STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

APPELLANT,

V.

WALTER M. BASH,

RESPONDENT

Appellate Case No. 2013-001430

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the lower court correctly suppress evidence where the police, acting on an anonymous tip and with the intent to search, entered the backyard of a residence without a warrant because the backyard was curtilage and therefore, protected by the Fourth Amendment to the United States Constitution and the officers exceeded any implied license by approaching the backyard?

STATEMENT OF THE CASE

On October 17, 2012, a Berkeley County grand jury indicted Respondent for trafficking cocaine (2012-GS-08-1823) and trafficking cocaine base (2012-GS-08-1824). R. * (indictments). On June 11, 2013, the Honorable Stephanie McDonald presided over a hearing on Respondent's motion to suppress the drugs. Tr. 1. Michael E. Patterson, Jr., and Colleen Dixon represented the state, and Melisa W. Gay represented Respondent. Tr. 2. At the conclusion of the hearing, Judge McDonald granted Respondent's motion to suppress. Tr. 77, lines 15-17.

The prosecution filed a notice of appeal. On March 6, 2014, the state, represented by Mark Farthing, filed the initial brief of appellant. Respondent now files his brief.

STATEMENT OF THE FACTS

On November 10, 2011, Lee Holbrook and Kimberly Milks, employees of the Berkeley County Sheriff's Office, were in Moncks Corner. An unknown agent received a phone call "stating that there was drug activity at a particular residence" and called Holbrook on his cellular phone with this information. Because Holbrook and Milks "just happened to be in Moncks Corner," they "drove over there and handled it." Tr. 20, lines 10-17; Tr. 44, line 4; Tr. 44, lines 16-24; Tr. 46, lines 4-6; Tr. 54, lines 11-17; Tr. 60, lines 14-18. Holbrook readily admitted he had no idea who provided the tip. He had no identifying information about the tipster and had no way to contact the tipster. Tr. 42, lines 11-21; Tr. 44, lines 13-15. Holbrook had no prior dealings with the tipster and had no information about the tipster's credibility or reliability. Tr. 43, lines 1-11.

> When asked for the specifics of the anonymous tip, Holbrook responded: The - - the tip was actually, if I'm not mistaken, that there was drug activity occurring at that exact time, and it was at [redacted address]. And it - - just specifically, that there was drug activity occurring at that incident. So we happened to be in Moncks Corner and were right around the corner and attempted to go handle that complaint.

Tr. 21, lines 19-25; Tr. 22, lines 1-4.

Holbrook and Milks put on their police vests and hats. Tr. 54, lines 18-22. Holbrook estimated that he arrived at the home, in an unmarked car, "within ten minutes or so" after learning of the anonymous tip. Tr. 21, lines 13-16; Tr. 45, lines 14-18. Holbrook and Milks were followed to the home by numerous other agents. Tr. 46, lines 7-10. Holbrook located the house associated with the address. There were no lights on at the home. He noticed "that there were some males behind the house in a grassy area." Therefore, "instead of actually approaching the house and conducting a knock-and-talk investigation, we just simply drove towards the backyard in a grassy spot behind the

backyard where the individuals were – there were several individuals back there - - and simply got out of the vehicle to meet with those folks." Tr. 22, lines 8-16; Tr. 54, lines 22-24. Holbrook saw "several black males standing by a little shed." Additionally, "there was a pickup truck pulled in on to the grass area." Tr. 26, lines 19-24. Holbrook readily admitted he was in the home's yard. Tr. 45, line 22 – Tr. 46, line 1; Tr. 55, lines 3-11.

The home "is entirely fenced in, the front and the back." The fence has a "walk-through gate" leading to a small utility shed "on the other side of the fence." Tr. 27, lines 3-8. When Holbrook observed the black men in the yard, he pulled up to them. Tr. 27, lines 22-24. Holbrook pulled his car "in behind where the truck was parked in the grass." Holbrook parked on the grass. Holbrook did not use a driveway or any other established access to the home. He simply drove his car from the road directly into the home's yard. Tr. 28, lines 16-23.

Holbrook was "twenty feet or so" from the truck. Tr. 30, lines 14-17. Holbrook pulled on to the grass because he "received a tip that there was some type of active drug activity going on at that time." When he approached the house from the front, he did not see anybody around it. This "caught [his] attention." He drove to the back of the property because the "activity was supposed to be happening in the - - in the rear of the property." He saw no need to make contact with the house because he saw people in the backyard. Tr. 28, line 25 – Tr. 29, line 12.

