FILED BY CLERK
DEC 28 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CRAIG S. DAHLIN, Appellant.	2 CA-CR 2011-0111 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000376

Honorable Ann R. Littrell, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Following a bench trial, appellant Craig Dahlin was convicted of possession of marijuana for sale, production of marijuana for sale, and possession of drug

paraphernalia. He was sentenced to presumptive, concurrent terms of imprisonment the longest of which was five years. On appeal, he argues the trial court erred by denying his motion to suppress evidence gained through entry onto his property and by improperly considering aggravating sentencing factors he claims were elements of the offenses of which he was convicted. For the reasons that follow, we affirm.

Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Dahlin's residence is located on a five-acre parcel of land he owns in a rural, gated community of approximately one hundred acres. Dahlin's property is "heavily treed" and has a section of river running through it.

¶3 In preparation for hunting season, off-duty border patrol agent Dagen Haymore was scouting a wooded, rural area near the river in June 2009. He was familiar with the area because he had hunted there for several years. While following what he believed to be a deer trail, Haymore noticed "a series of black irrigation hoses" next to what "appeared to be marijuana plants." Concerned that he might encounter someone guarding the property, Haymore immediately left the area and reported his discovery to law enforcement the following day.

¶4 Haymore returned to the area with two border patrol agents and two Cochise County Sheriff's Department detectives, using the route he had followed when he discovered the marijuana plants. That route led through a wash and required the officers to traverse two barbed wire fences. Upon reaching the area, the officers

encountered Dahlin near the plants. Dahlin informed the officers they were trespassing on private property, but, in response to an officer's questions, acknowledged he was growing marijuana and, at the officer's request, led them to his nearby home. After the officers obtained a search warrant for the residence and property, they discovered several hundred marijuana plants, dried marijuana stored in various containers, and drug paraphernalia. Prior to trial, Dahlin filed a motion to suppress the evidence gained by the officers' entry onto his property, which the trial court denied. Dahlin was convicted and sentenced as above. This appeal followed.

Discussion

Motion to Suppress

¶5 Dahlin contends the trial court erred when it denied his motion to suppress the evidence obtained through "two warrantless entries onto [his] property . . . and [through] a search warrant . . . based upon those unlawful entries." "In reviewing a denial of a motion to suppress, we review only the evidence submitted at the suppression hearing, and we view the facts in the light most favorable to upholding the trial court's ruling." *State v. Box*, 205 Ariz. 492, ¶ 2, 73 P.3d 623, 624 (App. 2003) (citation omitted). We defer to the court's factual determinations, but we review de novo its ultimate legal conclusion. *Id.* ¶ 7.

¶6 Dahlin claims that one of the warrantless entries occurred when the officers entered the curtilage of his home, and he argues the trial court erred by not granting his motion on this basis. We disagree. "[A]s a general rule, a warrant is required when the suspect has a reasonable expectation of privacy in the place or the item searched," *State*

v. Blakley, 226 Ariz. 25, ¶ 6, 243 P.3d 628, 630 (App. 2010). The Fourth Amendment expressly recognizes that individuals have a legitimate expectation of privacy in their own homes. U.S. Const. amend. IV; *see also Kyllo v. United States*, 533 U.S. 27, 31 (2001). This expectation extends to the "curtilage" of the home, *United States v. Dunn*, 480 U.S. 294, 300 (1987), which is distinguished from "open fields" and includes only "the land immediately surrounding and associated with the home" that a person may reasonably expect will remain private. *Oliver v. United States*, 466 U.S. 170, 176, 180 (1984). "The term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage . . . and need be neither 'open' nor a 'field' as those terms are used in common speech." *Id*. at n.11. "[N]o expectation of privacy legitimately attaches to open fields." *Id*. at 180. Thus, no privacy interests are violated when contraband is discovered in an open field beyond the curtilage of a home.

¶7 Courts employ four factors to determine whether an area is part of the curtilage:

> "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."

