STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 3, 2012
v	No. 304422 Leelanau Circuit Court
JOSHUA ADAM SPENCER, Defendant-Appellee.	LC No. 10-001713-FH

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

The prosecutor appeals the trial court's order that granted defendant's motion to suppress evidence obtained from the search of defendant's pole barn. The prosecutor charged defendant with one count of delivery or manufacturing of between 5 and 45 kilograms of marijuana, MCL 333.7401(2)(d)(*ii*). For the reasons set forth below, we reverse and remand.

Defendant, who purports to be a primary caregiver under the Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq.*,[1] was charged for manufacturing marijuana beyond the amount permitted by the MMMA. At the preliminary examination, Michigan State Police Officer Kipling Belcher testified that he and Leelanau County Sherriff's Detective Greg Hornkohl visited defendant's residence on September 30, 2010 in order to investigate an anonymous tip that defendant was growing a quantity of marijuana beyond that permitted by the MMMA. After no one answered the door of the residence when they knocked, the officers circled the home and inspected the backyard, and then approached a newly constructed pole barn, which was located approximately 150 to 175 feet north-northeast of the home, and was connected to the home by a dirt path. Belcher testified that when they reached the pole barn, he knocked on the pedestrian door to the building. After a few moments, defendant exited the pole barn and Belcher noticed a strong odor of marijuana emanating from the door. According to Belcher, he initiated a conversation with defendant, who conveniently claimed that he was growing 45 marijuana plants in his pole barn as a "registered caregiver" under the MMMA.

[1] The MMMA grants the defendant the statutory protection of a "primary caregiver" only if he grows the statutory amount of marijuana and, therefore, the disposition of this case will determine defendant's status as either a primary caregiver or guilty as charged.

Belcher stated that he was able to verify that if defendant were in compliance with the MMMA, he would be permitted to grow 84 plants from his MMMA certification paperwork.

Belcher testified that after informing defendant of the allegations they had received through an anonymous tip, he asked defendant to give consent for he and Hornkohl to enter and search the pole barn. While Belcher informed defendant that he could legally deny them entry, he told defendant that he would seek a search warrant and leave an officer on the scene (to prevent destruction of evidence) if defendant refused to give consent. According to Belcher, at that point, defendant became obstinate, implied the officers should leave his premises, and attempted to jog toward his home and then toward the pole barn. Belcher admitted that he elevated his tone and briefly used physical force to restrain defendant in order to prevent him from destroying any potential evidence. However, he denied that he detained defendant, because he only told defendant that he could not enter one of his structures without a police escort.

Belcher claimed that defendant later apologized and admitted that he was fleeing into the pole barn because he knew he was growing more plants than allowed and was attempting to destroy them before the police could recover them. According to Belcher, defendant then agreed to fully cooperate and verbally consented to allow Belcher and Hornkohl to have complete access to the pole barn. Belcher testified that he counted 143 marijuana plants in different rooms and in various stages of growth. Belcher testified that he seized the extra plants with defendant's assistance. At the close of the preliminary examination, the court bound the matter over to the circuit court.

Defendant subsequently filed a motion to suppress all evidence obtained from the search, on the ground that the officers engaged in an unreasonable search in violation of the Fourth Amendment. Defendant essentially argued that the officers' conduct went beyond what was constitutionally permissible in a "knock and talk" search and trespassed onto defendant's private property when they observed no evidence that defendant was then currently on the premises or engaged in criminal activity. Plaintiff replied that the search was constitutionally permissible because defendant's consent to search was knowingly and voluntarily made.

The trial court ruled that the officers lacked probable cause for a search of the pole barn. Because growing marijuana is permitted under the MMMA, the court reasoned, merely smelling marijuana from outside the pole barn offered no proof of criminal activity.[2] The court also noted that defendant's brief restraint was permissible to prevent defendant from destroying any evidence, and further that defendant's consent was not coerced and was knowingly and voluntarily made. However, the court ruled that the officers' search of the premises was unreasonable because they were essentially wandering around private areas of defendant's land looking for incriminating evidence. Because the officers went beyond what was permitted by the "knock and talk" procedure, the court ruled that the police were unreasonably trespassing on defendant's land when they went to the pole barn. Accordingly, the trial court granted defendant's motion to suppress.

[2] In light of the growing restrictions of the MMMA, the trial court's reasoning begs the question at issue.

The prosecutor argues that the search of defendant's premises did not violate his Fourth Amendment rights because the conduct of the police in approaching and knocking on the pole barn door was not a "search" that implicated constitutional protections. We agree.

> We review de novo a trial court's ultimate decision on a motion to suppress. However, we review the trial court's findings of fact for clear error. A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. This Court must give deference to the trial court's factual findings, particularly where the credibility of witnesses is involved. Accordingly, we may not substitute our judgment for that of the trial court and make independent findings. It is the prosecutor's burden to show that a search and seizure challenged by a defendant [was] justified by a recognized exception to the warrant requirement. [*People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003) (citations omitted).]

Both the United States and Michigan Constitutions protect citizens from unreasonable searches and seizures by the government. US Const, Am IV; Const 1963, art 1, § 11.[3] In order to implicate these protections, the government must first conduct a search, which is defined as an intrusion on a person's reasonable or justifiable expectation of privacy. *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002); see *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). "A mere 'technical trespass' does not transform an otherwise reasonable investigation into an unreasonable search." *People v Houze*, 425 Mich 82, 93; 387 NW2d 807 (1986) (citations omitted). We evaluate a search under the totality of the circumstances in determining whether the intrusion violated both a person's subjective and objective expectation of privacy. *Taylor*, 253 Mich App at 404-405.

