CURTILAGE: THE FOURTH AMENDMENT IN THE GARDEN

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Suppose a police officer, executing a search warrant authorizing the seizure of cocaine, is searching a residence in his jurisdiction. As the search proceeds, an outbuilding is discovered at the rear edge of the residence's backyard. The officer ponders whether he may search the outbuilding under the authority of the warrant he is executing.

Across town, another officer is conducting an unrelated surveillance of a drug trafficker. He follows the suspect to a residence that the suspect enters. The suspect and the resident of the house, who is unknown to the police, are heard talking on a fenced patio behind the house. If the officer crawls into the bushes at the side edge of the residence's lawn, he will be able to see the men on the patio without revealing his presence. He wonders whether such an entry will be lawful.

These officers are grappling with the concept of curtilage. The first officer needs to determine whether the outbuilding is within the curtilage of the residence and therefore within the scope of the search warrant. The second officer needs to determine whether the bushes he is considering crawling into are within the curtilage of the residence, and if so, whether his contemplated entry is a lawful one.

This article will discuss curtilage. It will first discuss the legal standards used in defining the physical limits of curtilage. Then, it will examine protections associated with curtilage and the limitations placed upon law enforcement officers by these protections. Finally, it will set forth guidelines that may be used by officers who need to determine the boundaries of a particular residence's curtilage so as to restrict their actions to those allowed under the Constitution.

CURTILAGE DEFINED

As the U.S. Supreme Court noted in United States v. Dunn, (1)

curtilage is the area immediately surrounding a residence that ``harbors the `intimate activity associated with the sanctity of a man's home and the privacies of life.'" (2) Curtilage, like a house, is protected under the fourth amendment from ``unreasonable searches and seizures." (3) Determining the boundaries of curtilage, however, is considerably more problematic than fixing the limits of a house.

In Dunn, the Court identified four factors that should be considered when determining the extent of a home's curtilage:

1) The distance from the home to the place claimed to be curtilage (the nearer the area to the home, the more likely that it will be found to lie within the curtilage);

2) Whether the area claimed to be curtilage is included within an enclosure surrounding the home (inclusion within a common enclosure will make it more likely that a particular area is part of the curtilage);

3) The nature of use to which the area is put (if it is the site of domestic activities, it is more likely to be a part of the curtilage); and

4) The steps taken by the resident to protect the area from observation by people passing by (areas screened from the view are more likely a portion of the curtilage).

The Court urged the use of these four factors as a guide in assessing 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." (4)

Since the Court in Dunn held that the area in question in that case was outside the curtilage, no guidance was provided regarding what protections the fourth amendment provides to curtilage. Fortunately, other U.S. Supreme Court and lower court decisions have delineated these protections in some detail.

PROTECTIONS AFFORDED CURTILAGE

Application of the Fourth Amendment

The fourth amendment to the U.S. Constitution protects the ``right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and

seizures...." (5) As earlier noted, this protection extends to the area surrounding a residence that is known as curtilage. (6) Often, the area outside the curtilage is properly classified as ``open fields'' and is subject to no fourth amendment protection. (7)

Whether a particular action in relation to the curtilage is controlled by the fourth amendment depends on whether the action constitutes a ``search or seizure'' for fourth amendment purposes. If the action is a search or seizure, officers are generally required to obtain a warrant prior to conducting the search or seizure, or to justify a warrantless action by demonstrating that it was lawful under one of the exceptions to the fourth amendment warrant requirement. (8) If no search or seizure is involved, the fourth amendment will not apply, and it is unnecessary for an officer to factually justify his actions. (9)

A search, for fourth amendment purposes, occurs when government action intrudes into a person's ``reasonable expectation of privacy.'' (10) As will be hereafter discussed, assessing whether a particular action by the government intrudes into a person's ``reasonable expectation of privacy'' is a critical component in the determination of what law enforcement officers may lawfully do in and around curtilage.

