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CRIMINAL PROCEDURE—SEARCH AND SEIZURE—CURTILAGE INCLUDES THE GARDEN. *Sanders v. State*, 264 Ark. 433, 572 S.W.2d 397 (1978).

State and local police officers searched the rural homeplace of Jack Sanders in Sorghum Hollow, Arkansas, and found fourteen hundred marijuana plants in his garden. Sanders' garden was located 100 to 200 yards behind his trailer and could only be reached through a gate in the fence that separated the trailer from the rest of the yard. The garden contained a small sampling of other vegetables in addition to the marijuana. Although the trial court found the search warrant to be invalid, it held that the search of Sanders' garden was not a violation of his fourth amendment rights against unreasonable searches and seizures. On Sanders' motion to suppress, the court ruled that the garden was not within the protected area of the curtilage, making the fruits of the search (the marijuana) admissible in evidence against Sanders.

Sanders was convicted of the manufacture of a controlled substance and sentenced to ten years in the Department of Corrections.¹ On appeal, the Supreme Court of Arkansas held that the motion to suppress should have been granted because the garden should not have been searched without a valid search warrant. Sanders' conviction was reversed and remanded for a new trial. *Sanders v. State*, 264 Ark. 433, 572 S.W.2d 397 (1978).

The term "houses" as protected by the fourth amendment has historically been interpreted to include the surrounding area of the house, known in the common law as the curtilage.² Derived from the Old French "cortillage," and from the Latin "cohors," which mean a "place enclosed around a yard,"³ the term includes that area surrounding the house that is considered "home."⁴ Curtilage has been defined as "a space, necessary and convenient and habitually used for the family purposes, and the carrying on of domestic employments. It includes the garden, if there be one, and it need not be separated from other lands by fence."⁵ Accordingly, there must be a home in order to have a curtilage. The curtilage includes that

1. *Sanders v. State*, 264 Ark. 433, 572 S.W.2d 397 (1978).

2. *Care v. United States*, 231 F.2d 22 (10th Cir. 1956), *cert. denied*, 351 U.S. 932 (1956).

3. *United States v. Romano*, 388 F. Supp. 101, 104 n.4 (E.D. Pa. 1975).

4. 4 W. BLACKSTONE, COMMENTARIES *225.

5. BLACK'S LAW DICTIONARY 460 (4th ed. 1968), citing *Fugate v. Commonwealth*, 294 Ky. 410, 171 S.W.2d 1020 (1943) and *Bare v. Commonwealth*, 122 Va. 783, 94 S.E. 168 (1917).

area used for the daily activities of the family, such as the garage,⁶ the back yard,⁷ the garden,⁸ the barn,⁹ the smokehouse,¹⁰ and the ground surrounding the dwelling.¹¹ The curtilage has been said to be protected from governmental intrusion as completely as the inside of the dwelling house.¹²

Whether an area is within the curtilage often turns upon the facts as a whole. Courts have developed certain factors to be used as guides in defining the limits of the curtilage. These factors include whether the area is near the dwelling house,¹³ whether the area is within the residential yard,¹⁴ whether the area is within the same fence surrounding the house,¹⁵ and whether the area is occupied for family purposes.¹⁶ Because the scope of the curtilage cannot be precisely defined, inconsistency has resulted among the courts on what is within the curtilage.¹⁷

The curtilage is sometimes demarcated by an adjacent open field. The well-known open field exception to the requirement of a search warrant arose in 1924 with the decision by the United States Supreme Court in *Hester v. United States*.¹⁸ In *Hester*, revenue

6. *Temperani v. United States*, 299 F. 365 (9th Cir. 1924).

7. *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974).

8. *Childers v. Commonwealth*, 198 Ky. 848, 250 S.W. 106 (1923).

9. *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966).

10. *United States v. Mullin*, 329 F.2d 295 (4th Cir. 1964).

11. *Boyance v. Myers*, 398 F.2d 896 (3d Cir. 1968).

12. *Durham v. State*, 251 Ark. 164, 471 S.W.2d 527 (1971). The Supreme Court of the United States has held that a search warrant is required unless the search is incidental to a lawful arrest, *Chimel v. California*, 395 U.S. 752 (1969), or unless exigent circumstances are present, *Warden v. Hayden*, 387 U.S. 294 (1967). The primary means of enforcing the fourth amendment is the exclusionary rule as applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). The rule deters illegal searches and seizures by prohibiting the use in court of all illegally seized evidence.

