COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0101-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS G. MARTWICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Price County: PARICK J. MADDEN, Judge. *Reversed and cause remanded with directions.*

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

HOOVER, J. Thomas Martwick appeals a judgment convicting him of manufacturing THC, contrary to § 961.41(1)(h)1, STATS. On appeal, he contends that the court erred by failing to suppress evidence of marijuana plants improperly seized within the curtilage of his home. We agree and therefore reverse and remand with directions.

Deputy sheriff Brian Roush applied for a search warrant for Martwick's property based on information provided to another deputy regarding the processing and packaging of marijuana at Martwick's residence. The district attorney concluded that probable cause was stale because the informant had viewed the marijuana over a month prior to application for the warrant. After consulting with the judge, the district attorney informed Roush that probable cause was indeed stale and a search warrant would not be issued.

Roush informed the district attorney that he intended to return to Martwick's premises to "see what [I] could find." He testified that he drove to Martwick's residence in the Township of Elk, parked his squad and crossed the lot line on foot. Martwick's property is located on a 1.52-acre lot; the sides are 260, 333, 420 and 200 feet. His home is across the street from the Wilson Heights subdivision, and is in the neighborhood of residential and recreational structures along the Wilson Flowage shoreline. Martwick testified that his yard consists of wildflowers, brush and weeds, and is not a typical mowed yard. He stated that vegetation around the perimeter of his lot makes it impossible for someone standing outside the lot to see the marijuana.

Roush testified that after he crossed the lot line, he tripped on a wire, possibly the remains of a fence. He stated that if it was a fence, however, it was no higher than a foot. Roush found marijuana plants in five-gallon pails located along a trail beginning about ten feet from the house and running back to a garden. He stated that the pails were fifty to seventy feet from Martwick's residence. He collected leaves from the plants as specimens, returned to the courthouse and obtained a search warrant for the premises. Pursuant to that warrant, Roush searched the property and seized the plants within the buckets. He also seized some items within Martwick's home.

Martwick was charged with manufacturing marijuana. He brought a motion to suppress physical evidence and observations obtained pursuant to the search. The trial court denied the motion, and Martwick subsequently pled guilty. On appeal, he contends that the court erred by failing to suppress evidence of marijuana plants improperly seized within the curtilage of his home.

The first issue we must address is our standard of review. Martwick cites ***State v. Kennedy***, 193 Wis.2d 578, 583, 535 N.W.2d 43, 45 (Ct. App. 1995), for the proposition that whether an area falls within a home's curtilage for Fourth Amendment purposes is a question of constitutional fact reviewed without deference to the trial court. The State argues that this issue is essentially a factual determination that should be reversed only if clearly erroneous. It asserts that while ***Kennedy*** states that the question is one of constitutional fact reviewed de novo, the case upon which ***Kennedy*** relies, ***State v. Lange***, 158 Wis.2d 609, 617, 463 N.W.2d 390, 392-93 (Ct. App. 1990), does not specifically reach such a conclusion. It urges us to follow federal courts and hold that the scope of curtilage is essentially a factual determination reversible only for clear error.

We hold that the scope of curtilage for Fourth Amendment purposes is a question of constitutional fact reviewed without deference to the trial court. While the State correctly asserts that ***Lange*** did not reach this precise holding, ***Kennedy*** specifically provides this standard of review. We are bound by prior decisions of this court. ***Cook v. Cook***, 208 Wis.2d 166, 189, 560 N.W.2d 246, 256 (1997). Our conclusion finds further support in Fourth Amendment cases where the issue whether a search and seizure is reasonable is a question of constitutional fact. *See* ***State v. Phillips***, No. 95-2912-CR, slip op. at 13 (Wis. May 22, 1998).