When Holbrook got out of his car, three people were standing around, including the property owner. Tr. 31, lines 19-23; Tr. 36, lines 12-13. Holbrook said, "Hey guys, what's going on." Tr. 36, lines 18-20; Tr. 46, lines 20-23. Milks also got out of the

unmarked car and approached the individuals in the yard. Tr. 55, lines 10-11. Milks approached the truck from the passenger side. Then, "one individual that was standing in the grass threw down a plastic bag containing a white powder substance that appeared to be cocaine." Tr. 30, lines 8-13. Holbrook was eight or nine feet from the individual who threw the bag to the ground. Tr. 30, lines 18-23. Then, the passenger door of the truck parked in front of Holbrook opened and a person ran into the woods. The agents, except for Holbrook, chased the individual. Tr. 31, lines 5-18; Tr. 32, lines 22-25; Tr. 56, lines 15-19. The driver – Respondent - got out and asked what was going on. Tr. 32, lines 7-9; Tr. 35, lines 3-13. Holbrook asked Respondent "to step to the rear of his vehicle" where Holbrook had gathered the others who were in the yard. Tr. 32, lines 10-21. Holbrook kept the individuals in that area until a second agent arrived. Then, Holbrook arrested the person who threw the plastic bag to the ground. Thereafter, Holbrook and the second agent detained everyone "due to the fact that the complaint was narcotic activity and the fact that there was narcotics thrown to the ground." Tr. 33, line 12 – Tr. 34, line 2; Tr. 48, lines 7-14; Tr. 50, lines 15-24.

Approximately ten minutes later, when the agents, who were involved in the foot chase, returned, Holbrook "peer[ed] into the truck through the window." The truck's door was closed. Holbrook claimed he could see "in plain view what appeared to be cocaine weighing scales." He thought "there may have even been some cocaine base right there in the console area also." Tr. 34, lines 3-16; Tr. 48, lines 21-24; Tr. 51, lines 15-23; Tr. 56, lines 23-25; State's Exhibit #2; State's Exhibit #3. Milks saw a plastic bag containing white material in the floorboard on the passenger side. She also saw "a white

bag containing white material" on the floorboard of the truck on the driver's side. Tr. 58, lines 1-19; State's Exhibit #4; State's Exhibit #5.

ARGUMENT

The lower court correctly granted Bash's motion to suppress where law enforcement, acting on an anonymous tip and with the intent to search for drugs, entered the backyard of a residence without a warrant because the backyard was curtilage, not open fields, and therefore, protected by the Fourth Amendment to the United States Constitution and the officer's exceeded any implied license by approaching the backyard.

Relevant facts

Respondent moved to suppress the evidence uncovered during the illegal search of his truck. Tr. 6, lines 13-24. Respondent was sitting in his parked pickup truck at a barbecue in the backyard at his friend's house when the police arrived. Tr. 9, line 22 – Tr. 10, line 8. Respondent argued that the search and seizure was in violation of the Fourth Amendment to the United States Constitution, and therefore, the items seized should be suppressed. Tr. 10, lines 14-24; Tr. 74, lines 20-21. Respondent noted the officers "suited up" prior to going to the residence. The officers saw no suspicious behavior until they were physically in the yard. Tr. 74, lines 1-16. Respondent argued the area where he was sitting in his parked pickup truck was within the curtilage of the home and protected under the Fourth Amendment. Further, Respondent cited Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409 (2013) to support his position that the search was illegal. Tr. 11, line 5 – Tr. 12, line 1.

The prosecutor appeared to argue two theories for admissibility. First, he argued the area where Holbrook and Milks encountered Appellant was not "part of the curtilage"; rather, this area was "considered open fields." Tr. 68, lines 5-7. The prosecutor argued that the home's backyard was open fields because there was a fence

around the house and "this particular property [was] beyond the fence" and open to two public roads." Tr. 75, line 22 – Tr. 76, line 2.

Alternatively, if the area were part of the curtilage, he analogized the encounter to a "knock and talk." Tr. 68, lines 7-11. He argued that nothing precludes an officer "from intruding on private property where a private citizen could have intruded." Tr. 75, lines 2-8.