13. *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977).

14. *Durham v. State*, 251 Ark. 164, 471 S.W.2d 527 (1971).

15. *Patler v. Commonwealth*, 211 Va. 448, 177 S.E.2d 618 (1970), *cert. denied*, 407 U.S. 909 (1972).

16. *Thomas v. United States*, 154 F.2d 365 (10th Cir. 1946).

17. Although a garage used in connection with a residence was held to be within the curtilage in *Temperani v. United States*, 299 F. 365 (9th Cir. 1924), an abandoned dwelling house was found not to be within the curtilage in *United States v. Thomas*, 216 F. Supp. 942 (N.D. Cal. 1963). While the court in *Welch v. State*, 154 Tenn. 60, 289 S.W. 510 (1926), found a hog lot 300 yards from a residence to be within the curtilage, another court has found an unoccupied house 300 yards from a residence not within the curtilage. *Robie v. State*, 117 Tex. Crim. 283, 36 S.W.2d 175 (1931). And although a barn on a small farm was found within the curtilage in *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966), a goose house 400 feet from a farmhouse has been held not to be within the curtilage. *Saiken v. Bensinger*, 546 F.2d 1292 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977).

18. 265 U.S. 57 (1924).

officers without a search warrant concealed themselves on Hester's father's land and watched Hester hand a bottle to another man. When Hester and his companion realized that they were being watched, Hester picked up a jug, and the two men ran across a field, dropping both the jug and the bottle. The officers picked up the jug and the bottle, the contents of which were subsequently found to be illegally distilled whiskey. In upholding Hester's conviction, the Supreme Court found the land upon which the officers stood while watching Hester to be an open field and not within the curtilage surrounding the house; hence, the lack of a search warrant was not fatal to the introduction in court of the evidence seized by the officers.¹⁹

This open field doctrine has served as a definite example of what is not within the curtilage. When an area is found to be an open field, no search warrant is required. Like the guidelines employed to find an area within the curtilage, the absence or presence of a dwelling,²⁰ the distance from the home,²¹ and the presence or lack of a fence²² usually are considered when determining if a particular area is in fact an "open field," and thus not within the protected area.

In *Katz v. United States*,²³ the United States Supreme Court changed its focus from protected physical areas to the protection of the privacy of the individual. Katz was indicted for transmitting wagering information from Los Angeles to Miami and Boston via calls made from a public phone booth. The Government was permitted to introduce recordings of Katz's conversations overheard by FBI agents who had placed an electronic listening device on the outside wall of the phone booth. The trial court based its admission

19. Mr. Justice Holmes succinctly stated the opinion of the Court:

The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects" is not extended to the open field. The distinction between the latter and the house is as old as the common law.

Hester v. United States, 265 U.S. 57, 59 (1924).

20. *Ford v. State*, 264 Ark. 141, 569 S.W.2d 105 (1978), where a partially enclosed field in a rural area was found to be an open field.

21. *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977), where a wooded area one mile away from the home of the accused was held to be an open field.

22. *Patler v. Commonwealth*, 211 Va. 448, 177 S.E.2d 618 (1970), *cert. denied*, 407 U.S. 909 (1972).

23. 389 U.S. 347 (1967).

of such evidence upon *Olmstead v. United States*,²⁴ which had held that any recording obtained without a physical trespass did not violate the fourth amendment.²⁵ Katz was convicted, and the Court of Appeals affirmed his conviction.²⁶ On appeal, the United States Supreme Court abandoned the physical trespass test adopted by the lower courts. Instead of focusing upon whether a phone booth is a constitutionally protected area and whether penetration of that area is necessary to find a violation of the fourth amendment, the Court stated that the proper approach is to ask whether the individual has a reasonable expectation of privacy in the area searched and not whether the area is physically protected by the fourth amendment.²⁷ Finding the interception of Katz's conversations without a search warrant to be a violation of the fourth amendment, the Supreme Court reversed Katz's conviction.²⁸

In *Sanders v. State*,²⁹ the Arkansas Supreme Court continued to rely on a standard analogous to the physical trespass test and reviewed Arkansas cases wherein the open fields doctrine was applied to uphold convictions based upon evidence seized without

24. 277 U.S. 438 (1928).