Examination of the Curtilage from a Point Outside

An officer, positioned in a place where he has a right to be outside the curtilage of a residence, may generally look into the curtilage without performing a ``search.'' This is true because the officer is observing nothing more than any other member of the public might see from the same viewpoint, and ``[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection.'' (11) For example, when agents of the Internal Revenue Service hid in a cornfield adjacent to a residence's backyard and observed illicit whiskey transactions therein, their actions did not constitute a search, even though the backyard was clearly part of the curtilage. (12)

Where necessary, an officer may take steps to improve his view without his actions constituting a search, so long as he does nothing that might not be done by some other ordinarily curious member of the public. Standing on a rock in order to see over a 6-foot fence, for example, has been held not to constitute a search since the resident ``...had reasonably to expect that

his neighbors might glance into his backyard...." (13) Similarly, when officers saw marijuana plants growing in a person's backyard, by standing on tiptoes on a neighbor's back porch to look over the person's 6-foot high stake fence that was overgrown by vines and bushes, they did not conduct a search. (14)

Use of an airplane or helicopter flying in lawful airspace as a platform to view what a person has exposed, in his curtilage, to air view will also not constitute a search. (15) When the officer is observing nothing more than some other member of the public flying over the residence might see, those observations are not intruding into any expectation of privacy that society is willing to recognize as reasonable. (16) Consequently, the viewing is not a search. (17)

Similarly, use of devices that optically or mechanically enhance an officer's view into curtilage does not constitute a search as long as the device does not reveal significant details that could not be viewed from a closer public vantage point. For example, officers who concealed the existence of their surveillance by hiding in woods and using binoculars and a spotting scope to observe the yard, garage, barn and exterior of a rural home were not conducting a search since these things were also visible from a public highway closer to the house. (18) In another case, officers used a telephoto lens while on a helicopter overflight to photograph a barn adjacent to a suspect's rural home and thereby observed a newly constructed addition to the barn and unusually wide tire tracks leading to the barn. These actions were held not to constitute a search since the things observed could have been seen with the naked eye during a closer, lawful overflight. (19)

However, use of sophisticated devices to enhance the officers' observation powers to reveal things not visible with the naked eye from some lawful vantage point will likely constitute a search. Thus, when police used a 600-millimeter camera lens from a distance of 100 yards (the nearest point the officers had a right to be) to glimpse through the fan louvers of an opaque greenhouse surrounded by brush and two fences, their observations of marijuana plants were held to be a search. (20) Therefore, if the use of enhancement devices is contemplated during a surveillance, absent emergency circumstances, a valid search warrant should be obtained prior to its institution.

The information that officers gather by seeing what has been placed in the view of the public may be used as component facts

of probable cause to search or arrest. However, mere possession of facts amounting to probable cause will not necessarily justify further warrantless action by the officers. As will be discussed, absent the applicability of some recognized exception to the warrant requirement, a search warrant may be required before officers enter curtilage and seize evidence.

Entry into Curtilage

Determining whether an entry into curtilage by law enforcement officers constitutes a search or seizure for fourth amendment purposes necessitates a second ``reasonable expectation of privacy'' analysis. While citizens may have no reasonable expectation that police officers will not look into their curtilage from vantage points where the officers have a right to be, they may reasonably expect that the same officers will not enter their curtilage.

In United States v. Whaley, (21) a deputy sheriff driving along a road crossing an 11,000-acre farm saw what he thought to be marijuana growing adjacent to a house that was near the road. The deputy later entered the property and seized the marijuana plants without first obtaining a warrant. The seizure of the marijuana plants was held to be illegal. Even though the deputy's view of the plants from the road was not a search, his entry onto the property to seize the plants was an intrusion into the curtilage. Since no emergency had been shown to exist, and no other exception to the warrant requirement was apparently applicable, the court ruled the warrantless entry and seizure violated the fourth amendment.