At the conclusion of the pretrial hearing, Judge McDonald granted Appellant's motion to suppress relying upon Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409 (2013). After reading the materials supplied by the prosecution and defense and conducting independent research, she concluded "this one's not even close." She held that "[a]n anonymous tip is not enough to allow you to roll up in somebody's backyard when your sole purpose for going there is to search it." Tr. 65, lines 12-22. She found the backyard where Holbrooks and Milks apprehended Appellant was part of the curtilage based upon State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Tr. 73, lines 8-11. Judge McDonald explained there were no exigent circumstances present and that Holbrooks and Milks did not observe anything suspicious from the street. Tr. 73, lines 3-7. Essentially, Judge McDonald found "they suited up and went into the curtilage of this lady's house based on an anonymous tip alone." Tr. 81, lines 9-11.

Judge McDonald made a credibility determination as well: "[T]he tip was not enough to roll up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there. They were not there to politely ask the homeowner, Hey, are you selling drugs out of your house? They were there to see if they could find any." Tr. 73, lines 13-21.

Discussion

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Any police intrusion on private property for the purpose of obtaining information is a search under the Fourth Amendment. United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 949 (2012); see also McHam v. State, 404 S.C. 465, 477-80, 746 S.E.2d 41, 48-49 (2013) (finding officer's slight intrusion into a vehicle was a search under the Fourth Amendment). In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court's review is limited to determining whether any evidence supports the circuit court's decision. State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). The appellate court may only reverse where there is clear error. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000); State v. Jones, 364 S.C. 51, 610 S.E.2d 846 (Ct. App. 2005). The evidence in the record clearly supports the circuit court's ruling that the backyard was curtilage protected by the Fourth Amendment and that the officers exceeded any implied license by approaching the backyard of the residence.

A. The police intruded upon the curtilage of the home, which is protected by the Fourth Amendment, by entering the backyard.

The Fourth Amendment's protection to be free from police intrusion and unreasonable searches and seizures extends to the curtilage of the home. Oliver v. United States, 466 U.S. 170, 181 (1984). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207 (1986). A warrantless search of a home's curtilage

implicates the core of the Fourth Amendment and presumptively is unreasonable. Bleavins v. Bartels, 422 F.3d 445, 451 (7th Cir. 2005). "The curtilage of a residence means the land immediately surrounding and associated with the home, including the backyard, although the question of where the curtilage ends is determined on a case-by-case basis." Ann K. Wooster, Search and Seizure: Reasonable Expectation of Privacy in Backyards, 62 A.L.R.6th 413. Curtilage includes areas, such as the backyard, that are intimately connected with activities of the home. Bleavins, 422 F.3d at 452.

"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 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)); see also Rogers v. Pendleton, 249 F.3d 279 (4th Cir. 2001). Curtilage is defined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." Oliver, 466 U.S. at 180. "No single factor determines whether an individual may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant." Id. at 177. "In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." Id. at 178 (internal citations omitted). Additionally, the Court held:

> 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.

United States v. Dunn, 480 U.S. 294, 301 (1987). However, the factors are merely "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. In short, the inquiry can be boiled down to one question – "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." Oliver, 466 U.S. at 182-183.

In contrast to curtilage, "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." Hester v. United States, 265 U.S. 57, 58 (1924). The Oliver Court concluded that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." Oliver, 466 U.S. at 181. "The 'open fields' doctrine ... permits police officers to enter and search a field without a warrant." Id. at 173. The Oliver Court reaffirmed the rule announced in Hester, supra, that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounded the home." Id. The Court explained that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." Id. at 179.

In a case similar to the one at issue, in Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409 (2013), the police had "an unverified tip" that Jardines was growing marijuana in his home. Id. at 1413. Without a warrant, the police took a drug dog into the curtilage of Jardines' house and on his front porch. Id. The dog indicated marijuana was present at "the base of the front door." Id. The police then used the dog's activity to obtain a warrant. Id.

