[Cite as *State v. Vondenhuevel*, 2004-Ohio-5348.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO **CASE NUMBER 8-04-15**

PLAINTIFF-APPELLANT

v. **O P I N I O N**

CHARLES VONDENHUEVEL

DEFENDANT-APPELLEE

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: October 4, 2004

ATTORNEYS:

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ROGERS, J.

{¶1} Although originally placed on our accelerated calendar, we have elected, pursuant to Local Rule 12(5), to issue a full opinion in lieu of a judgment entry.

{¶2} Plaintiff-Appellant, the State of Ohio, appeals a judgment of the Logan County Court of Common Pleas, granting Defendant-Appellee's, Charles Vondenhuevel, motion to suppress all evidence obtained by the Logan County Sheriff's Office from his property. On appeal, the State contends that the trial court erred in granting Vondenhuevel's motion. Finding that the evidence seized was within the curtilage of Vondenhuevel's house and that the sheriff's department seizure of the property without a warrant was unlawful, we affirm the judgment of the trial court.

{¶3} In August of 2003, the Logan County sheriff's department, in conjunction with other state agencies, conducted a helicopter marijuana eradication program. The program involved a helicopter flying over certain properties, as well as officers on the ground. While in the air, BCI agent, Dwight Anspacher, witnessed and photographed marijuana plants growing on Vondenhuevel's property. The photographs focused on a kennel, approximately thirty-five feet from Vondenhuevel's house. The kennel consisted of a concrete pad about the size of a mobile home. Vondenhuevel's property was on the list of

properties to be inspected by helicopter, based on an anonymous complaint by a neighbor that Vondenhuevel was growing marijuana on his property.

{¶4} Sergeant Cooper, the officer on the ground, was advised that marijuana was located on Vondenhuevel's property. At that point, Cooper drove to Vondenhuval's property, exited his vehicle and walked toward an open barn, from which he could hear music. Cooper then walked over to the marijuana plants and pulled them out of the ground.

{¶5} Subsequently, Vondenhuevel was indicted for illegally cultivating marijuana plants in violation of R.C. 2925.04, a felony of the third degree. In February of 2004, Vondenhuevel filed a motion to suppress the evidence obtained from his property.

{¶6} In March of 2004, a hearing was held on Vondenhuevel's motion. At the hearing, Cooper's testimony was the only evidence presented. He testified to the above events. He also testified that the anonymous tip had come in approximately two weeks prior to the helicopter fly-over and that there had been no attempt to verify the complaint. Additionally, Cooper testified that he did not obtain a search warrant or Vondenhuevel's permission prior to entering Vondenhuevel's property. He stated that there was nothing prohibiting the sheriff's department from obtaining a warrant, that a warrant generally takes two to four hours to obtain and that there were seven to nine officers and agents on the

ground that could have secured the property while a warrant was obtained. Finally, Cooper testified that there was nothing alarming going on at Vondenhuevel's property. There was no evidence that the marijuana was in any danger of being destroyed or removed, and there was no evidence of any type of violent retaliation being taken by Vondenhuevel or anyone else on his property.

{¶7} Finding that the marijuana plants were contained within the curtilage of Vondenhuevel's house and that no exigent circumstance were shown to indicate the plants were at risk of being destroyed, the court concluded that the sheriff's department was required to obtain a warrant prior to entering the property and, accordingly, granted Vondenhuevel's motion. It is from this judgment that the State appeals, presenting the following assignment of error for our review.

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT TO SUPPRESS EVIDENCE RETRIEVED BY LAW ENFORCEMENT WHO SAW MARIJUANA GROWING DURING A FLY OVER DURING AN ERADICATION PROGRAM

{¶8} In the sole assignment, the State contends that the trial court erred in granting Vondenhuevel's motion to suppress the evidence retrieved following the fly-over. Specifically, the State argues that the marijuana, which was located by helicopter, was observable from public airspace and was not within an enclosure. Additionally, the State argues that no efforts were taken to protect the marijuana from an overhead view. Thus, according to the State, the seizure was lawful since

the plants were in plain view and, as a result, Vondenhuevel had no reasonable expectation of privacy. We disagree.

