

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 29, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP1226-CR**

**Cir. Ct. No. 2006CF599**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS W. HOLLAND,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County:  
LINDA M. VAN DE WATER, Judge. *Modified and, as modified, affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Thomas W. Holland pled guilty to manufacture/delivery of THC (>2500 – 10,000 grams). He appeals from the judgment of conviction on grounds that the trial court wrongly denied a motion to suppress the

fruits of a premises search triggered by materials found in garbage bags put out for collection on a sanitation easement. We conclude that Holland did not demonstrate a reasonable, subjective expectation of privacy in garbage so placed. We affirm.

¶2 Holland lives at the end of an access road that also serves another property situated between his house and the main thoroughfare. City records indicate that the driveway is subject to a sanitation and access easement. Police officers were informed of a possible indoor “marijuana grow” operation at Holland’s address. While surveilling the property one evening, an officer saw garbage cans inside Holland’s garage through its open doors. When the officer returned around 11:15 p.m., the garbage cans had been moved about forty-five feet outside the garage to the mouth of the easement.

¶3 The officer retrieved garbage bags from the trash cans. Materials in the bags tested positive for cocaine and THC. Based on that discovery, a warrant issued for a search of Holland’s residence. Police found grow rooms, specialized equipment, scores of marijuana plants and a .38-caliber handgun. Holland was charged with manufacture/delivery of THC (>2500 – 10,000 grams), second and subsequent offense, possession of a firearm by a felon and maintaining a drug-trafficking place.

¶4 Holland filed a motion to suppress materials confiscated in the search and statements he made to police, arguing that the search warrant was illegally issued because he had a reasonable expectation of privacy in his garbage. The court denied the motion. Holland pled guilty to manufacture/delivery of THC (>2500 – 10,000 grams). He appeals.

¶5 Holland argues that he had a reasonable expectation of privacy in his garbage because (1) it was out of public view on the curtilage of his property at the end of a private road and (2) there was no indication, besides moving the trash out of the garage, that he intended to abandon it or make it available to a third party for collection. We disagree.

¶6 On review of a trial court’s denial of a motion to suppress evidence, we uphold the court’s factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Whether a search passes constitutional muster, however, is a question of law to be decided de novo. *Roberts*, 196 Wis. 2d at 452.

¶7 The Fourth Amendment does not prohibit a warrantless seizure of garbage bags from garbage cans left for collection beyond the curtilage of a residence. *See California v. Greenwood*, 486 U.S. 35, 37 (1988). The test for determining the constitutionality of a warrantless garbage search is “(1) whether the individual by his or her conduct has exhibited an actual, subjective expectation of privacy, and (2) whether that expectation is justifiable in that it is one which society will recognize as reasonable.” *State v. Sigarroa*, 2004 WI App 16, ¶19, 269 Wis. 2d 234, 674 N.W.2d 894. The defendant bears the burden of establishing a reasonable expectation of privacy by a preponderance of the evidence. *State v. Orta*, 2003 WI App 93, ¶11, 264 Wis. 2d 765, 663 N.W.2d 358. The controlling standard is the totality of the circumstances. *Id.*, ¶14.

¶8 We turn first to Holland’s “curtilage” argument. Whether a certain area is part of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. *State v. Artic*, 2010 WI 83, ¶93, 327 Wis. 2d 392, 768 N.W.2d 430;

(see also *United States v. Dunn*, 480 U.S. 294, 300 (1987)). Those factors include the proximity of the alleged curtilage area to the home, whether the area is enclosed, the owner's use of the area and the steps the owner takes to protect the area from observation. *Dunn*, 480 U.S. at 301.

¶9 Based on the police officer's testimony at the suppression hearing, the trial court found that the officer first observed the garbage cans inside the garage, later saw that they had been dragged outside to a spot about forty-five feet away from the house to the mouth of the driveway, the area was not posted as private property and UPS used the access road. The trial court concluded there was no trespass onto the curtilage. These findings are not clearly erroneous. We have little difficulty concluding that the end of the sanitation easement—the area where the garbage was placed—lay outside the curtilage of Holland's house.

¶10 Even if within the curtilage, however, Holland's challenge still fails. The law has moved away from a strict "curtilage" approach. See *Sigarroa*, 269 Wis. 2d 234, ¶16. The central consideration is whether Holland's claimed expectation of privacy in the garbage left out for collection was one society would deem reasonable. See *id.*, ¶¶16-19.

¶11 Holland argues that, except that the trash was relocated, the record is devoid of evidence that he intended to abandon or relinquish it. Although the burden was his to prove that his expectation of privacy was reasonable, he offers no material facts showing he took precautions associated with notions of privacy in his garbage. He does not claim that the area was gated, fenced or posted as private property. Instead of keeping the garbage cans in the garage, he moved them well away from the house to an area the city designated for the express purpose of having strangers take it.

¶12 The trial court concluded that if Holland had an expectation of privacy in the garbage put out late at night for collection, his expectation is not one society would recognize as reasonable simply because police officers, rather than sanitation workers, picked it up. We agree. The trial court properly denied the motion to suppress.

¶13 We note that the judgment of conviction indicates that Holland pled not guilty. We order that the judgment be amended to reflect that Holland was convicted upon entering a plea of guilty.

*By the Court.*—Judgment modified and, as modified, affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

