent to search. Even if Mr. Larivier or Mr. St. Onge had intended to give the warden consent to search Defendant's property, the warden may not rely on consent from someone he knows cannot legally give it. *Stoner v. California*, 376 U.S. 483, 488 (1964). Without a reasonable belief that he had consent to search Defendant's property, the warden was required to obtain a warrant.

Accordingly, both the December 9, 2014 and December 13, 2014 searches were unconstitutional, warrantless searches. "Evidence obtained in violation of the Fourth Amendment and Article 11 . . . is inadmissible against a criminal defendant." *State v. Hawkins*, 2013 VT 5, ¶ 19, 193 Vt. 297. Any evidence obtained through the searches, and the fruits thereof, are suppressed. Without any evidence from the searches, the State does not make a prima facie case of baiting deer. The charge is dismissed.

Having come to this conclusion, the Court need not address Defendant's arguments regarding the timeliness of the State's filings.

OPINION AND ORDER

Defendant's Motion to Suppress and Dismiss is *granted.*

SO ORDERED.

DATED this the 31st day of March, 2016 at the county of Franklin, St. Albans, Vermont,

Hon. Alison Sheppard Arms
Superior Court Judge