{¶9} Appellate review of a decision on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez* (11th Cir. 1992), 949 F.2d 1117, 1119. At a suppression hearing, the trial court assumes the role of trier of fact, and as such, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Carter* (1995), 72 Ohio St .3d 545, 552. As such, a reviewing court must accept a trial court's factual findings if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. The reviewing court then applies the factual findings to the law regarding suppression of evidence. An appellate court reviews the trial court's application of the law de novo. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶10} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Accordingly, the state is prohibited from making unreasonable intrusions into areas where people have legitimate expectations of privacy without a search warrant. *United States v. Chadwick* (1977), 433 U.S. 1, 7, 97 S.Ct. 2476, overruled on other grounds in *California v. Acevedo* (1991), 500 U.S. 565, 111

S.Ct. 1982. Such areas include a person's home and the curtilage surrounding it. *Oliver v. United States* (1984), 466 U.S. 170, 180, 104 S.Ct. 1735; *Hester v. United States* (1924), 265 U.S. 57, 44 S.Ct. 445. "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" *Oliver*, 466 U.S. at 180, citing *Boyd v. United States* (1886), 116 U.S. 616, 630, 6 S.Ct 524, overruled on other grounds in *Warden v. Hayden* (1967), 387 U.S. 294, 87 S.Ct. 1642. Therefore, curtilage has been considered part of the home itself for Fourth Amendment purposes and courts have extended Fourth Amendment protection to the curtilage. *Oliver*, 466 U.S. at 180. In defining curtilage courts have relied upon factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. Id., citing *United States v. Van Dyke* (4th Cir. 1981), 643 F.2d 992, 993-994; *United States v. Williams* (5th Cir. 1978), 581 F.2d 451, 453; *Care v. United States* (10th Cir. 1956) 231 F.2d 22, 25, cert. denied, 351 US 932, 76 S.Ct 788. Conversely, as at common law, no expectation of privacy legitimately attaches to open fields. *Oliver*, 466 U.S. at 180.

{¶11} In *United States v. Dunn* (1987), 480 U.S. 294, 107 S.Ct. 1134, the United States Supreme Court set forth a four-factor test to determine the extent of the curtilage:

> **Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task**

> **of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: 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. We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are 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. at 301. (Citations and footnote omitted.)

{¶12} Applying these factors to the kennel area where Cooper seized the marijuana plants, we conclude that the trial court properly found that the plants lay within the curtilage of Vondenhuevel's house. First, the record discloses that the kennel area was located approximately thirty-five feet from the house itself. While there is no exact formula for determining proximity, greater distances have been upheld. See *State v. Todor* (Dec. 9, 1999), 4th Dist. No. 99CA09, unreported, (fifty yards from the house found to be sufficient proximity); *State v. Bayless* (Dec. 10, 1992), 4th Dist. No. 92 CA 527, unreported, (fifty feet from the house found to be a sufficient proximity). Secondly, upon a review of the record, specifically the aerial photographs, we find that kennel is clearly included within an enclosure surrounding Vondenhuevel's home. The aerial photographs show a

clear area surrounding Vondenhuevel's home. There is a fence running from a barn to a tree-line, which is directly behind the kennel area. The tree-line is clearly discernible and runs to an L-shaped drive-way. A second fence is located on the other side of the drive-way and is connected to a second barn. The two fences, the tree-line and the barns clearly act as boundaries to Vondenhuevel's house.

{¶13} Thirdly, the area inside the enclosure is mowed and sufficiently landscaped. Accordingly, the record reveals that the area in question was used as Vondenueval's lawn or yard area and was not an open-field. Finally, the record discloses that Vondenhuevel did little to protect the plants from observation by passers-by. However, the kennel area is on the back side of the property. Additionally, from the aerial photograph, it appears that his entire property is set quite a ways from the main road and was surrounded by fields that would prevent passers-by from viewing the area.

{¶14} Viewing these factors together, we conclude that the plants were growing within the curtilage and are entitled to Fourth Amendment protection. The kennel area was located in close proximity to the house. Vondenhuevel's house was sufficiently enclosed, and the kennel area was included within the surrounding enclosure. The lawn was mowed and landscaped, and it appears that sufficient steps were taken to protect the area from observation by passers-by.

{¶15} Having found that that the area where the plants were seized was within the curtilage of Vondenhuevel's home and is entitled to Fourth Amendment protection, we must next determine whether Cooper was nevertheless justified in making a warrantless seizure. In its brief, the State argues that even an area determined to be curtilage may not be protected when that area is open to public view. Relying on *California v. Ciraolo* (1986), 476 U.S. 207, 106 S.Ct. 1809, and *Florida v. Riley* (1989), 488 U.S. 445, 109 S.Ct. 693, the State asserts that the United States Supreme Court has held that warrantless aerial observations do not violate a defendant's constitutional rights.

