COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3302-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

TIMOTHY H. POWERS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. The State appeals an order suppressing evidence that the police seized from Timothy Powers's property. The State argues that the trial court erroneously concluded that the evidence was the fruit of an unconstitutional search and seizure. The police obtained a search warrant for Powers's residence after an officer discovered marijuana plants growing at the bottom of a berm-

ringed compost pile in the woods at least eighty feet behind Powers's home. The trial court concluded that the compost pile was within the curtilage of Powers's home, and that the initial warrantless search and seizure of the marijuana growing in the compost pile was therefore unconstitutional. Because we conclude that the compost pile was not within the curtilage of Powers's home, we reverse the order and remand this case for further proceedings.

After receiving a tip from an informant, deputy sheriff Michael Richter went to Powers's residence to investigate the possible existence of marijuana plants. It was established at the trial court that Powers's lot was approximately 90,000 square feet (300 feet by 300 feet), and divided into a smaller area of a manicured lawn and a larger area of wooded land. Richter parked some distance away from Powers's house and approached through the woods.

While searching through the woods behind Powers's house, Richter observed a large compost pile with green plants at the center. The compost pile was at least eighty feet from the house, located just inside the woods.[1] As Richter approached the compost pile he noticed that it had been dug out at the center, and that the green plants were being grown at the center of the pile. At the time Richter made this observation, the plants had grown sufficiently tall that they could be seen over the walls of the compost pile from twenty feet away. Richter suspected the green plants to be marijuana, and removed one leaf for testing. After the test confirmed that the plant was marijuana, Richter obtained and

[1] Richter testified that the pile was between 50 and 60 yards from the home, but Powers testified that the distance was only 82 feet. The trial court did not make a specific finding of fact on the proximity. For purposes of this appeal we will accept the shorter distance as true, because doing so does not affect our decision.

executed a search warrant, and seized approximately twenty marijuana plants from various locations on Powers's property.

Powers moved to suppress the evidence as the fruit of an illegal search on his property. The trial court granted the motion, concluding that Powers had an expectation of privacy in the area surrounding the marijuana plants because he took great lengths to conceal the plants within the compost pile. The court was not persuaded by the fact that the compost pile was outside the manicured portion of Powers's property, and instead relied on the pile's proximity to the house and the existence of a path leading to the pile to conclude that the area was the curtilage to Powers's home. The State appeals the suppression order.

The issue whether Richter's initial search and seizure of Powers's property violated the Fourth Amendment to the United States Constitution and § 11 of the Wisconsin Constitution presents a mixed question of law and fact. *See* ***State v. Kennedy***, 193 Wis.2d 578, 583, 535 N.W.2d 43, 45 (Ct. App. 1995). The trial court's findings of fact are reviewed under the clearly erroneous standard. ***Id***. Once the facts are established, "whether the area in question is so intimately tied to the home itself that it should be considered curtilage … is a … constitutional fact that we review without deference to the trial court." ***Id***.

The extent of the curtilage of one's home "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." ***United States v. Dunn***, 480 U.S. 294, 300 (1987). There are four such factors to consider: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by

passersby. ***Id***. at 301. These factors, however, are not to be mechanically applied. ***Id***. Rather, they 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***.

We conclude that the compost pile lies outside the curtilage of Powers's home. The most important factor in our consideration is the use to which the area is put. There simply is no evidence that either the compost pile or the surrounding woods were ever used for private or "intimate activities of the home." ***Id***. at 302. On the contrary, the area was used for only two purposes: disposing yard waste and growing marijuana. When this factor is combined with the fact that the area was over eighty feet away from the Powers home, we must conclude that the area lies beyond the curtilage. The compost pile should not "be treated as the home itself." ***Id***. at 300.

We acknowledge that Powers did attempt to protect the marijuana from observation by constructing the compost pile as a barrier around it. This factor, however, only reflects on Powers's subjective expectation of privacy; it does not also establish conclusively that his expectation was reasonable. *See* ***California v. Ciraolo***, 476 U.S. 207, 211 (1986) (constitution only protects reasonable expectations of privacy). Because virtually all criminals seek to hide the evidence of their crimes, their attempts at doing so cannot imbue the hiding place with a constitutional privacy protection when the chosen spot is an area not intimately tied to their house.

We also wish to stress that our decision is not controlled by the mere fact that the compost pile was beyond the tree line. A tree line does not establish

the boundaries of curtilage where the trees are adjacent to property used for private, intimate purposes. *See* ***Kennedy***, 193 Wis.2d at 585-86, 535 N.W.2d at 46 (area beyond tree line that was adjacent to sauna and outhouse could constitute curtilage). In the present case, however, there was no evidence that the tree line bordered such intimately used property.

Because Richter seized the marijuana outside the curtilage of Powers's home, there was no constitutional violation. A search and seizure is not illegal if an officer gathers evidence outside the curtilage of a home. ***State v. Moley***, 171 Wis.2d 207, 214-15, 490 N.W.2d 764, 767 (Ct. App. 1992). The trial court therefore erred by suppressing the evidence seized during the execution of the search warrant as a fruit of the poisonous tree. The order is reversed and this cause is remanded for further proceedings.[2]

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[2] We note also that the trial court suppressed Powers's statements as other fruits of the poisonous tree. While that order was entered after this appeal was filed and is not before us, the State nevertheless asks us to advise the trial court to reconsider that order as well. Because we have concluded there was no constitutional violation, we urge the trial court to reconsider its order suppressing Powers's statements to the extent they were suppressed as unlawful fruits.