All warrantless entries into curtilage do not, however, violate the fourth amendment. In assessing the constitutionality of an entry, courts look to the nature of the particular area entered to assess whether the entry intruded into some reasonable expectation of privacy. In that regard, areas of the curtilage, such as walkways and driveways, that members of the public would be expected to enter are not private. As one court expressed, ``In conducting a criminal investigation, a police officer may enter those residential areas that are expressly or impliedly held open to casual visitors.'' (22) Officers may generally enter access areas of the residence's curtilage without a warrant since it is reasonable to expect members of the public, such as neighbors and salespersons, to enter such areas. The court noted, ``If one has a reasonable expectation that various members of society may enter the property in their personal or business

pursuits, he should find it equally likely that the police will do so." (23)

In United States v. Smith, (24) for example, an officer drove into the driveway of the defendant's 70-acre farm and saw from his car a large marijuana plant growing beside the house. Although there was a wire fence along the highway, the court in holding that no search had occurred noted that the driveway was unobstructed, and that it was not reasonable to expect that members of the public wouldn't drive in.

In United States v. Roberts, (25) an officer drove into a road marked ``private'' that the defendant shared with other neighbors and walked up to the defendant's front door. His view of evidence from that point was held not to be the product of a search. An unobstructed driveway or sidewalk carries with it an implied invitation to both neighbors and the police.

Officers may also deviate somewhat from the straight path to the front door. In United States v. Johnson, (26) officers stepped 2 or 3 feet off the sidewalk leading to the front door of an urban residence and thereby gained a view into the lighted basement through an uncurtained window. Their view of drugs being packaged in the basement was held not to be the product of a search.

However, entry by officers into private areas of curtilage will constitute an intrusion into fourth amendment rights. In United States v. Van Dyke, (27) officers began a surveillance of a rural home from a neighbor's property. As darkness fell the officers moved in closer to obtain a better vantage point. ``The officers walked through trees growing along the boundary between the two properties, climbed a fence, and moved 15 feet beyond the fence to a location 150 feet from the residence. There they lay down in a patch of honeysuckle bordering the mowed lawn.'' (28) Although quite distant from the house, this area was held to be within the curtilage in part due to its proximity to the large, manicured lawn. This entry into curtilage was held to constitute a search, and the information obtained from surveillance at this location was suppressed.

Searches Made Pursuant to a Search Warrant

Officers executing a search warrant that authorizes them to search a residence for evidence of crime have authority to enter the curtilage area in order to gain access to the residence. But

that is not the end of their powers under the search warrant. Many warrants include a specific authorization to search the curtilage and any outbuildings therein. Even without this specific authorization, officers may, pursuant to the warrant, search portions of the curtilage that might conceal the evidence they are empowered to seize. (29) This is because the ``...word `premises' in a search warrant includes the land, the buildings, and the appurtenances thereto.'' (30) Thus, in United States v. Griffin, (31) a warrant that described a residence as ``premises known as'' followed by the street address and a description of the house gave authority to search and seize soil and rock in the backyard, the contents of a tool shed and the contents of an automobile parked in the driveway.

An officer who knows prior to applying for a search warrant that there are outbuildings or automobiles on the premises to be searched should seek a warrant that includes a specific authorization to search the curtilage, outbuildings and automobiles. (32) This is especially true where defendants might claim that the outbuildings are separate residences. (33) However, where the warrant merely authorizes the search of specified ``premises,'' officers should understand this to include the curtilage and outbuildings (that are clearly not other residences) located therein. (34)

CONCLUSION

Three circumstances have been identified where the concept of curtilage has legal significance to police officers. First, where officers contemplate observing an area from a lawful vantage point using a device to enhance their senses to an extent that they will be able to observe details not visible with the naked eye from any other lawful vantage point, the officers must determine whether the area is part of a residence's curtilage. This is because if the area is curtilage their enhanced viewing is likely a search under the fourth amendment, and absent emergency circumstances, a search warrant is required in order for their viewing to be lawful.