Unless there is a valid exception to the warrant requirement, such as consent, any evidence obtained from a search or seizure performed without a warrant is suppressed. *People v Beydoun*, 283 Mich App 314, 337-338; 770 NW2d 54 (2009). A seizure occurs if a person is deprived of dominion over his or her property. *Horton v California*, 496 US 128, 133; 110 S Ct 2301; 110 L Ed 2d 112 (1990). Evidence may be lawfully seized without a warrant if: (1) the police were lawfully present at the location where they observed the contraband; (2) the police had a lawful right of access to the contraband when they seized the property; and (3) its incriminating nature is immediately apparent. *Id.* at 136-137. The Court looks to the objective conduct of the officers in conducting the search or seizure without consideration of the officers' subjective intent behind their actions. *Id.* at 138.

Here, the parties dispute the validity of the police officers' approach of the pole barn and purported use of the "knock and talk" procedure to initiate contact with defendant. The knock and talk procedure has been accepted as constitutional. See *People v Frohriep*, 247 Mich App

[3] This Court generally construes the protections of the Michigan Constitution as identical to those guaranteed by the United States Constitution, unless a compelling reason justifies a different interpretation. *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004).

692, 637 NW2d 562 (2001). See also *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973). As established in *Frohriep*, a 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 establish 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 at police officers, and request consent to search for the suspected illegality or illicit items. [*Frohriep*, 247 Mich App at 697.]

Defendant asserts that the officers exceeded the scope of a knock and talk procedure by continuing to search for defendant at the pole barn when they had no indication that he was on the premises. In so doing, defendant claims the police were not lawfully on the premises when they obtained his confession and seized the marijuana in the pole barn. Defendant further claims that the officers' intrusion was not cured by defendant's later consent.

In view of constitutional precedent, we hold that the trial court erred in suppressing the evidence. As clearly established in *United States v Dunn*, 480 US 294, 302-304; 107 S Ct 1134; 94 L Ed 2d 326 (1987), people do not enjoy a reasonable expectation of privacy in areas outside the curtilage of their property, which is "the area around the home to which the activity of home life extends." *Dunn* concluded that large fields not contained within an immediate fence surrounding the defendant's residence and a detached barn located 50-60 yards from the suspect's home were not within the curtilage of the home. *Id.* at 304. "Standing in isolation," the Court concluded, "this substantial distance supports no inference that the barn should be treated as an adjunct of the house." *Id.* at 302. The Court also found

> significant that respondent's barn did not lie within the area surrounding the house that was enclosed by a fence. We noted in *Oliver* [*v United States*, 466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984)], that "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." 466 US, at 182, n. 12, 104 S Ct, at 1743, n 12. Viewing the physical layout of respondent's ranch in its entirety, . . . it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house. Conversely, the barn—the front portion itself enclosed by a fence—and the area immediately surrounding it, stands out as a distinct portion of respondent's ranch, quite separate from the residence. [*Dunn*, 480 US at 302.]

"It is especially significant," the Court continued, "that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home." *Id.* Finally, the Court found that the defendant "did little to protect the barn area from observation by those standing in the open fields." *Id.* at 303. The Court explained that under the circumstances, the police did not commit an unreasonable search by circling the barn and peering inside it with flashlights. *Id.*

Unlike *Dunn*, there is no evidence in the record of a fence (or other structure) demarcating the curtilage. However, the distance between the detached barn and the residence in *Dunn* is approximately the same as the distance between the detached pole barn and the residence in this case. Moreover, there is no indication that defendant did anything "to protect the barn area from observation by those standing in the open fields." *Id.* at 303.

The pole barn was also not in an area where the intimate daily activity of defendant's life extended. "Generally speaking, curtilage has been held to include all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling, and is habitually used for family purposes." *United States v Potts*, 297 F2d 68, 69 (CA 6, 1961). "A dwelling's curtilage for Fourth Amendment purposes is generally the area so immediately and intimately connected to the home that within it, a resident's reasonable expectation of privacy should be respected." 68 Am Jur 2d, Searches and Seizures, § 69, p 184. Although some of the marijuana grown in the pole barn was used by defendant's wife under MMMA, the barn itself was not used for family purposes. Moreover, "[a]n individual may not have a reasonable expectation of privacy, even in areas close to the principle residence, such as will allow them to be treated as the curtilage, when those areas are readily accessible and visible to the public." The pole barn was readily accessible by a dirt path, and there is no indication in the record it was not visible to the public from that path.

Defendant relies on this Court's decision in *Galloway*, in an attempt to establish that police officers cannot enter any portion of the premises that is not a common area that is accessible to the public. In *Galloway*, this Court ruled that the police violated a person's right to privacy by using a knock and talk procedure as a sham in order to enter the backyard and obtain viewing access to contraband, which was then seized under the plain view exception. *Galloway*, 259 Mich App at 640-641.

But this case is distinguishable from *Galloway*. Here, Belcher and Hornkohl sought (and obtained) defendant's consent to search the premises. The contraband seized, and defendant's confession as a result, was born of his consent, not the plain view exception as in *Galloway*.

More importantly, *Galloway* involved officers who intruded on the curtilage by walking into defendant's backyard without knocking on the door of the residence in an attempt to contact a resident and ask for permission to search the premises. *Id.* at 641. The officers' direct entry "into the backyard of a private home" was "more aptly characterized as an investigatory entry." *Id.* at 640. In this case, the officers were not on the curtilage when they knocked on the door of the pole barn in order to make contact with defendant.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad