# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant,<br><br>v<br><br>JOEL ARTHUR GALLOWAY,<br><br>Defendant-Appellee. | FOR PUBLICATION<br>December 9, 2003<br>9:25 a.m.<br><br>No. 241804<br>Sanilac Circuit Court<br>LC No. 02-005495-FH<br><br>Updated Copy<br>February 13, 2004 |

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

MURPHY, J. (*dissenting*).

I respectfully dissent because the evidence showed that Sergeant Lawrence Scott, on the basis of objective facts, acted reasonably in proceeding to the barrier-free rear of defendant's premises in an effort to identify the property owner for purposes of seeking consent to a search and then saw marijuana plants in plain view. I would reverse the trial court's ruling suppressing the marijuana plants seized by the police.

With respect to the so-called knock and talk procedure, this Court in *People v Frohriep*, 247 Mich App 692, 697; 637 NW2d 562 (2001), stated:

> Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items.

The ruling in *Frohriep* indicates, consistent with the constitutional protection against unreasonable searches and seizures, US Const, Am IV; Const 1963, art 1, § 11, that an officer cannot merely go wherever the officer pleases under the guise of the knock and talk procedure; there must be a reasonable attempt to proceed and make proper contact with an individual or property owner. *Frohriep, supra* at 698-699. In other words, the police cannot go rummaging through one's property looking for evidence, and then simply argue that they were attempting to locate a property owner in order to request permission or consent to search. The *Frohriep* panel stated:

> Here, the knock and talk procedure that the police utilized involved police officers initiating an ordinary citizen contact. *The police action, i.e., approaching defendant as he was standing in his yard, did not amount to a seizure of defendant.* The police simply identified themselves, told defendant they had been informed that he had controlled substances on his property, and asked defendant's permission to "look around." [*Id.* at 701 (emphasis added).]

In general, it would be reasonable for the police to first go to the door of a home and knock when seeking consent to search. Here, however, when Scott arrived at the home and parked in the driveway, I believe it was reasonable for him to first approach an individual, an unknown neighbor, who he saw standing in the side yard of defendant's home as opposed to first going to a door of the residence.

It appears that, after identifying the neighbor, Scott went into the backyard of defendant's home without yet seeing another individual in the rear of the premises. At first glance, the reasonable thing to do would have been to go back to the residence and knock on the door. That being said, the prosecutor points out, consistent with the testimony at the suppression hearing, that Scott went to the backyard after being informed by police personnel in a surveillance helicopter that there was an individual in the backyard waving at the helicopter.[1] The record reveals that the backyard was open without any physical barriers over which to cross or climb.[2]

Scott's testimony indicates that he went to the backyard to identify and speak with the individual waving his arms. Scott testified that he was attempting to locate the owner of the property to execute what we have referred to as the knock and talk procedure, and when he approached the individual in the backyard, he noticed the marijuana plants in plain view. I find that Scott's actions in proceeding to the open backyard in an attempt to obtain consent to a search from the property owner under the facts of this case was proper and reasonable. In measuring the reasonableness of the officer's conduct, there can be no absolute rule that an officer who seeks to obtain consent to search from an individual must first go to the front door (or any door) of a residence as opposed to approaching an individual who is known to be on the property but outside the residence. This, in fact, was the situation that existed in *Frohriep*.

Because Scott was properly and reasonably attempting to execute the knock and talk procedure, consistent with the constitutional protections against unreasonable searches and seizures, there is no reason not to allow the application of the "plain view" doctrine. "The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). Scott

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[1] A police officer who worked as a "spotter" from the helicopter testified that, before Scott went to the backyard, he communicated to officers on the ground that an individual was in the backyard waving his arms. The officer further testified that, until this case, he had never seen a person wave at a helicopter during any of his fifty or so surveillance flyovers.

[2] Scott testified at the earlier preliminary examination that he did not have to pass through or over any fences, doors, or gates to get to the backyard.

was lawfully in defendant's backyard to engage an individual in conversation pursuant to the knock and talk procedure, from which vantage point he saw the marijuana plants. Photographic evidence confirms that the marijuana plants were in plain view. The evidence failed to show that Scott was actually searching defendant's property under the guise of the knock and talk procedure when he viewed the marijuana.[3] Moreover, the evidence indicated that Scott was an experienced police officer with sixteen years of employment with the Michigan State Police, and that he was very familiar with the appearance of marijuana plants. Therefore, the marijuana was properly seized by the police under the plain view doctrine and should not have been suppressed.

I would reverse the trial court's ruling that suppressed the marijuana plants and remand this case for further proceedings.

/s/ William B. Murphy

[3] I wish to emphasize that, assuming Scott subjectively anticipated or believed that marijuana would be located in the backyard, it would not require suppression of the evidence as long as he was not conducting an actual search and there was objective evidence providing a reasonable basis for Scott to proceed to the backyard in order to conduct the knock and talk procedure. See *People v Wilson*, 257 Mich App 337, 355-356; 668 NW2d 371 (2003) (officer's motive and subjective intentions do not invalidate objectively justifiable behavior under the Fourth Amendment); *Frohriep, supra* at 698. I respectfully disagree with the majority's assessment of my dissent as ignoring the trial court's factual findings and not giving the required deference to those findings. On review de novo of the decision to suppress, I am merely reaching a different legal conclusion than the trial court from the court's factual findings. There is no factual dispute, nor did the trial court find to the contrary, that an individual was waving his arms in the backyard of the property, that Scott was knowledgeable about this fact through communications from the helicopter, that the backyard was barrier-free, that Scott saw an unknown individual in the side yard upon first arriving at the premises, that Scott then went directly to the neighbor and stopped and spoke to the neighbor, and that Scott then proceeded to the backyard knowing that someone in that area was waving his arms. Even if Scott was proceeding hastily, which movement was halted when he encountered the neighbor, I fail to see how this fact would invalidate execution of the knock and talk procedure. I hardly believe that the *Frohriep* panel would have reached a different conclusion if the police had run up to the defendant at his location near the pole barn.