Second, when contemplating entering areas near a residence that are not access areas or that are access areas with public access either blocked or discouraged in a significant way, (35) officers should determine whether the area to be entered is within the curtilage. Again, if the area is part of the curtilage, the officers should, absent emergency circumstances, seek a search warrant before making the entry. The second

officer mentioned in the beginning of this article is faced with such a circumstance. The bushes he is contemplating crawling into are likely within a nonaccess portion of the curtilage, and the officer would need a warrant in order to lawfully view his suspect from that location.

Finally, officers executing search warrants, such as the first officer mentioned in the beginning of this article, need to determine the bounds of the curtilage when contemplating the search of a structure arguably beyond the curtilage. The same holds true when they encounter what is likely a separate dwelling not specified as a place to be searched in the search warrant. The search of separate dwellings and structures beyond the curtilage will require seeking additional warrants specifically directing the search of those structures.

Where a determination regarding curtilage is required, officers should make a common sense assessment using the factors set forth in the Dunn decision: (1) The distance of the area from the residence; (2) whether the area is included with the residence in a common enclosure; (3) the nature of the use of the area; and (4) what steps the resident has taken to screen the view of the area. If the area in question is very close to the residence, that fact alone will likely cause the area to constitute curtilage. If the area is farther away, the other factors will also be of significance. In a close case, it is recommended that officers seek a search warrant prior to acting. This will serve as a safeguard that the officers' actions are within the bounds of Constitutional constraints.

FOOTNOTES

(1) 480 U.S. 294 (1987).

(2) Id., at 300 (quoting Oliver v. United States, 466 U.S. 170, 180 (1984) [internal quotation marks omitted]).

(3) United States v. Dunn, supra note 1; United States v. Oliver, supra note 2.

(4) United States v. Dunn, supra note 1, at 301.

(5) U.S. Const. Amend. IV.

(6) See Oliver v. United States, supra note 2.

(7) Id. The ``open fields'' doctrine is not limited to rural settings, but can also include undeveloped urban property. See State v. Stavricos, 506 S.W.2d 51 (Mo. App. 1974).

(8) Katz v. United States, 389 U.S. 347 (1967).

(9) Id. See also, United States v. Jacobsen, 104 S.Ct. 1652 (1984).

(10) Id.

(11) Katz v. United States, supra note 8, at 351.

(12) United States v. Campbell, 395 F.2d 848 (4th Cir. 1968), cert. denied, 393 U.S. 834 (1968).

(13) State v. Corra, 745 P.2d 786, 788 (Or. App. 1987), review denied, 752 P.2d 842 (Or. 1988).

(14) United States v. McMillon, 418 F.2d 1150 (D.C. Cir.1969).

(15) California v. Ciraolo, 476 U.S. 207 (1986); Florida v. Riley, 109 S.Ct. 693 (1989). See also, United States v. Broadhurst, 805 F.2d 849 (9th Cir. 1986). As noted in State v. Bridges, 513 A.2d 1365 (Me. 1986), the means used to gather the information will not be relevant as long as what was observed could have been seen from a legitimate, public vantage point.

(16) Id.

(17) Id.

(18) United States v. Lace, 669 F.2d 46 (2d Cir. 1982), cert. denied, 459 U.S. 854 (1982).

(19) United States v. Allen, 675 F.2d 1373 (9th Cir. 1980), cert. denied, 102 S.Ct. 133 (1981).

(20) Wheeler v. State, 659 S.W.2d 381 (Tex. Crim. App. 1983). See also, United States v. Taborda, 635 F.2d 131 (2d Cir. 1980); United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987). In Cuevas-Sanchez, the court in dicta indicated that the use of a video camera to obtain a full-time view of the defendant's backyard (which was fenced but visible to a number of his neighbors) constituted a search due to the pervasive nature of the surveillance. The reasoning that it is reasonable to expect

that persons will not gaze constantly into one's backyard but unreasonable to expect that persons will not look occasionally seems significantly flawed. A place is either open to public view or it's not. The court was not required to decide the issue in Cuevas-Sanchez since the officers in that case got prior judicial authorization to conduct the video surveillance. Consequently, their actions would have been reasonable for fourth amendment purposes even if the video surveillance had constituted a search.