The Court ruled this police activity violated the Fourth Amendment. Id. at 1417-18. The majority decided the case solely on property rights grounds without resorting to the Katz[1] test. Id. at 1417 ("[W]e need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under Katz."); see also Jones, supra ; Bleavins, 422 F.3d at 450 (holding that "a property-based concept – curtilage – remains important in evaluating privacy interests"). The Court explained that the analysis in Katz concerning a reasonable expectation of privacy "may add to the baseline" protection of property rights, but "it does not subtract anything from the Amendment's protections 'when the Government **does** engage in [a] physical intrusion of a constitutionally protected area.'" Jardines, 133 S.Ct. at 1414 (quoting United States v. Knotts, 460 U.S. 276, 286 (1983)(Brennan, J. concurring in the judgment))(emphasis in original). The Court explained:

> The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Id. at 1414.

In discussing the curtilage, the Jardines Court held that the right to be free from unreasonable government intrusion in a home "would be of little practical value if the state's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." Id. The "area 'immediately surrounding and associated with the home'" is the curtilage and is "'part of the

[1] Katz v. United States, 389 U.S. 347 (1967).

"area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" Id. at 1415 (quoting Ciraolo, 476 U.S. at 213). The Court held the front porch was "the classic exemplar of an area adjacent to the home and 'to which the activity of the home life extends.'" Id. (quoting Oliver, 466 U.S. at 182, n.12).

Numerous courts have found the backyard to be protected by the Fourth Amendment as part of the home's curtilage. See e.g., Bleavins, 422 F.3d at 452 (stating that "[a]reas that are intimately connected with the ... activities of the home include, for example, backyards.")(internal citations omitted); Lundstrom v. Romero, 616 F.3d 1108, 1128-1129 (10th Cir. 2010)(having "little trouble finding that Lundstrom's backyard qualified as curtilage" where it "directly abut[ted] the rear of his house, was enclosed such that the officer had to go over a fence or open a gate to access it, was used in a manner typical of an ordinary residential backyard, and was protected from observation to an extent that prevented the neighbor from peering into it over the fence"); United States v. Struckman, 603 F.3d 731, 739 (9th Cir. 2010)(finding the "backyard – a small, enclosed yard adjacent to a home in a residential neighborhood" was "unquestionably such a clearly marked area to which the activity of the home life extends and so is curtilage subject to Fourth Amendment protection")(internal citiations omitted); Feller v. Township of West Bloomfield, 767 F.Supp.2d 769, 774 (E.D. Mich. 2011)(finding the warrantless entry onto the back yard of property to post notices to stop illegal work violated the Fourth Amendment); State v. Kruse, 306 S.W.3d 603 (Mo. Ct. App. 2010)(suppressing evidence discovered by law enforcement entering the defendant's backyard at 12:21 a.m. to guard against anyone running from the home when police were knocking on the front door despite

the lack of gates to hinder entrance into the backyard and the presence of a well-travelled route from the driveway to the rear of the property); State v. Frizzelle, 89 S.E.2d 725, 726 (N.C. 1955)(finding that "curtilage fo the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings").

In State v. Morsman, 394 So.2d 408, 408 (Fla. 1981), the Supreme Court of Florida found a police officer conducted an illegal search and seizure when he walked into the backyard and seized marijuana plants. Morsman's neighbor told another neighbor that marijuana plants were in Morsman's backyard. The second neighbor called the police. Id. An officer went to Morsman's home to investigate the complaint. The officer knocked on the front door. When no one answered, the officer walked around the house and saw marijuana plants growing in the backyard. Id. The Florida Supreme Court held "[t]he officer had no right to be in [Morsman]'s backyard." Id. Although the officer going to the front door to investigate did not infringe upon Morsman's right to privacy, the officer entering the backyard violated the Fourth Amendment. Id. at 409.

Ample evidence supports the trial judge's finding that the backyard where the police trespassed, after "suiting up," was part of the curtilage of the residence. By all accounts, it was the backyard to the home, and the officers knew they were entering private property when they drove into the backyard. The officers did not use an existing driveway to make their entrance into the backyard. Thus, even the officers knew the area was curtilage when they made their illegal entry. Consideration of the factors enunciated by the Supreme Court leads to the same result. First, the area was in very close proximity to the home. Although no one testified as to the exact distance, the photographs show the area was close to the

