

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENISE LOUISE POWELL,

Defendant-Appellant.

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UNPUBLISHED

April 18, 2006

No. 256878

Livingston Circuit Court

LC No. 04-014120-FH

ON REMAND

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court “for reconsideration and application of the four-factor test for resolving curtilage questions detailed in *United States v Dunn*, 480 US 294, 301; 107 S Ct 1134; 94 L Ed 2d 326 (1987).” *People v Powell*, 474 Mich 928; 706 NW2d 195 (2005). After reconsideration, we again reverse.

At issue here is the legality of a police officer’s entry into defendant’s backyard, where the officer discovered and confiscated several marijuana plants growing in a garden abutting the rear of defendant’s home, access to which was gained by the officer by walking along the side of the house. The United States Supreme Court has long recognized that the curtilage of a person’s home, i.e., “the land immediately surrounding and associated with the home,” is entitled to the Fourth Amendment protections that attach to the home itself. *Oliver v United States*, 466 US 170, 180; 104 S Ct 1735; 80 L Ed 2d 214 (1984). In *Dunn*, *supra* at 300, the Court held that the determination whether a particular area is part of the curtilage of an individual’s residence for purposes of the Fourth Amendment requires consideration of “factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.” In particular, the Court cited as relevant “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.” *Id.* at 301. However, the Court counseled against “mechanical” application of these factors, which the Court indicated are “useful . . . 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.* With this caveat in mind, we again address the question whether the search at issue here involved an unreasonable invasion of the curtilage of defendant’s home.

In reaching its decision to deny defendant's motion to suppress the marijuana found by the officer, the trial court stated:

Okay, the facts in this case are pretty easy. On August 14th in Livingston County the officer was working the day shift, 7:00 a.m. to 7:00 p.m. They had a tip about marijuana growing at [defendant's] address in Hamburg. She went there, she knocked on the door. The only person answering was the dog with the bark and she walked around the back, took a route that she thought was a reasonable route to the back. There was no fencing, that is, that would prohibit access to the back from the front door. There was a side split rail fence which is depicted in the picture. There were no signs saying trespassers keep away, don't come on the property. There was nothing indicating that she could not go back there. She followed her way to the back, turned the corner, saw the marijuana. You might call it a technical trespass but I'm satisfied there was reasonable right for her, especially in view of the dog barking, to feel that somebody may have been there, around the back as she testified. She went back to observe and what she observed was not a person but marijuana growing, and seized it. I'm satisfied that the motion must be denied . . . .

We review a trial court's factual findings in a suppression hearing for clear error and will affirm those findings unless left with a definite and firm conviction that a mistake has been made. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). However, the trial court's application of constitutional standards to the facts is not afforded such deference. *People v Stevens*, 460 Mich 626, 631; 597 NW2d 53 (1999). We review de novo the trial court's ultimate decision on a motion to suppress evidence. *Davis, supra*; see also, *United States v Johnson*, 256 F3d 895, 912-913 (CA 9, 2001) ("the determination that a particular search did (or did not) occur within the curtilage must be reviewed de novo on appeal").

On review de novo, we find that there can be no dispute that the backyard of defendant's home was within the curtilage of her residence under the test espoused in *Dunn*.<sup>1</sup> Indeed, the area at issue was immediately next to the back of the residence, and was partially enclosed by a fence that ran along the property line, as well as a wooded area behind the yard, and the house itself. A deck, which was attached to the house and from which entrance into the home could be obtained, was also built into the yard. Finally, any view of the backyard was obstructed by the house itself so that anyone passing by could not view the backyard.<sup>2</sup> Clearly the backyard of

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<sup>1</sup> In reaching this conclusion we note that, in contrast to the instant matter, *Dunn* involved the question whether a barn, located approximately 50 yards from a fence surrounding the respondent's home, was within the curtilage of the house. *Id.* at 296.

<sup>2</sup> We are not persuaded that, to qualify as protected from the view of passersby within the meaning of *Dunn*, a homeowner must erect a fence or other barrier that obstructs all viewing from a neighbor's otherwise private backyard. Cf. *Hardesty v Hamburg Twp*, 352 F Supp 2d 823, 825-826, 829 (ED Mich, 2005). Rather, we believe that protection of the area "from observations by people passing by" encompasses only such obstructions reasonably necessary to obstruct or otherwise obscure viewing of the subject area from positions that are open to the public generally. *Dunn, supra* at 301. In this regard, we respectfully disagree with the apparent

(continued...)

defendant's home was "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn, supra*; see also, e.g., *Daughenbaugh v City of Tiffin*, 150 F3d 594, 603 (CA 6, 1998) ("[c]onsidering the general complexity of curtilage questions, the law seems relatively unambiguous that a backyard abutting the home constitutes curtilage and receives constitutional protection).

Moreover, although the side yard from which the officer gained access to the rear of defendant's home was not itself obstructed from the view of passersby, this relatively narrow strip between defendant's garage and the side split-rail fence was also immediately adjacent to the home. See, e.g., *Pond v People*, 8 Mich 150, 181 (1860) ("a fence [is] not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling"), citing *People v Taylor*, 2 Mich 250, 251-252 (1851) (defining "curtilage" as a "courtyard, back-side, or piece of ground lying near and belonging to a dwelling-house," and as "a space of ground within a common enclosure, belonging to a dwelling house") (citations and internal quotations marks omitted); cf. *Oliver, supra* at 178 ("an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area *immediately surrounding* the home") (emphasis added). Furthermore, with respect to the use to which this area was put, the record shows that the side yard provides access to a side door leading into the garage. As noted in our prior opinion, however, past this service door, and well before one could observe the backyard area where the contraband at issue here was located, the yard greatly narrows as a result of the fencing and several large trees and bushes. On reconsideration, we therefore again conclude that the manner in which the side yard area past the garage service door was landscaped communicated both privacy and "the obvious message that access to the backyard by strangers is not provided by proceeding along side the house." *People v Powell*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2005 (Docket No. 256878), slip op at 2. The area past the service door was thus part of the curtilage of defendant's home, *Dunn, supra*, and, because in traversing the side yard past the area of the service door the officer failed to restrict her movements "to places visitors could be expected to go," she engaged in a search of defendant's property violative of the Fourth Amendment. *LaFave, 1 Search & Seizure* (4th ed), Residential Premises, § 2.3(f), pp 600-603; see also *People v Galloway*, 259 Mich App 634, 641; 675 NW2d 883 (2003) (police officers conducting a knock and talk must "proceed along a path that the public could be expected to travel in visiting [a] defendant's home"). Stated another way, we conclude that any reasonable person would intuitively know that proceeding beyond the garage service door would constitute an invasion of an area immediately adjacent to this residence that is intended to provide a barrier to accessing the otherwise private backyard. Accordingly, we again reverse the trial court's denial of defendant's motion to suppress.

Reversed.

/s/ Jessica R. Cooper  
/s/ Kathleen Jansen  
/s/ Joel P. Hoekstra

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(...continued)

conclusion of the court in *Hardesty, supra*, which, in any event, we are not bound to follow. See, e.g., *People v James*, 267 Mich App 675, 680 n 1; 705 NW2d 724 (2005).