We turn to Martwick's argument that the court erred by failing to suppress the evidence improperly seized within the curtilage of his home. 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). The factors considered are: (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and 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; *see also* ***State v. Moley***, 171 Wis.2d 207, 215, 490 N.W.2d 764, 767 (1992). These factors are not to be mechanically applied. ***Dunn***, 480 U.S. at 301. 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 area in which the leaves were seized was indeed part of the curtilage of Martwick's home and therefore Fourth Amendment protections apply. First, uncontroverted testimony demonstrated that the plants were found between fifty and seventy-five feet from the home.[1] Although there is no bright-line rule that an area within a given distance from a home falls within a home's curtilage, the close proximity combined with other factors convince us that the area was indeed curtilage. The State cites two Ninth Circuit cases, ***United States v. Brady***, 993 F.2d 177, 178 (9th Cir. 1993), and ***United States v. Calabrese***,

[1] Roush estimated the plants were 50 to 75 feet from the home. Martwick testified that they were 50 feet.

825 F.2d 1342, 1350 (9th Cir. 1987), where areas fifty feet or less from a home did not fall within curtilage. Both cases address whether detached structures fell within curtilage and are easily distinguished. In ***Calabrese***, the court concluded that the structure had no tie to the home and that the exclusive use of the structure was manufacturing drugs and not any household purpose. ***Id***. at 1350. In ***Brady***, a fence segregated the home from the detached building. ***Id***. at 178. The court further noted that the fences on the property were not sight-obstructing and the building was readily visible from open fields surrounding Brady's property. ***Id***. at 179.

Aside from the proximity factor, the nature and use of Martwick's property demonstrates that the area from which the leaves were seized was one of intimate activity and that there was a reasonable expectation of privacy. The area in question is situated within a parcel of 1.52 acres of wooded brush land. Uncontroverted testimony established that the yard was not a typical mowed yard, but rather consisted of wildflowers, brush and weeds and that a person looking across the lot lines would have been unable to see the marijuana in the pots. We conclude the overgrown and wooded nature of Martwick's property militates in favor of his reasonable expectation of privacy.

Further, the area from which the marijuana was seized was located on a path that began ten feet from the home and led to a garden shed in which Martwick grew ginseng. Martwick routinely traveled the path to reach the shed, and no evidence suggests the path was publicly accessible. We have previously held that use of an area as a garden weighs in favor of a "use for intimate activities of the home." *See* ***Lange***, 158 Wis.2d at 619, 463 N.W.2d at 393-94 (*quoting* ***Dunn***, 480 U.S. at 302). Here, placement of the plants along an isolated path that

begins ten feet from the home and leads directly to a garden area supports the finding that the area in question is within the home's curtilage.

We next consider steps taken by Martwick to prevent passersby from observing activities on the property. Martwick did not testify as to affirmative steps he took to prevent such observation. However, the overgrown nature of the property also supports the inference that Martwick intended to prevent passersby from observing his activities.[2] *See* ***State v. Grawien***, 123 Wis.2d 428, 436-37, 367 N.W.2d 816, 820 (Ct. App. 1985) (The emphasis on the Fourth Amendment inquiry is not the ability of third parties to gain access to or view the property but rather upon the manner in which the possessor holds out the property to the public.).

The only remaining factor we must consider is whether the property was enclosed. Roush testified that he believed he tripped over a wire while crossing the lot line, and that it could have been the remains of a fence, although it was near to the ground. Given the other factors previously discussed, however, we are unconvinced that lack of a barrier more formal than heavy flora overgrowth is sufficient to diminish Martwick's expectation of privacy.

In sum, the close proximity of the area from which the plants were seized, the overgrown nature and the use of the property, together with the

[2] In ***State v. Lange***, 158 Wis.2d 609, 620, 463 N.W.2d 390, 394 (Ct. App. 1990), the court made the following statement:

> The state argues that there is nothing in the record to indicate that Lange planted the trees in question. This is not dispositive of our inquiry into the fourth *Dunn* factor. Whether Lange planted the trees himself, or merely chose to live on the property because the trees afforded privacy, he took steps to protect the area from observation by people passing by.

compelling inference that Martwick intended to prevent passersby from observing his activities, demonstrate that he had a reasonable expectation of privacy. Roush therefore improperly seized the plants without a warrant and the court erred by failing to suppress the evidence and all derivative evidence obtained from the seizure.

By the Court.—Judgment reversed and cause remanded with directions.

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