State v. Olm, 223 Ariz. 429, ¶ 10, 224 P.3d 245, 248 (App. 2010), *quoting Dunn*, 480 U.S. at 301. These factors "are not to be 'mechanically applied,' and are merely '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.'" *Id.*, *quoting Dunn*, 480 U.S. at 301. After applying these factors, the trial court rejected Dahlin's claim that the area the officers had entered was curtilage and instead concluded it was part of the open fields of Dahlin's property.

¶8 As to the first factor, the trial court found, and the record indicates, that the plants discovered by the officers were at least 100 feet from the house. In general, there is no particular distance at which curtilage ends. *United States v. Johnson*, 256 F.3d 895, 902 (9th Cir. 2001). "[C]ourts have reasoned that the curtilage of a home in a rural area could extend farther than the curtilage of a home in an urban or suburban setting." *Id.* But, "even in rural areas, it is rare for curtilage to extend more than 100 feet beyond the home." *United States v. Dellas*, 355 F. Supp. 2d 1095, 1103-04 (N.D. Cal. 2005) (collecting cases). Nevertheless, under the circumstances presented, we agree with the trial court that this factor taken alone "neither proves [n]or disproves that the marijuana was in the curtilage of the home."

¶9 Concerning the second factor, whether the area is included within an enclosure surrounding the home, the evidence presented at the suppression hearing established that Dahlin had two fenced areas on his property—an area enclosed with chain link fencing and a larger plot of land surrounded by barbed wire. The marijuana plants were located within the larger fenced area. The area enclosed within the chain link fence was immediately behind Dahlin's residence, contained several structures and stored items, and was partially cleared of vegetation. A barbed wire fence connected with one

side of the chain link and enclosed the larger, separate area.[1] In contrast to the area within the chain link fence, the land enclosed by the barbed wire was overgrown with vegetation and contained no structures.[2] Given the characteristics of the land within the barbed wire fence, we conclude it was not part of the "'enclosure surrounding the home.'" *See Olm*, 223 Ariz. 429, ¶ 10, 224 P.3d at 248, *quoting Dunn*, 480 U.S. at 301.

¶10 We next consider the nature and use of the area. The evidence presented at the hearing indicated the land was undeveloped and, other than the drip irrigation system, contained only a bird feeder and wind chimes. Dahlin testified he would sometimes "put up a temporary gazebo" and "bring chairs out there in the summertime, sit and watch the river." But these were at best occasional uses and are not evident from the photographs of the area presented at the hearing.[3] Indeed, the only visible activity portrayed in the photographs of the area is the cultivation of marijuana. This is consistent with the officers' testimony that they saw no evidence of human activity "other than the drip line and the marijuana" and that there was "nothing to indicate that it was somebody's useable, livable back yard." Accordingly, this factor supports a finding that the area was

[1]An opening in the chain link fence provided access to the area within the barbed wire. The irrigation lines also ran through the opening.

[2]Dahlin agreed that the area within the barbed wire contained "a lot of vegetation," and he noted that from the location where he encountered the officers, "you couldn't really even see the house."

[3]Dahlin also testified he is "a nud[i]st, and . . . [he] walk[s] around [his] property naked." He appears to argue that, due to this use of the property, he had a reasonable expectation of privacy in the area. While this use might indicate he had a subjective expectation of privacy in the area, it does not demonstrate the expectation was objectively reasonable. *See Blakley*, 226 Ariz. 25, ¶ 6, 243 P.3d at 630 (determination of curtilage turns on whether expectation of privacy in area is objectively reasonable).

not within the curtilage of the home. *See Oliver*, 466 U.S. at 179 (cultivation of crops is a type of activity that generally occurs in open fields).