home. See Defendant's Exhibit #2; Defendant's Exhibit #4; Defendant's Exhibit #5. Several courts have recognized the importance of considering whether the area in question is in a rural, urban, or suburban setting. See United States v. Johnson, 256 F.3d 895, 902 (9th Cir. 2001)(citing United States v. Reilly, 76 F.3d 1271, 1277 (2d Cir. 1996); United States v. Acosta, 965 F.2d 1248, 1256 (3d Cir. 1992); United States v. Seidel, 794 F.Supp. 1098, 1103 (S.D. Fl. 1992)). The Ninth Circuit recognized that in rural areas, the curtilage of a home may extend farther than in urban or suburban areas. The Court explained "[t]he realities of rural country life dictate that distances between outbuildings will be greater than on urban or suburban properties and yet still encompass activities intimately associated with the home; this is the nature of the 'farmstead.'" Johnson, 256 F.3d at 902. The area in question is rural. The curtilage, therefore, extends greater than in more urban areas.

The state's only argument that the backyard was not curtilage was based on the lone fact that part of it was outside a fence. This argument has been squarely rejected by the United States Supreme Court. In Dunn, 480 U.S. at 301 n. 4, the United States Supreme Court rejected the government's argument that a home's curtilage "should extend no farther than the nearest fence surrounding a fenced house." Further, an enclosure is unnecessary to demarcate the curtilage. See Florida v. Riley, 488 U.S. 445, 454 (1989)(O'Connor, J. concurring)("To require individuals to completely cover and enclose their curtilage is to demand more than the precautions customarily taken by those seeking privacy.")(internal citations omitted); see also, Williams v. Garrett, 722 F.Supp. 254, 261 (W.D. Va. 1989)(explaining that "requiring a person to expend resources and sacrifice aesthetics by building a fence in order to obtain protection from unreasonable search is not required by the constitution").

The area was being used in a manner consistent with and intimately connected with activities of the home. The record shows that individuals had gathered for a barbecue. Obviously, the acts of cooking, eating, and gathering of friends and family are activities of the home are intimately connected with activities of the home as Americans traditionally have cooked, eaten, and gathered in their homes. Few events are more American than a backyard barbecue. See Young v. City of Radcliff, 561 F.Supp.2d 767, 784-785 (W.D. Ky. 2008). Judge McDonald did not only have abstract considerations before her as to whether the backyard was used as curtilage. At the time of the search, the backyard was being used for a party.

Further, the location of the activity occurred in an area protected from the observation of people passing by. The backyard was blocked from the main road by the house. Portions of the backyard were blocked from view by the side road by the shed. See Defendant's Exhibit #2; Defendant's Exhibit #4; Map. The backyard was protected from view by the trees planted as well. The photographs show a clear line of trees and shrubs planted in the backyard area very close to the dirt road on the back side of the house. See Defendant's Exhibit #1; Defendant's Exhibit #5. The photographs also show a thick grove of mature trees growing along the side of the house, including the side of the backyard, blocking the view of passersby on the dirt road. Defendant's Exhibit #3; Defendant's Exhibit #4; Map. Without question, the trees and shrubs evidence the intent to block observation of people passing by on the side road. Thus, the Dunn factors clearly demonstrate that the backyard as part of the curtilage of the residence.

Looking beyond the factors to the ultimate question of whether the government's intrusion infringed upon personal and societal values protected by the Fourth Amendment,

see Oliver, 466 U.S. at 182-183, it is clear that having a backyard barbecue with friends free from the police arriving and harassing the hosts and guests is a personal value and societal value protected by the Fourth Amendment. The actions by the police of "suiting up" and entering the backyard constituted an illegal search on the curtilage of the residence. Judge McDonald correctly found the backyard was curtilage and suppressed the evidence.

B. The police exceeded the implied license to trespass on property when the investigators intruded entered the backyard for the purpose of search for drugs.

Based upon the habits of Americans, the Court has recognized an implied license for trespass on property: "'the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.'" Jardines, 133 S.Ct. at 1415 (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951)). This implied license "permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id.

The Jardines Court reaffirmed the holding in Kentucky v. King, 563 U.S. ___, 131 S.Ct. 1849, 1862 (2011) that due to the theory of implied license, which is what permits a Girl Scout or trick-or-treater to approach one's home, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any other private citizen might do.'" Id. at 1416. However, "[t]here is no customary invitation to" introduce "a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." Id. The Court compared the scenario to a "visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying

hello and asking permission." Id. "[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." Id.

