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Constitutional Law: An End to Privacy in the Curtilage

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CASE COMMENTS

CONSTITUTIONAL LAW: AN END TO PRIVACY IN THE CURTILAGE

Sarantopoulos v. Florida, 629 So. 2d 121 (Fla. 1993)

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Petitioner was arrested and charged with possessing and manufacturing marijuana seized at his residence.[1] Acting on an anonymous tip,[2] police officers went to petitioner's residence where their view of the backyard was obstructed by a six foot high wooden fence.[3] In an attempt to see over the fence, the officers proceeded onto adjacent private property without permission.[4] One officer testified that he was able to see over the fence[5] and observed marijuana growing in the petitioner's yard, at which time a search warrant was obtained.[6] The trial court granted the petitioner's motion to suppress the evidence seized on the grounds that the officers violated the petitioner's reasonable expectation of privacy.[7] On appeal, the Florida Second District Court of Appeal reversed, but certified a conflict with the Fourth District Court of Appeal to the Florida Supreme

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** To Keire Rice and my parents Frank and Margaret Hosley.

1. Sarantopoulos v. State, 629 So. 2d 121, 122 (Fla. 1993). Petitioner was also charged with possession of diazepam. *Id.*

2. *Id.* The police received information that the petitioner had marijuana in his home and growing in his backyard. *Id.*

3. *Id.* The fence surrounding the backyard was board-on-board and could not be seen through. *Id.*

4. *Id.* The adjacent property was the neighbor's yard and not an uninhabited open field. *See* State v. Sarantopoulos, 604 So. 2d 551, 552, 555 (Fla. 2d DCA 1992).

5. *Sarantopoulos*, 604 So. 2d at 552. The 6'2" officer's statement that he could see over the fence by standing on the tips of his toes was apparently accepted by the trial court, even though the 6'1" neighbor testified that he had to stand on the lower railing of the fence to see over it, and the 6'0" petitioner stated that he needed assistance to see over the fence. *Id.* at 552 n.1.

6. *Sarantopoulos*, 629 So. 2d at 122. The search warrant was based on the anonymous tip and the officer's observations. *Id.*

7. *Sarantopoulos*, 604 So. 2d at 552-53. The trial court found "law enforcement engaged in 'extraordinary efforts,' " violating the petitioner's reasonable expectation of privacy. *Id.* at 553 (citing West v. State, 588 So. 2d 248, 249-50 (Fla. 4th DCA 1991) (holding that a police officer entering adjoining property with permission and climbing a ladder to see over defendant's wooden fence committed an unreasonable search because his actions constituted an extraordinary effort to overcome reasonable attempts at privacy).

Court for a determination of the reasonableness of the search.[8] The Florida Supreme Court affirmed, and HELD, that although petitioner may have an expectation of privacy under article I, section 12 of the Constitution of the State of Florida,[9] society is not prepared to recognize his expectation as reasonable.[10]

Historically, the Fourth Amendment of the United States Constitution[11] required surveillance by physical trespass and the seizure of tangible personal property by law enforcement officers for a search and seizure to be unreasonable.[12] However, Fourth Amendment jurisprudence changed abruptly in the United States Supreme Court decision of *Katz v. United States*.[13] In *Katz*, the Court confronted the issue of whether warrantless[14] electronic surveillance and recording of a telephone conversation by the government constitutes a search and seizure under the Fourth Amendment.[15] Based in part on the government's evidence of telephone conversations recorded by FBI agents through a wire tapping operation, the petitioner had been convicted for transmitting wagering information.[16]

In reversing the petitioner's conviction, the Court found that a person who uses a telephone booth, shutting the door behind him, assumes his telephone conversation will be private.[17] Accordingly, the government's surveillance violated the privacy upon which the petitioner justifiably

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8. *Id.* at 554. The Florida Second District Court of Appeal certified conflict with West v. State, 588 So. 2d 248 (Fla. 4th DCA 1991) and with State v. Parker, 399 So. 2d 24 (3d DCA) (finding an unreasonable search occurred where police officers on adjoining land looked in a backyard to locate a handgun), *rev. denied*, 408 So. 2d 1095 (Fla. 1981). *Sarantopoulos*, 604 So. 2d at 554-55. However, the Florida Supreme Court addressed only the conflict with *West*. *Sarantopoulos*, 629 So. 2d at 121.