¶11 Turning to the final factor, Dahlin contends the actions he took to protect the area from view were "several and significant." But, in support he argues only that he "protect[ed] the area from trespassers" by enclosing it with a barbed wire fence, which he maintains is a secondary barrier to "the locked, gated entrance with posted no trespassing signs" at the northern boundary of the community. But, Dahlin's fence was not posted with "No Trespassing" signs and the officers did not enter his property from the direction of the community fence with the posted signs, and testimony at the suppression hearing indicated they did not see them. And, as the trial court noted, Dahlin's fence was of "the type generally used to keep out livestock," and the owner of the community testified he had cattle on the property. Dahlin did not take sufficient steps to ensure the privacy of the land enclosed by the barbed wire. Indeed, he testified he placed the buildings on his property within the chain link fence area because this area provided greater protection. And, in any event, the presence of a fence alone would not be sufficient to invoke the protection of the Fourth Amendment. *See, e.g., Oliver*, 466 U.S. at 173-74, 184 (field not curtilage despite it being "highly secluded," fenced, locked and posted with "No Trespassing" signs at regular intervals).

¶12 Considering the factors together, we conclude the area in which the plants were found was not "so intimately tied to the home itself" that it should be considered curtilage. *See Olm*, 223 Ariz. 429, ¶ 10, 224 P.3d at 249, *quoting Dunn*, 480 U.S. at 301.

Accordingly, the trial court properly determined that a warrant was not required for the officers to enter the area. *See Oliver*, 466 U.S. at 180.

¶13 Dahlin also argues a second warrantless search occurred because officers trespassed on his private property. But, as the state points out, "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment." *Oliver*, 466 U.S. at 183-84. "Nor is the government's intrusion upon an open field a 'search' in the constitutional sense because that intrusion is a trespass at common law." *Id*. at 183; *accord Dunn*, 480 U.S. at 303-04 (trespass in open fields not search and not barred by Fourth Amendment). Thus, even assuming the officers had trespassed on Dahlin's land,[4] such a trespass would not implicate the Fourth Amendment and would not require suppression.

¶14 Dahlin next appears to challenge the validity of the search warrant authorizing police to search his residence because the affidavit made in support contained an inaccurate statement. In the affidavit, Detective Wilkins stated "the wash/river area is actually state land and not privately owned." The trial court found this statement erroneous but did not invalidate the warrant because it was "made in good faith" and "had no legal significance." "A trial court's finding on whether the affiant deliberately included misstatements of the law or excluded material facts is a factual determination, upheld unless 'clearly erroneous.'" *State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178,

[4]Dahlin argues, based on Haymore's familiarity with the area, the officers must have known they were on private property. But the officers testified they did not encounter any "No Trespassing" signs during their approach, saw nothing artificial other than the two fences and a ladder placed against one fence, and were not aware they were on private property until Dahlin informed them they were trespassing.

182 (1991), *quoting United States v. Fawole*, 785 F.2d 1141, 1145 (4th Cir. 1986). We find no error in the court's determination, much less clear error.

¶15 Challenges to warrant affidavits generally involve a two-step process. *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978); *see also Buccini*, 167 Ariz. at 554, 810 P.2d at 182. First, the defendant must establish by a preponderance of the evidence "that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement in the affidavit." *Buccini*, 167 Ariz. at 554, 810 P.2d at 182. If the court finds that the affiant made a false statement, the court removes that statement and determines whether sufficient probable cause remains. *Id.* Evidence seized under the warrant must be excluded only if the warrant application lacks probable cause after the improper statements are removed from consideration. *Id.*

¶16 Wilkins testified he believed the riverbed was state land. Haymore testified he was unaware whether the area was private property but thought it "could have been" state land. This testimony is sufficient to support the trial court's finding that the statement was "made in good faith" and not "knowingly, intentionally, or with reckless disregard for the truth." *Id.* Moreover, as the trial court correctly concluded, the statement "had no legal significance" because the officers entered only open fields and the warrant did not allege that the area to be searched was on state lands. Thus, even assuming the statement warranted exclusion, sufficient probable cause remained for issuance of the warrant.[5] *See id.*

[5]Dahlin argues the trial court erred in applying a good faith standard to this statement because the "*Leon* good faith case exception is not applicable to the facts of

¶17 Dahlin also contends that officers could have obtained a warrant before returning to his property because "'[a] physical address was not required for a search warrant.'" He maintains that, due to Haymore's familiarity with the area, "[a]mple resources and knowledge w[ere] available for the officers to adequately describe the premises to be searched." He concludes that by following Haymore to the location, instead of first obtaining a warrant, the officers violated his Fourth Amendment rights. But, as discussed, the trial court correctly held that Dahlin "had no constitutional protection against warrantless searches of th[e] area." Therefore, even assuming arguendo that Haymore had sufficient information to obtain a search warrant based on his initial discovery of the plants,[6] a warrant was not required to enter the area, and no violation occurred. *See Oliver*, 466 U.S. at 180.