25. In *Olmstead v. United States*, 277 U.S. 438 (1928), where the "trespass doctrine" was established, Mr. Justice Brandeis dissented: "If the Government becomes a law-breaker, it breeds contempt for law; it invites anarchy." *Id.* at 485.

26. *Katz v. United States*, 369 F.2d 130 (9th Cir. 1966).

27. *Katz v. United States*, 389 U.S. 347, 351 (1967). The Court discussed the reasons for a privacy-oriented approach to fourth amendment issues:

It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry . . . , for that Amendment was thought to limit only searches and seizures of tangible property. But "[t]he premise that property interests control the right of the Government to search and seize has been discredited" Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

Id. at 352-53.

28. The Supreme Court found Katz to have entertained a reasonable expectation of privacy in his calls made from the phone booth:

[A] person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

Id. at 352. Because Katz had a reasonable expectation of privacy in his phone calls, a search warrant was necessary to intercept his calls. The Court held that Katz' conviction could not stand because the interception of his phone calls was effected without going through the procedural safeguard of obtaining a search warrant. *Id.* at 359.

29. 264 Ark. 433, 572 S.W.2d 397 (1978).

valid search warrants.³⁰ The court held that the area searched by the police in the *Sanders* case was a garden and not an open field, and therefore within the protection of the fourth amendment.³¹ The decision rested upon the finding that the area searched was a garden and thus by definition within the curtilage.³² It was therefore protected against warrantless searches; any evidence seized within the area without a valid search warrant should have been suppressed.³³

Although the court rested its decision in *Sanders* upon the fact that the area searched was a garden and was therefore within the area protected by the fourth amendment, the court did not discuss the factors ordinarily used to determine whether an area is within the protection of the fourth amendment. At hand were the judicially-developed criteria used for many years: the proximity of the garden to the trailer,³⁴ the lack of enclosure of the garden,³⁵ the use of the garden for family purposes,³⁶ and the location of the garden outside the residential yard.³⁷ As Justice Byrd discussed in his dissenting opinion, it would seem that the area was more in the nature of an open field when viewed in the light of past decisions.³⁸ Justice Byrd stated that two of the factors listed above should form the basis for a finding that the area searched was not within the protection of the fourth amendment. First, the garden was separated by a fence from the residential yard, and the garden itself was not enclosed.³⁹ Second, the unusually high ratio of the number of

30. *Id.* at 436, 572 S.W.2d at 398.

31. *Id.* at 437, 572 S.W.2d at 399.

32. The court in *Sanders* attached some significance to the fact that the police officers originally believed that a valid search warrant was necessary to search Sanders' garden. *Id.*

33. The Arkansas Supreme Court summarily advanced the basis of the decision:

The State's argument that this was an open field search is inconsistent with the action of the officers and the physical facts in this case. First, they did not attempt to conduct an open field search. They attempted to search Sanders' premises pursuant to a warrant that was later declared invalid. The first witness called by the state called it a garden—not an open field.

Essentially, the State is using the open field argument as a crutch to shore up an otherwise illegal search. The officers were right the first time—a warrant was needed because the plot was Sanders' garden, next to his dwelling.

Id.

34. *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977).

35. *Patler v. Commonwealth*, 211 Va. 448, 177 S.E.2d 618 (1970), *cert. denied*, 407 U.S. 909 (1972).

36. *Thomas v. United States*, 154 F.2d 365 (10th Cir. 1946).

37. *Durham v. State*, 251 Ark. 164, 471 S.W.2d 527 (1971).

38. *Sanders v. State*, 264 Ark. 433, 439, 572 S.W.2d 397, 400 (1978) (Byrd, J., dissenting).

