

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY ALAN KATZ,

Defendant-Appellant.

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UNPUBLISHED  
September 4, 2001

No. 224477  
Livingston Circuit Court  
LC No. 99-011039-FH

Before: Hood, P.J., and Whitbeck, and Meter, JJ.

WHITBECK, J. (*concurring*).

I concur in the result that my colleagues reach. I write separately to set out my views on the applicability of the United States Supreme Court's recent decision in *Kyllo v United States*<sup>1</sup> and the "substantial basis" that existed for the magistrate to issue the search warrant for the Vines Road property.

I. *Kyllo*

At first blush, this case bears a considerable similarity to the situation in *Kyllo*. In *Kyllo*, agents of the Department of the Interior used an Agema Thermovision 210 to gather evidence to support an application for a search warrant for Danny Kyllo's home because they suspected that he was growing marijuana there using high intensity heat lamps. The majority opinion in *Kyllo* explained the basic scientific premise behind the Thermovision:

Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth--black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images.<sup>[2]</sup>

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<sup>1</sup> *Kyllo v United States*, 533 US \_\_; 121 S Ct 2038; 150 LEd2d 94 (2001) (*Kyllo III*).

<sup>2</sup> *Id.* at 2041.

The agents used the Thermovision to scan Kyllo's home from two different areas on the street, taking no more than a few minutes.<sup>3</sup> The scan revealed that Kyllo's garage roof and a side wall of the home were "relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex."<sup>4</sup> One of the agents who performed the scan concluded that this heat pattern was consistent with halide lamps used to grow marijuana.<sup>5</sup> Using this information, as well as tips from informants and utility bills, the agents persuaded a federal magistrate to issue a search warrant for Kyllo's home. When they executed the search warrant, the agents confirmed their original suspicions. They found more than one hundred marijuana plants growing in Kyllo's home, which also had in it halide lamps.<sup>6</sup>

After the federal district court denied Kyllo's motion to suppress the evidence obtained with this search warrant, Kyllo entered a conditional guilty plea.<sup>7</sup> Several appellate steps later, the case made its way to the United States Supreme Court.<sup>8</sup> When the Supreme Court granted certiorari, the last holding in the case was that Kyllo had not manifested a subjective expectation of privacy by attempting to conceal the heat emitted from his home.<sup>9</sup> Further, any objective expectation of privacy he had in the heat emitted from his home was not reasonable because the Thermovision "did not expose any intimate details of Kyllo's life . . . ."<sup>10</sup> Thus, the trial court had not erred when it refused to suppress the evidence discovered and seized because of the warrant.

A majority of the justices of the Supreme Court, however, had a very different impression of the facts and law. Justice Scalia authored the majority opinion, focusing on what constitutes a "search" within the meaning of the Fourth Amendment. Quoting *Silverman v United States*,<sup>11</sup> Justice Scalia made plain his central legal premise that "[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"<sup>12</sup> Noting the historical connection between Fourth Amendment jurisprudence and common-law trespass, he explained that visual surveillance was traditionally lawful because "the eye cannot by the laws of England be guilty of a trespass."<sup>13</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *United States v Kyllo*, 140 F3d 1249 (1998), 190 F3d 1041 (1999) (*Kyllo II*), cert gtd 530 US 1305 (2000).

<sup>9</sup> See *Kyllo II*, *supra* at 1046.

<sup>10</sup> *Id.* at 1047.

<sup>11</sup> *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961).

<sup>12</sup> *Kyllo III*, *supra* at 2041.

<sup>13</sup> *Id.* at 2042, quoting *Boyd v United States*, 116 US 616, 628; 6 S Ct 524; 29 L Ed 746 (1886), quoting *Entick v Carrington*, 19 How St Tr 1029; 95 Eng Rep 807 (KB 1765).