Further, the Jardines Court distinguished the line of cases stating that "the subjective intent of the officer is irrelevant." Id. at 1416-17. Subjective intent is not considered unless the police conduct is objectively unreasonable. Id. at 1416. Jardines explicitly asked the question of "whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered." Id. at 1417. Jardines concluded that "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." Id. at 1416 n.4. Here, the conduct was objectively unreasonable and the court's finding that the officers intended to search is amply supported in the evidence. Judge McDonald specifically found the intention of the officers when they arrived was to search for drugs.

Of particular interest to the instant case is the recent decision from the North Carolina Court of Appeals in State v. Grice, 735 S.E.2d 354 (N.C. Ct. App. 2012), review granted 743 S.E.2d 179 (N.C. 2013). The police went to Grice's home to investigate an anonymous tip that Grice was growing and selling marijuana. Id. at 355. One officer went to the front door to initiate a "knock and talk." The second officer stayed in the driveway. Id. While the first officer was knocking, the second officer looked around the residence. He saw marijuana plants growing in four plastic buckets. Id. at 355-356. Both officers then walked to the backyard where the plants were growing beside an outbuilding. Id. at 356. The officers seized the plants and sought a search warrant. Id. Recognizing the privacy protections afforded curtilage under the Fourth Amendment, the North Carolina Court of Appeals held the "initiation of a valid 'knock and talk' inquiry"

did not give the officers "a lawful right of access to walk across [Grice's] backyard in order to seize the plants." Id. at 357-358. Holding otherwise would make it "difficult to articulate a limiting principle such that 'knock and talk' investigations would not become a pretense to seize any property within the home's curtilage." Id. at 358; See also Powell v. State, 120 So.3d 577, 584-89 (Fla. Ct. App. 2013) (holding that "knock and talk" did not salvage officers' purposeful warrantless intrusion into the curtilage and peering through a window).

Similarly, the Michigan Court of Appeals held helicopter surveillance and movement by law enforcement officers on the ground directly into the backyard of a private home do not constitute ordinary citizen contact. People v. Galloway, 675 N.W.2d 883, 887 (Mich. Ct. App. 2003). Four officers in plainclothes and two in uniforms arrived at Galloway's home in several vehicles. The police had received an anonymous tip that marijuana was in a container right behind the house. Id. The first officer "proceeded directly to the back of defendant's home after his contact with an individual in the side yard of the home." Id. A second officer also entered the backyard and approached an individual there. The first officer saw marijuana plants inside the lean-to. Id. "The police did not first approach the front door of the home, nor did they proceed along a path that the public could be expected to travel in visiting defendant's home, or simply approach defendant as he was standing in his yard to ask permission to 'look around.'" Id.

The Supreme Court of Kentucky provided a lengthy discussion of "knock and talk" procedures and the interplay between those procedures and curtilage in Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2009). After noting that most "knock and talks

are typically conducted at the front door" and that the front door is "the main entrance to the home," the Kentucky Court explained that the homeowner's consent to approach the main entrance to the home is assumed. Id. at 758. As long as the officer has legitimate business, he may approach the front door of a residence. Id. When there has been no finding of probable cause to grant a warrant, "the knock and talk is limited to only the areas which the public can reasonably expect to access." Id. at 759. While noting "[t]he back door of a home is not ordinarily understood to be public accessible," the court explained that a side or back door used as primary access by the resident may be appropriate for a "knock and talk" if the officer was aware of the resident's prior use of the door. Id.

The officers in the Kentucky case approached the front door of Quintana's residence for a "knock and talk." When the officers received no answer, one officer walked the length of the driveway and into the back yard to look for a back door. Id. at 760. When the officer found no back door, he continued to walk across the back yard until he found a window with an air conditioning unit in it where he claimed to smell marijuana. Id. The court held that when the officer "moved beyond the public entrance of the home, he went beyond the limits of a proper knock and talk." Id. After noting that "[a] backyard is not normally an area that the general public would perceive as public access," the court explained that rarely would a backyard not be considered curtilage. Id. Due to the backyard's status as curtilage and the officer's veering from the area in which he had an implied license to be, the Kentucky Supreme Court suppressed the evidence found pursuant to a search warrant obtained based upon the officer's sniffing in the backyard. Id. at 761.

the evidence found pursuant to a search warrant obtained based upon the officer's sniffing in the backyard. Id. at 761.