(21) 781 F.2d 417 (5th Cir. 1986).

(22) People v. Shorty, 731 P.2d 679, 682 (Colo. 1987). See also, United States v. Ventling, 678 F.2d 63 (8th Cir. 1982) (officer drove into driveway and walked to front door, observing evidence); United States v. Kramer, 711 F.2d 789 (7th Cir. 1983), cert. denied, 104 S.Ct. 397 (1983) (officers removed trash bags which were just inside a knee-high chain fence running along street curb 30 feet from front of house); United States v. Reed, 733 F.2d 492 (8th Cir. 1984) (officer entered fenced back parking lot of commercial establishment through open gate). Cf. Maryland v. Macon, 472 U.S. 463 (1985) (detective in plain clothes entered book store, which was open to the public, and purchased magazine later used as evidence.

(23) State v. Corbett, 516 P.2d 487, 490 (Or. App. 1973).

(24) 783 F.2d 648 (6th Cir. 1986).

(25) 747 F.2d 537 (9th Cir. 1984).

(26) 561 F.2d 832 (D.C. Cir. 1977), <MI>cert. denied, 432 U.S. 907 (1977).

(27) 643 F.2d 992 (4th Cir. 1981).

(28) Id. at 993.

(29) See United States v. Bonner, 808 F.2d 864 (1st Cir. 1986), cert. denied, 107 S.Ct. 1632 (1987) (detached garage included in term ``premises'' for purposes of describing the place to be searched); United States v. Penn, 647 F.2d 876 (9th Cir. 1980), cert. denied 449 U.S. 903 (1980) (warrant describing residential premises included the residence's yard).

(30) State v. Trujillo, 624 P.2d 44 (N.M. 1981).

(31) 827 F.2d 1108 (7th Cir. 1987).

(32) See United States v. Percival, 756 F.2d 600 (7th Cir. 1985) (approving of a search of a suitcase in the trunk of a car parked in a detached garage during the execution of a search warrant authorizing the search of the residential premises, but noting that the ``better practice'' would be to specifically include the car in the warrant where possible).

(33) See United States v. Frazin, 780 F.2d 1461 (9th Cir. 1986), cert. denied sub. nom. Miller v. United States, 107 S.Ct. 142 (1986) (noting the outer limits of authorization of search based upon curtilage, stating ``[w]e have upheld searches of all the property at a listed street address under warrants that recite probable cause as to only a portion of the premises where a multiunit building or collection of separate buildings is used as a single entity, where the defendant is in control of the whole premises, or where the entire premises is suspect."); accord, United States v. Alexander, 761 F.2d 1294 (9th Cir. 1985) (approving the search of a house trailer located on a ranch pursuant to a warrant authorizing a search of the entire ranch); United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (approving the search of a large stucco house where the house and the adjacent cottage where the probable cause statement indicated the illegal activity was occurring shared the same street address and were occupied in common by the defendants).

(34) United States v. Long, 449 F.2d 288 (8th Cir. 1971), cert. denied, 405 U.S. 974 (1972); United States v. Asselin, 775 F.2d 445 (1st Cir. 1985) (which notes that a defendant is often placed in a ``no win'' situation where the area in question is either within the curtilage and thus within the warrant's authorization, or in an ``open field,'' thus requiring no warrant).

(35) It is noteworthy that fences and ``no trespassing'' signs are not a barrier to an officer's entry into ``open fields.'' See Oliver v. United States, supra note 2; United States v. Dunn, supra note 1.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal

adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.