Justice Scalia observed that, though the Supreme Court had subsequently “decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property,” it had done so without altering “the lawfulness of warrantless visual surveillance of a home . . . .”<sup>14</sup> Acknowledging that visual surveillance had evolved from the limited observations available to the “naked eye” to much more significant, though lawful, intrusions aided by technology,<sup>15</sup> he framed the issue on appeal as “what limits there are upon this power of technology to shrink the realm of guaranteed privacy.”<sup>16</sup> Answering this question, Justice Scalia, joined by Justices Souter, Thomas, Ginsburg, and Breyer, held that

[w]here . . . the Government uses a device that is not in general public use, to explore the details of the home that would previously have been unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant.<sup>[17]</sup>

Thus, the majority reversed the lower appellate court and remanded the case to the district court so that it could determine whether, without the evidence gathered with the Thermovision, there was sufficient evidence to issue a warrant. Quite clearly, in reaching this decision, the five justices in the majority agreed that the entrance to a home is a threshold the government may not cross to search without a warrant, but that the agents had made just such an intrusive and unconstitutional search.<sup>18</sup>

*Kyllo* was, however, a close decision. Justice Stevens, joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor, penned a vigorous dissent challenging the majority's conclusion regarding the very nature of the governmental intrusion, if any, the Thermovision caused in the case. According to Justice Stevens and the other dissenters, there was a

distinction of constitutional magnitude between “through-the-wall surveillance” that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand.<sup>[19]</sup>

To them, this case “merely involve[d] indirect deductions from ‘off-the-wall’ surveillance, that is, observations of the exterior of the home.”<sup>20</sup> By “passively measur[ing] heat emitted from the exterior surfaces” of *Kyllo*'s home,<sup>21</sup> the agents had gathered evidence that had entered the

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<sup>14</sup> *Kyllo III*, *supra* at 2042.

<sup>15</sup> *Id.* at 2042-2043.

<sup>16</sup> *Id.* at 2043.

<sup>17</sup> *Id.* at 2046; see *id.* at 2043.

<sup>18</sup> *Id.* at 2046.

<sup>19</sup> *Id.* at 2047.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2048.

“public domain.”<sup>22</sup> This process of emitting heat was much “like aromas that are generated in a kitchen, or in a laboratory or opium den,” for which society would consider any subjective expectation of privacy unreasonable.<sup>23</sup> At most, the Thermovision only allowed the government to draw an inference about what was going on in Kyllo’s home, which could not amount to a constitutional violation.<sup>24</sup> Thus, the dissenters would have held, the agents had not violated the Fourth Amendment because they had not conducted what amounted to a warrantless search of the *interior* of Kyllo’s home.

Justice Scalia, never one to be shy when disagreeing with his colleagues, flatly rejected the way the dissent simplified the nature of the governmental activity:

The dissent’s repeated assertion that the thermal imaging did not obtain information regarding the interior of the home . . . is simply inaccurate. A thermal imager reveals the relative heat of various rooms in the home. The dissent may not find that information particularly private or important, . . . but there is no basis for saying it is not information regarding the interior of the home. . . . The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. . . . In any event, on the night of January 16, 1992, no outside observer could have discerned the relative heat of Kyllo’s home without thermal imaging.<sup>[25]</sup>

Further, the dissent’s suggestion that the Thermovision technologically permitted nothing more than an inference about what occurred inside Kyllo’s home avoided the true constitutional issue:

The issue in this case is not the police’s allegedly unlawful inferencing, but their allegedly unlawful thermal-imaging *measurement* of the emanations from a house. We say *such measurement* is a search; the dissent says it is not, because an inference is not a search. We took that to mean that, since technologically enhanced emanations had to be the basis of inferences before anything inside the house could be known, the use of emanations could not be a search. But the dissent certainly knows better than we what it intends. And if it means only that an inference is not a search, we certainly agree. That has no bearing, however, upon whether hi-tech *measurement of emanations* from a house is a search.<sup>[26]</sup>

I view Justice Scalia as one of the clearest writers in the history of the United States Supreme Court. Here, however, I must admit that I have some difficulty following his reasoning. *Random House Webster’s College Dictionary*<sup>27</sup> defines “emanate” as “to flow out, issue forth; originate”

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2048-2049.

<sup>25</sup> *Id.* at 2043.

<sup>26</sup> *Id.* at 2044 (emphasis supplied).

<sup>27</sup> *Random House Webster’s College Dictionary* (2d ed), p 425.

and notes that it comes from the Latin *emanare* meaning “to flow out.” Logically, then, while an “emanation,” whether of heat, light, or odor, may originate in a house, it has flowed out of that house and is therefore outside it. This would appear to contradict – or at least extend – Justice Scalia’s central concern with warrantless governmental intrusions *into* the castle that is one’s home to include some area outside the home as well.