The Third Circuit held the "knock and talk" exception to the warrant requirement did not apply where an officer proceeded directly through the backyard and did not begin his visit at the front door. Carman v. Carroll, 749 F.3d 192, 194 (3d Cir. 2014). The police were dispatched to search for a man who had stolen a car and two loaded handguns. According to dispatch, the man "might have fled" to a particular residence. Id. at 195. The residence sat on a corner lot with a main street running along the front and a side street running along the side. A marked path led to the front door and a stone parking area was on the left side. Id. The police parked their cars and immediately entered the backyard. An officer believed a sliding glass door attached to the back deck of the house looked like a customary entryway and approached it. Id.

The Third Circuit held that "[f]rom the moment that [the officer] entered the ... backyard, he was in the curtilage surrounding their house." Id. at 197. Citing Jardines, supra, the court explained that a "knock and talk" must satisfy three requirements: (1) the officer, like any visitor, must knock promptly, wait briefly, and then leave if not invited to stay longer; (2) the purpose of the "knock and talk" must be to interview the occupants of a home, not to conduct a search; and (3) a "knock and talk" encounter must begin at the front door because that is where police officers, like any other visitors, have an implied invitation to go." Id. at 198. The court was not persuaded by the officer's argument that the back door was more convenient because "the Fourth Amendment is not grounded in expediency." Id. at 199. "The 'knock and talk' exception requires that police officers begin their encounter at the front door, where they have an implied

Although the Fourth Circuit refused to adopt the requirement that the police must knock at the front door under all circumstances, the court made clear that an officer's intrusion into the curtilage of a residence must be reasonable. Alvarez v. Montgomery County, 147 F.3d 354, 358 (4th Cir. 1998); see also United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974)(holding that the police officer did not exceed the scope of his implied license by walking around to the back door when he was unable to get an answer at the front door where he had a legitimate reason – questioning the homeowner about an abandoned car near his property - for this intrusion unconnected with a search of the premises). Officers were investigating a complaint about underage drinking at a house party. Alvarez, 147 F.3d at 356. When an officer approached the front door to knock, a second officer observed a sign affixed to a lamppost in the front driveway directing guest to the party in the backyard. Rather than knocking on the front door, the officers went to the backyard. Once in the backyard, the officers observed teenagers drinking. Id. at 357. The officer's entry into the backyard was reasonable because they were responding to a call about underage drinking, they entered the property simply to notify the homeowner of the complaint – which was a legitimate reason to enter the property unconnected with a search of the premises. Id. at 358. In light of the sign directing guests to the party in the backyard, it was reasonable for the officers to proceed directly there. Id. at 359.

In United States v. Perea-Rey, 680 F.3d 1179, 1186-88 (9th Cir. 2012), U.S. Border Patrol agents watched a man scale the border fence between the United States and Mexico and followed him to Perea-Rey's house. Id. at 1182-83. Uninvited, the agent walked into Perea-Rey's carport. Id. Based on Jones and Jardines, the court determined that the warrantless entry into the carport was an entry into the curtilage and violated the

Fourth Amendment. Id. at 1186. The court stated, "[T]he ability to see into the curtilage or the home does not, absent some other exception to the warrant requirement, authorize a warrantless entry by the government." Id.

The government contended that "the so-called 'knock and talk' exception to the warrant requirement" justified the warrantless trespass. Id. at 1187. The court rejected this contention, based in part on the agent's conduct. Id. at 1187-88. The court noted the agent "did not seek Perea-Rey's consent to enter the property or even to speak with him." Id. at 1188. The agent identified himself and ordered Perea-Rey not to move. Id. Importantly, the court held that "Perea-Rey never had an opportunity to simply ignore a knock on the door to his home by police." Id.

The police exceeded the scope of the implied license for a "knock and talk" by immediately proceeding to and entering the backyard with the intent to search. Judge McDonald made the factual finding that the officers intended to search when they intruded upon the backyard. Based upon her view of Holbrooks and Milks as witnesses and in judging their credibility, Judge McDonald found the officers went into the backyard, not with the purpose of interviewing the occupants of the home. The evidence that the officers "suited up," drove directly into the backyard of a residence without any attempt to knock on the front door supports the trial court's logical conclusions.

CONCLUSION

Respondent respectfully requests this Court affirm the ruling by the Circuit Court to suppress the evidence seized during the illegal search.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT.

This 8th day of August, 2014.