{¶16} The State correctly notes that warrantless aerial observations have been upheld as constitutional; however, it incorrectly applies those cases to the facts here. While warrantless aerial *observations* may be permissible, warrantless *seizures* without exigent circumstances are not permissible. See *State v. Wangul* (Feb. 14, 2002), 8th Dist. No. 79393, unreported; *State v. Staton* (Mar. 15, 1991), 2d. Dist. No. 90-CA-62, unreported. Under the State's argument, plain view alone is sufficient to justify a warrantless seizure. However, in *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, the Supreme Court held that searches committed outside the judicial process without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment subject to only a few well defined exceptions. The Supreme Court went on to note:

> **The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.**

Id. at 468. (Citations omitted.)

{¶17} Exigent circumstances exist when there is a substantial risk of harm to persons or to the law enforcement process if the police were to delay a search until a warrant could be obtained. See, *U.S. v. Hicks* (9th Cir. 1985), 752 F.2d 379, overruled on other grounds in *LaLonde v. County of Riverside* (9th Cir. 2000), 204 F.3d 947.

{¶18} In the case sub judice, Sergeant Cooper testified that it would have taken him two to four hours to secure a search warrant, that there was nothing alarming going on at Vondenhuevel's property indicating that the marijuana plants were going to be destroyed and that there were several officers on the ground that could have secured the area while a search warrant was secured. Thus, we cannot say that there was any risk of harm to any persons or the law enforcement process if Cooper had delayed his seizure until a warrant was obtained. The evidence presented at the hearing failed to establish that there were any exigent

circumstances justifying the warrantless seizure of the marijuana plants. There was no evidence that the contraband was about to be destroyed or removed, and there was an adequate number of officers to protect the scene until a warrant could be obtained. See *Wangul*, supra; *Staton*, supra.

{¶19} Furthermore, Sergeant Cooper had sufficient evidence to obtain a search warrant for Vondenhuevel's property following the fly-over. As in *California v. Ciraolo*, the officers' warrantless aerial observation could have been used to obtain a warrant. However, a warrantless seizure of the plants, without any exigent circumstances, could not be based upon observations alone.

{¶20} Having found that the kennel area, where the marijuana plants were seized, is within the curtilage of Vondenhuevel's house and that the sheriff's department failed to prove the existence of any exigent circumstances, we find that the trial court did not err in granting Vondenhuevel's motion to suppress. Accordingly, the State's sole assignment of error is overruled.

{¶21} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

BRYANT, J., concurs.

CUPP, J., concurs separately.

{¶22} CUPP, J., concurs separately. I do not believe that the area in which the growing marijuana was found is so clearly and necessarily within the curtilage of the home as the majority opinion seems to suggest. I concur with the majority's conclusion that the location of the marijuana plants are within the curtilage but only because of what is not in the record before us.

{¶23} Sergeant Cooper testified, upon cross-examination by defendant, that the helicopter search of defendant's property was conducted based on an anonymous tip that defendant might be growing marijuana, The tip was from a person purporting to be a neighbor of defendant's. However, the record of the suppression hearing provides no evidence to show how a neighbor might have been able to observe the marijuana on defendant's property. Such evidence is significant because it may have shown that defendant had no reasonable expectation of privacy at the location where the marijuana was being grown and, therefore, the growing marijuana plants were not within the curtilage.

{¶24} The photographic exhibits appear to show that the kennel area where the marijuana was found growing is vacant of dogs or other animals; is not used for "the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" *Oliver v. United States* (1984), 466 U.S. 170, 180; and that the marijuana plants are in open view and would be visible to a curious neighbor

standing in an area which, on the photograph marked as "Exhibit 2", appears to be an open corn field.

{¶25} Without testimony or other evidence, however, showing that the apparent corn field was in the possession of someone other than the defendant, this court may not presume it is a neighboring property rather than part of defendant's property. If it is not the property of a neighbor, then the majority's conclusion that the kennel area would enjoy a reasonable expectation of privacy from passers-by is correct, and the kennel area with its marijuana plants would fall within the curtilage. On this state of the record, then, I am constrained to affirm, as does the majority, the trial court's judgment suppressing the evidence.

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