Further, in this instance Justice Scalia appears to have changed his initial focus on the intrusiveness of the sense-enhancing technology to a consideration of a technology’s ability to “measure” “emanations,” whatever their kind, from a home in order to make a comparison. By implication, this ability to compare the emanations from a home under suspicion with other homes is a factor in determining whether governmental activity constitutes a search. Thus, one could restate the holding in the majority opinion as:

Where the Government uses a device that is not in general public use<sup>[28]</sup> to measure the emanations from a home, this conduct is a “search” and is presumptively unreasonable without a warrant.

## II. Surveillance Of The Vines Road Property With The Night Vision Binoculars

The factual circumstances in this case are similar but, importantly, not identical to those in *Kyllo*. Here, according to the affidavit Officer Woods completed and signed on May 5, 1998, to support his application for a search warrant, he

conducted surveillance [of the Vines Road property] at night with night vision infrared binoculars on two occasions from adjacent properties and . . . observed through the night vision binoculars an intense bright light coming from what appears to be cracks on coverings on the windows.

Officer Woods stated that this, and other, evidence “is indicative of a marijuana grow operation.” At the preliminary examination, Officer Woods gave similar testimony to the effect that he and other officers conducted surveillance of the Vines Road property through infrared binoculars and observed glowing lights emanating from around covered windows.

At issue, then, is whether *Kyllo*, which the United States Supreme Court decided after the trial court made its decision in this matter, now requires the night vision binoculars evidence to be disregarded. I submit that *Kyllo*, as applied to the facts of this case, does not require such a result. Under the first possible reading of Justice Scalia’s majority opinion, using the night vision binoculars involved no intrusion *into* the Vines Road property. While the intense light may have “emanated” from the house, at the time that Officer Woods observed it, the light was *outside* the house. The fact that the night vision binoculars enhanced Officer Woods’ ability to perceive this light would, it seems to me, make no difference in the analysis.

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<sup>28</sup> Earlier in his majority opinion, see *Kyllo, supra* at 2038, Justice Scalia added the qualifier “at least” to the requirement that the technology not be in general public use. This may imply that if the technology is in public use, less stringent standards may apply.

Under the second possible reading of Justice Scalia’s majority opinion, “emanations” from the house would be covered. However, it is clear that Officer Woods did not, in any fashion, use the night vision binoculars to “measure” the light emanating from the house. Rather, he simply used the night vision binoculars to perceive, or to enhance his perception of, that light. Unlike the agents’ use of the Thermovision device in *Kyllo*, Officer Woods did not use the night vision binoculars to compare various areas of the house with other houses. Nor did the binoculars give him any information about the relative intensity of the light emanating from different areas in the house. While the night vision binoculars may have enhanced Officer Woods’ visual surveillance, it was still simply visual surveillance. Therefore, I conclude that the technological aspects of the governmental activity in this case are sufficiently distinct from the facts of *Kyllo* to conclude that *Kyllo* does not bind this Court’s decision. Irrespective of which interpretation of Justice Scalia’s *Kyllo* opinion is more accurate in this instance, the magistrate did not err when he considered the evidence gathered with the night vision binoculars when determining whether to issue the search warrant for the Vines Road property.

### III. “Substantial Basis”

Even if *Kyllo* could be interpreted to require the courts to disregard the evidence gathered with night vision binoculars when determining the validity of the search warrant, I agree with my colleagues that the remaining facts set forth in the search warrant affidavit provided a “substantial basis” for the magistrate’s decision. I emphasize that, in my view, this is a very close call. Individually, each of the remaining facts alleged in the affidavit can be explained rationally as lawful conduct unrelated to a marijuana grow operation. However, *People v Whitfield*<sup>29</sup> makes clear that appellate courts are not free to view the assertions in an affidavit separately and in the abstract; appellate courts must view the facts alleged in an affidavit in a commonsense fashion, giving substantial deference to the magistrate’s determination concerning whether there was a “substantial basis” to conclude that contraband would be found in the place listed. This is, in effect, a totality of the circumstances analysis.<sup>30</sup> Under the totality of the circumstances described in Officer Woods’ affidavit, there were still sufficient allegations to lead a reasonably cautious person to conclude that Katz was growing marijuana at the Vines Road property even without considering the evidence obtained with the aid of the night vision binoculars.<sup>31</sup>

/s/ William C. Whitbeck

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<sup>29</sup> *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000), quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992).

<sup>30</sup> See *People v Nunez*, 242 Mich App 610, 614; 619 NW2d 550 (2000).

<sup>31</sup> *Id.*