39. *Id.* at 439, 572 S.W.2d at 399.

marijuana plants to the number of vegetables indicated that the area searched was not used for family purposes; hence, it was not a garden.⁴⁰

The court did not consider Sanders' reasonable expectation of privacy in the garden. Since the *Katz* decision in 1967,⁴¹ the United States Supreme Court and the lower federal courts have used the privacy interest as the focus of search and seizure issues. The determination of a person's expectations of privacy about an area is made after examining the individual's efforts to keep the area private and the nature of the area itself.⁴² This new emphasis upon privacy has signalled an end to the carving out of specific ground areas as within the scope of fourth amendment protection.⁴³ Although the *Hester* decision has not been expressly overruled, the Supreme Court has since *Katz* consistently adhered to the reasonable expectation of privacy standard when deciding search and seizure cases.⁴⁴ This

40. Justice Byrd pointed out that "to call the one row of corn and the few vegetables here grown among the ten rows of marijuana anywhere from 200 to 300 feet in length a garden bastardizes the plain meaning of the term garden. . . ." *Id.* at 439, 572 S.W.2d at 400. Justice Byrd also stated: "Whether the appellant was raising the 1400 marijuana plants here (a pickup truck load) for family purposes or for commercial purposes was certainly a fact issue for the trial court. . . ." *Id.*

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

42. In *United States v. Hitchcock*, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973), the court found that the defendant did not have a reasonable expectation of privacy in his jail cell because it was under official surveillance and shared none of the attributes of a home.

43. The *Katz* decision has been repeatedly cited as establishing a new approach to the protection of the fourth amendment. As the Court of Appeals for the Ninth Circuit stated in *United States v. Fluker*, 543 F.2d 709 (9th Cir. 1976), "The 'curtilage' test is no longer appropriate in ascertaining the extent of the Fourth Amendment's protections against unreasonable searches and seizures." *Id.* at 716. In *United States v. Hitchcock*, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973), the court stated, "[t]he protection of the Fourth Amendment no longer depends upon 'constitutionally protected' places." *Id.* at 1108. A good discussion of the old curtilage test and the new privacy standard appears in *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968):

[I]t seems to us a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public. . . . As the Supreme Court said in *Katz*, "The Fourth Amendment protects people, not places."

The "curtilage" test is predicated upon a common law concept which has no historical relevancy to the Fourth Amendment guaranty. . . .

If the determination of such questions is made to turn upon the degree of privacy a resident is seeking to preserve as shown by the facts of the particular case, rather than upon a resort to the ancient concept of curtilage, attention will be more effectively focused on the basic interest which the Fourth Amendment was designed to protect.

Id. at 857-58.

44. Recent decisions wherein the Supreme Court relied upon the reasonable expecta-

adherence was verified by the Court in *Smith v. Maryland*,⁴⁵ where Justice Blackmun stated: "Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."⁴⁶

The Arkansas Supreme Court has decided several cases dealing with the open field doctrine since 1967, yet in none of them has the court expressly employed the privacy standard set forth in *Katz*.⁴⁷ In view of the focus upon the expectations of privacy of the individual set forth and consistently followed by the United States Supreme Court and followed by the state and lower federal courts since 1967, a reliance upon the *Katz* reasonable expectation of privacy standard in addition to, if not in place of, the common law curtilage doctrine would more comprehensively protect the interests of those claiming fourth amendment violations. A careful consideration of an individual's reasonable expectation of privacy in the area searched is a necessary ingredient of an effective fourth amendment claim in light of the Supreme Court's admonition in *Katz* that the "Fourth Amendment protects people—and not simply 'areas'" and that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."⁴⁸

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tions of privacy standard are *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Chadwick*, 433 U.S. 1 (1977); *United States v. Miller*, 425 U.S. 435 (1976); *United States v. Dionisio*, 410 U.S. 1 (1973); *Couch v. United States*, 409 U.S. 322 (1973); *Mancusi v. DeForte*, 392 U.S. 364 (1968); and *Terry v. Ohio*, 392 U.S. 1 (1968).

45. 442 U.S. 735 (1979).

46. *Id.* at 740.

47. In *Durham v. State*, 251 Ark. 164, 471 S.W.2d 527 (1971), evidence found in an open field was suppressed where the entry was gained from the curtilage (wherein evidence obtained led the officers to the open field). In *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975), *cert. denied*, 430 U.S. 931 (1977), evidence obtained in a search of a 306 acre tract of partially cleared land was held to have been properly admitted in court. A wooded area one mile away from the home of the accused was held to be an open field in *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977). In *Ford v. State*, 264 Ark. 141, 569 S.W.2d 105 (1978), a partially enclosed field in a rural area was found to be an open field.

48. *Katz v. United States*, 389 U.S. 347, 353 (1967).