9. The constitutional provision provides: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . shall not be violated. . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. I, § 12.

10. *Sarantopoulos*, 629 So. 2d at 122-23. The court reasoned that since the petitioner's fence was only six feet tall he could not reasonably expect privacy from heights above six feet. *Id.* at 623 & n.2.

11. U.S. CONST. amend. IV. By its own terms, the Constitution of the State of Florida provides that the searches and seizures article should be construed in conformity with the Fourth Amendment to the United States Constitution. FLA. CONST. art. I, § 12. In addition, the United States Supreme Court has held that the Fourth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

12. *See* Katz v. United States, 389 U.S. 347, 353 (1967). The Court abandoned the trespass doctrine because it required a focus on the area viewed, while the Fourth Amendment focuses on people. *Id.*

13. 389 U.S. 347 (1967).

14. *See id.* at 356-57.

15. *Id.* at 348, 353. The second issue before the Court, answered in the negative, was whether electronic surveillance of a telephone booth was exempt from advance authorization by a magistrate, when the officers showed probable cause. *Id.* at 356-59.

16. *Id.* at 348.

17. *Id.* at 352.

relied and thus constituted an unreasonable search and seizure.[18]

However, it is not the majority's rationale, but the two-prong analysis set forth in Justice Harlan's concurrence,[19] that has made the *Katz* decision one of the most frequently cited in Fourth Amendment jurisprudence.[20] Justice Harlan stated that a person must first exhibit a subjective "expectation of privacy" before that expectation can be violated.[21] Objects or activities which a person exposes to the plain view of outsiders are not protected because there is no intention to keep them private.[22] Justice Harlan then stated that even if a subjective expectation of privacy exists, a person's expectation must be one that society will recognize as reasonable.[23] For example, conversations in public are not afforded protection because any expectation of privacy would be unreasonable.[24]

Applying a similar test, the *Katz* majority reasoned that by shutting the door and paying a toll the petitioner exhibited a subjective expectation of privacy.[25] Because the booth was temporarily a private place, the petitioner's expectations were reasonable.[26] Thus, the two-prong test allows courts to analyze the protection the Fourth Amendment affords to individuals, not areas.[27] Justice Harlan's articulation of the two-prong test would be explicitly adopted later by the Court.[28]

Since the *Katz* decision, however, the Supreme Court's interpretation of the two-prong test has continued to narrow Fourth Amendment protection.[29] In *California v. Ciraolo*,[30] the Court considered whether aerial surveillance of the curtilage[31] of respondent's home was an unreasonable

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18. *Id.* at 353.

19. *Id.* at 361 (Harlan, J., concurring). This two-fold analysis has been fully adopted by the Supreme Court. *E.g.*, Colorado v. Ciraolo, 476 U.S. 207, 211 (1986); Smith v. Maryland, 442 U.S. 735, 740 (1979).

20. *See* William S. McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435, 436-37 (1991).

21. *Katz*, 389 U.S. at 360-61 (Harlan, J. concurring).

22. *Id.* (Harlan, J., concurring). The plain view doctrine provides, "when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search' within the meaning of the Fourth Amendment." 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.2, at 320 (2d ed. 1987).

"Plain view searches are to be distinguished from plain view seizures in that the latter invade the owner's possessory interest in the item." McAninch, *supra* note 20, at 436 n.9 (citing Horton v. California, 496 U.S. 128, 133 (1990)).

23. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

24. *Id.* (Harlan, J., concurring).

25. *Id.* at 352.

26. *See id.*

27. *See id.* at 353.

28. *See supra* note 19.

29. *See* McAninch, *supra* note 20, at 436, 446-58.

30. 476 U.S. 207 (1986).

31. Curtilage includes "those out-buildings which are directly and intimately connected with the

search in violation of the Fourth Amendment.[32] Law enforcement officers were unable to see respondent's backyard because it was enclosed by a wooden fence.[33] The officers then flew over the area and were able to photograph marijuana plants in the respondent's yard.[34]

The Supreme Court applied the *Katz* two-prong test[35] and found no violation of the Fourth Amendment.[36] The Court reasoned that although respondent had a subjective expectation of privacy,[37] it was not one that society recognizes as reasonable.[38] The fact that the search involved the curtilage of the home, where privacy expectations are heightened, was inconsequential in the Court's analysis.[39] Under the plain view doctrine, an officer is not required to shield his eyes when observations are made from a public vantage point where he has the right to be.[40] Because the officers were in public airspace where any member of the public had the right to be, the search was reasonable.[41]

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habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." BLACK'S LAW DICTIONARY 384 (6th ed. 1990).

32. *Ciraolo*, 476 U.S. at 209.

33. *Id.* Respondent's yard was enclosed by a six foot outer fence and a 10 foot inner fence. *Id.*

34. *Id.* The two officers' flight was at 1000 feet, which was within navigable air space. *Id.* The marijuana was photographed with a standard 35mm camera. *Id.*

35. *Id.* at 211.

36. *Id.* at 215.

37. *Id.* at 211. The state did not challenge respondent's subjective expectation, but the Court did recognize that the first prong was satisfied because the intent to maintain privacy in the backyard was clear from the presence of fences. *Id.* However, the Court said it was not clear whether the respondent's subjective expectation of privacy was to all observations of his back yard or to only those made from a vantage point below 10 feet. *Id.* at 211-12.

38. *Id.* at 214.

39. *Id.* at 212. "[T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." *Id.* at 212 (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)). The Court reasoned that because the area in question was immediately adjacent to the home and surrounded by fences it was within the curtilage. *Id.* at 213. The privacy interests are heightened in the curtilage in order to protect "families and personal privacy in an area intimately linked to the home both physically and psychologically." *Id.*

40. *Id.*; *see also supra* note 22 (noting that no intent to keep objects or activities private exists if they are in plain view).

41. *Ciraolo,* 476 U.S. at 215. The Court also noted that because public aircraft travel is routine, the respondent's expectation of privacy was even more unreasonable because he could have foreseen the observation of his backyard from the air. *Id.*

In Florida v. Riley, 488 U.S. 445 (1989), law enforcement officers hovered over respondent's curtilage in a helicopter, observing marijuana. *Id.* at 448. A plurality of the Court found the respondent's expectation of privacy was unreasonable because the helicopter was flying at a legal altitude and there was no evidence to suggest that helicopter flights were rare in respondent's area. *Id.* at 451. The plurality stated that it would be a different case if the helicopter's altitude had been contrary to law or regulation. *Id.* However, it was also argued that the question is not whether the officers were at a legal vantage point but whether the vantage point was one routinely used by the public. *Id.* at 453. If not, the respondent did not knowingly expose the marijuana to public view. *Id.* at 454-55 (O'Connor, J., concurring).

The plain view doctrine noted in *Katz* has been expanded to include observations that are made on or from open fields.[42] In *United States v. Dunn*,[43] the Supreme Court addressed the issue of whether police officers who enter private property to examine the contents of a barn have violated the expectations of privacy guaranteed by the Fourth Amendment.[44] In *Dunn*, law enforcement officers suspected the respondent of storing controlled substances in a barn on his property.[45] A fence encircled the respondent's residence and a separate fence surrounded the barn.[46] The officers crossed the barbed-wire fence surrounding the barn, looked inside and observed illegal substances.[47]

The court concluded that the officers did not trespass on the respondent's curtilage,[48] but only on an open field.[49] Because there is no constitutional difference between police observations from an open field and a public place, society is not prepared to recognize the respondent's expectation of privacy as legitimate.[50] Furthermore, the Court reasoned that even if the barn was given Fourth Amendment protection, the search was reasonable because the officer's observations were only from an open field.[51]

In the instant case, the Florida Supreme Court adopted the application of the two-prong test, set forth by the Fourth District Court of Appeal.[52] Under the first prong, the court appeared to agree that the petitioner made his subjective expectation of privacy clear by enclosing his backyard with

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42. *See* Oliver v. United States, 466 U.S. 170, 179-81 (1984) (holding that the open fields doctrine allows police officers to enter and search a field without a warrant—open fields are open to the public and police in a way a home would not be; the expectation of privacy in fields is unreasonable).

43. 480 U.S. 294 (1987).

44. *Id.* at 296-300.

45. *Id.* at 296-97. Agents from the Drug Enforcement Agency learned that the respondent had purchased chemicals used to manufacture illegal drugs. *Id.* Aerial photographs showed the respondent's truck, which they knew transported the chemicals, backed up to the barn behind his house. *Id.* at 297.

46. *Id.*

47. *Id.* at 297-98. The officers passed through two barbed wire fences and a wooden fence. *Id.* The officers observed a phenylacetone laboratory from outside the barn, but at no time entered the barn. *Id.* at 298.

48. *Id.* at 301.

49. *See id.* at 303-04. The Court used a four-factor test to come to this conclusion:

> [T]he 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.

50. *See id.* at 304.

51. *Id.*

52. *Sarantopoulos*, 629 So. 2d at 122-23.

a solid six foot fence.[53] However, under the second prong, the court relied on the Fourth District's citation of *Ciraolo* in finding that the six foot fence created a zone of privacy only for those who could not see over the fence.[54]

Additionally, the instant court rejected the petitioner's contention that because the officers were trespassers, they viewed the property from an illegal vantage point and thus violated the Fourth Amendment.[55] The court reasoned that this conclusion was supported by *Dunn*.[56] As in *Dunn*, the officers were trespassers on private land, and at no time entered an area protected by a heightened expectation of privacy.[57] However, the instant court did note that *Dunn* was distinguishable in that it turned on the open field doctrine.[58] Notwithstanding this difference, the instant court reasoned that the petitioner had no constitutionally protected expectation of privacy because the officers observed the marijuana plants in plain view and trespassed only on adjoining land.[59]

Two separate dissenting justices reasoned that the majority's decision was not supported by prior caselaw.[60] First, it was contended that an anonymous tip should not give police officers the right to use extraordinary means to look into a person's backyard.[61] Second, as the majority noted, the instant case is distinguishable from *Dunn* and therefore not solidly based on precedent, according to the dissent.[62]

In its analysis, the instant court appropriately turned to the *Katz* two-prong test,[63] but applied it in a questionable manner. In relying on the lower court's rationale, the instant court failed to properly address all of the implications of the opinions which formed the basis for that rationale. For example, the instant court relied on *Ciraolo* in concluding that the petitioner could not have a reasonable expectation of privacy in the area above the six foot fence.[64] However, the *Ciraolo* decision turned on the fact that the officers observed the curtilage from a routinely used public thoroughfare—the airways.[65] Because the officers in *Ciraolo* observed the marijuana from a legally recognizable public access point, any expectation

53. *Id.*
54. *Id.* at 122.
55. *Id.* at 123.
56. *Id.* (comparing the instant facts to those in *Dunn*, 480 U.S. at 297-98).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 124 (Barkett, C.J., dissenting); *id.* (Kogan, J., dissenting).
61. *Id.* (Barkett, C.J., dissenting).
62. *Id.* (Kogan, J., dissenting).
63. *Id.* at 122.
64. *Id.*
65. *Ciraolo*, 476 U.S. at 213.

of privacy was unreasonable.[66] Thus, it was the foreseeability of respondent's marijuana plants being observed from this vantage point that made expectations of privacy unreasonable.[67]

Conversely, the police officers in the instant case were civil trespassers and were therefore not at a legally recognized public access point.[68] Also, because there was no evidence that petitioner's neighbor customarily permitted trespassers to violate his curtilage, the officers were not at a routinely used public thoroughfare.[69] Accordingly, the petitioner had no reason to foresee his marijuana plants being observed from this vantage point by a trespasser. As the evidence indicates, the petitioner did reasonably foresee his neighbor looking into his backyard and properly guarded his expectation of privacy against this hazard by erecting a fence.[70]

However, the instant court reasoned that the civil trespassing did not make the police officers' observations an unreasonable search under the open fields doctrine as applied in *Dunn*.[71] In *Dunn*, the police officers' observations were allowed because, although trespassers, their vantage point was from an open field which is no different than observing from a public place.[72] The instant court also found it compelling that the *Dunn* majority rejected the argument to extend Fourth Amendment protection to a trespass occurring on private land.[73]

As the dissent points out, *Dunn* is clearly distinguishable from the instant case.[74] Even the majority noted that *Dunn* turned on the open fields doctrine.[75] The *Dunn* Court found that Fourth Amendment protections were not violated because the officers remained in the open field and never entered an area where expectations of privacy were heightened.[76] In the instant case, the officers were trespassing, not in an open field, but in the curtilage of the neighbor's house.[77] It is difficult to infer from the majority opinion in *Dunn* that observing as a trespasser from the

66. *Id.* at 213-14.

67. *See id.*; *supra* note 41.

68. *See Sarantopoulos*, 629 So. 2d at 122; RESTATEMENT (SECOND) OF TORTS § 329 (1965) (defining a trespasser as one who enters and remains on land without privilege). The police officers were not acting under any privilege. *See* RESTATEMENT (SECOND) OF TORTS §§ 191-211 (1965) (defining available privileges).

69. *Sarantopoulos*, 629 So. 2d at 121-24; *Sarantopoulos*, 604 So. 2d at 552-56.

70. *See Sarantopoulos*, 629 So. 2d at 122-23.

71. *Id.* at 123.

72. *Dunn*, 480 U.S. at 304.

73. *Sarantopoulos*, 629 So. 2d at 123.

74. *Id.* at 124 (Kogan, J., dissenting).

75. *Id.* at 123. For a brief discussion of the open fields doctrine, see *supra* note 42 and accompanying text.

76. *Dunn*, 480 U.S. at 304.

77. *See Sarantopoulos*, 604 So. 2d at 552.

curtilage of adjoining property is somehow analogous to observing from an open field. Thus, the instant court has expanded the plain view doctrine to recognize not only observations from legal, public vantage points[78] and open fields,[79] but also from illegal vantage points seldom used by the public. In doing so, the instant court has eroded Fourth Amendment protections beyond any case which it cites as controlling.[80]

Furthermore, the instant court failed to note that the officers had many alternatives that were within Fourth Amendment boundaries. They simply could have knocked on the neighbor's door and asked for permission to enter his property.[81] They could have flown over the property within navigable airspace.[82] This latter alternative is compelling because a United States Supreme Court case out of Florida recently reaffirmed the reasonableness of such a search.[83] Yet, the officers chose to trespass in the neighbor's yard instead of acting in accordance with established Fourth Amendment guidelines.

When considering that modern Fourth Amendment jurisprudence has developed only in the twenty-seven years since the *Katz* decision,[84] it is no surprise that each opinion demonstrates the judiciary's struggle to interpret what privacy expectations society will recognize as reasonable. The most recent decisions rest on a bare majority[85] or even a plurality supported by a less-than-definite concurrence.[86] However, these close decisions have succeeded in eroding the *Katz* ideal that a person's expectation of privacy will be recognized as long as society recognizes such an expectation as reasonable.[87] The outcome of this test should not turn on what a person is growing in his backyard, but what a law abiding citizen should expect from the Fourth Amendment. Will society recognize privacy in a curtilage only if the curtilage is fully protected from any possibility of view by the public? The instant Court appears to answer this question in

78. *See supra* note 22 and accompanying text.

79. *See supra* note 42 and accompanying text.

80. *Compare Sarantopoulos*, 629 So. 2d at 123 (upholding a search where the officers trespassed on a neighbor's yard) *with Dunn*, 480 U.S. at 304 (holding officers never violated respondent's Fourth Amendment rights where they trespassed, but never entered, the curtilage of his house and then peered into a barn on the property); *Ciraolo*, 476 U.S. at 213-15 (holding that aerial observation from a lawfully operated aircraft does not violate reasonable expectations of privacy under the Fourth Amendment); *and Katz*, 389 U.S. at 352 (extending Fourth Amendment protection to private conversations at a public phone booth).

81. *See* 1 LAFAVE, *supra* note 22, § 2.3(g), at 417-18.

82. *See supra* note 41 and accompanying text.

83. *See* Florida v. Riley, 488 U.S. 445, 451 (1989) (plurality opinion).

84. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring); *supra* notes 19-24 and accompanying text.

85. *See, e.g., Ciraolo*, 476 U.S. at 208.

86. *See Riley*, 488 U.S. at 447 (plurality opinion); *id.* at 452-55 (O'Connor, J., concurring).

87. *See Katz*, 389 U.S. at 360-61 (Harlan, J., concurring); *supra* note 29 and accompanying text.

the affirmative.[88] Thus, what is the point of recognizing privacy in the curtilage if the only way it is protected is when it is covered, losing its use as a yard? In narrowing Fourth Amendment protections beyond any prior case, the Florida Supreme Court has informed society that it cannot recognize any expectation of privacy in the curtilage as reasonable.

88. *See* 1 LAFAVE, *supra* note 22, § 2.3(g), at 417-18 (discussing instances where police were permitted to enter a neighbor's property before spying on a defendant in conformity with the Fourth Amendment).