Sentencing

¶18 Dahlin finally argues that the trial court erred by "finding aggravated factors that are inherent in the crime itself." The court found three aggravating factors: substantial planning and premeditation, pecuniary gain, and the quantity of marijuana

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this case." *See United States v. Leon*, 468 U.S. 897, 922 (1984) (applying good faith exception to officer's reasonable reliance on search warrant where warrant was ultimately invalid due to error of issuing magistrate). We agree with Dahlin that *Leon* is inapplicable because the error here is based on the officer's statement in the affidavit and not "on a magistrate's erroneous finding." But, it is not evident from the record that the court relied on *Leon*. And, in any event, as discussed above, Dahlin has not demonstrated the statement was made "knowingly, intentionally, or with reckless disregard for the truth." *Buccini*, 167 Ariz. at 554, 810 P.2d at 182.

[6]Wilkins testified that Haymore had tried to narrow down the area in which he had seen the plants, but, based on the description provided, Wilkins would not have been able to obtain a search warrant.

involved. Dahlin challenges only the first two. We review for an abuse of discretion a sentence within the statutory range. *State v. Tschilar*, 200 Ariz. 427, ¶ 32, 27 P.3d 331, 339 (App. 2001). But we review de novo whether an aggravating factor is an element of the offense and whether the trial court may consider that factor for purposes of sentence aggravation. *Id.*

¶19 Dahlin first contends the trial court erred in considering the factor of substantial planning and premeditation under the "catch-all provision" in A.R.S. § 13-701(D)(24). He asserts, without citation to authority, that substantial planning and premeditation is an element of the offense of production of marijuana because "growing an irrigated crop in Arizona inherently requires planning and premeditation."[7] In the absence of any authority, we cannot agree. But even if planning and premeditation were an element of production of marijuana under A.R.S. § 13-3405(A)(3), a trial court is permitted to use an element of the offense to aggravate a sentence under the catch-all provision if the defendant's actions go beyond what needs to be established for conviction. *See State v. Germain*, 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986) ("Where the degree of the defendant's misconduct rises to a level beyond that which is merely necessary to establish an element of the underlying crime, the trial court may consider such conduct as an aggravating factor . . . ."). Here, the court found that substantial planning and premeditation merited consideration as an aggravating factor due

[7]Although Dahlin cites A.R.S. § 13-3415(A) when he discusses production of marijuana, we assume he intends to cite A.R.S. § 13-3405(A)(3), the statute under which he was convicted in count two.

to the extensive and year-round, continuous nature of the operation. We agree. Therefore, the court did not err by applying this aggravating factor.

¶20 Dahlin next asserts the trial court impermissibly considered pecuniary gain as an aggravating factor because it is also an element of the possession of marijuana for sale charge. But even assuming, without deciding, that pecuniary gain is an element of the offense, it is a specifically enumerated aggravating circumstance that a trial court must consider in determining an appropriate sentence when present—even if the circumstance is also an element of the offense. A.R.S. § 13-701(D)(6); *see also State v. Bly*, 127 Ariz. 370, 371-73, 621 P.2d 279, 280-82 (1980) (legislature constitutionally may require consideration of element of offense more than once in exercising its authority to prescribe punishment for single crime); *Germain*, 150 Ariz. at 290, 723 P.2d at 108 (applying *Bly*). Consequently, the court did not abuse its discretion when it considered these aggravating factors during sentencing.

Disposition

¶21 We affirm Dahlin's convictions and sentences.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge