STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 7, 2005
v	No. 256878 Livingston Circuit Court
DENISE LOUISE POWELL, Defendant-Appellant.	LC No. 04-014120-FH

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant was charged with manufacturing less than twenty marijuana plants, in violation of MCL 333.7401(2)(d)(iii). Defendant appeals by leave granted the trial court's denial of her motion to suppress evidence. Specifically, defendant challenges the legality of the investigating officer's entrance into her backyard without a warrant, which enabled the officer to observe and confiscate thirteen marijuana plants growing in a vegetable garden directly behind and next to defendant's home. We conclude that the evidence should have been suppressed as the result of an unconstitutional search and, therefore, reverse.

Hamburg Township Police Officer Megan Pingston testified at the suppression hearing that after receiving an anonymous tip that marijuana was being grown in a garden at defendant's home, she responded to the home in order to investigate the allegation. When she arrived, Pingston parked in the driveway and proceeded to the front door where she either knocked or rang the doorbell. Although she could hear a dog barking from inside the home, Pingston testified that no one responded to the front door and that, despite having been informed by the anonymous tipster that the homeowners may have been on vacation at that time, she decided to go into the backyard to determine if anyone was "back there." She entered the backyard by walking through the side yard next to the home's garage. Pingston testified that there was no sidewalk in this area and that a split-rail fence ran along the property line. As Pingston rounded the back corner of the home she immediately observed marijuana growing in a garden located next to the house, directly under a window and adjacent to the back patio. Pingston testified that the garden was not visible from the roadway or from her initial position at the front of the home.

At the conclusion of the motion hearing the trial court denied the motion to suppress, reasoning that the absence of any fencing or signage prohibiting access to the backyard and the reasonableness of both the route taken by Pingston and her belief that someone may have been

outside in the backyard that morning justified her entry into the backyard. This Court granted leave to appeal the trial court's decision in that regard.

We review a trial court's factual findings in a suppression hearing for clear error and will affirm those findings unless left with a definite and firm conviction that a mistake has been made. *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). However, the trial court's application of constitutional standards to the facts is not afforded such deference. *People v Stevens*, 460 Mich 626, 631; 597 NW2d 53 (1999). We review de novo the trial court's ultimate decision on a motion to suppress evidence. *Powell*, *supra*.

Both the United States and the Michigan Constitutions protect citizens against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Absent an exception, a seizure conducted without a warrant is unconstitutional and the evidence obtained must be excluded. See *Terry v Ohio*, 392 US 1, 12-13; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Goldston*, 470 Mich 523, 528-529; 682 NW2d 479 (2004). The plain view exception to the warrant requirement allows the police to seize objects falling within the plain view of an officer who has a right to be in the position to have that view. *Harris v United States*, 390 US 234, 236; 88 S Ct 992; 19 L Ed 2d 1067 (1968); *People v Houze*, 425 Mich 82, 91; 387 NW2d 807 (1986). In the present case there is no question that the seized marijuana was in plain view. Therefore, the applicability of the plain view exception turns on whether Officer Pingston observed the marijuana from a position where she had a lawful right to be.

Generally, the Fourth Amendment protects persons against warrantless searches of the curtilage of a person's home, which has been described as the outside areas of a home "so intimately tied to the home itself" that an individual reasonably could expect persons to treat those areas as part of the home. *United States v Dunn*, 480 US 294, 300-301; 107 S Ct 1134; 94 L Ed 2d 326 (1987). The controlling test, however, is whether the police activity violated the defendant's reasonable expectation of privacy. *Katz v United States*, 389 US 347, 360; 88 S Ct 507; 19 L Ed 2d 576 (1967); *People v Whalen*, 390 Mich 672, 677; 213 NW2d 116 (1973).

Here, we conclude that in traversing the side yard of defendant's home in order to gain access to the backyard, Pingston invaded a portion of the curtilage of defendant's home to which defendant possessed a reasonable expectation of privacy. The record established that defendant's home is a single-family ranch. The marijuana seized in this case was planted at the rear of the home next to a backyard patio and immediately adjacent to the house itself and was not visible from the front of the house where a visitor would normally go to gain access to the premises, as Pingston did when she initially approached the residence. Ordinarily, access to the patio area was gained through the interior of the home via a sliding glass door, but access to the backyard area was also possible by walking through a narrow, grassy area along side the house, which was the means used by Pingston. However, although this side area provides access to a side door leading into the garage, past this door and well before one could observed the patio area, the trees, shrubs, landscaping, and fencing along the property line clearly suggest that further access to the home and its curtilage was not provided or welcome by proceeding beyond that door. Stated another way, the side yard area past the door to the garage, which Pingston walked through to gain access to the backyard area, was landscaped to communicate privacy and showed no evidence of use inconsistent with the landscaping. Further, the absence of "no trespassing" signage or fencing does not implicate the obvious message that access to the backyard by strangers is not provided by proceeding alongside the house.

The prosecution argues that because Pingston was engaged in a "knock and talk" procedure, her entrance into the backyard was proper and the subsequent seizure of the plainly viewed marijuana lawful. However, although this Court has approved the use of the knock and talk procedure as a valid police tactic for securing consent to search a premise where the police do not have enough information to obtain a warrant, we have expressly held that use of that procedure is nonetheless "subject to judicial review to ensure compliance with general constitutional protections," in particular those guaranteed by the Fourth Amendment. See *People v Frohriep*, 247 Mich App 692, 698; 637 NW2d 562 (2001) As one noted legal treatise provides:

> [W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment. But other portions of the lands adjoining the residence are protected, and thus if the police go upon these other portions and make observations there, this amounts to a Fourth Amendment search . . . . [LaFave, 1 Search & Seizure (4th ed), Residential Premises, § 2.3(f), pp 600-603.]

As explained above, Pingston failed to restrict her movements within the curtilage of defendant's home "to places visitors could be expected to go" and, in doing so, engaged herself in a search of defendant's property that was violative of the Fourth Amendment protection against unreasonable searches and seizure. *Id*.

Reversed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra