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Susan Ann Swanner

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courts of appeal to meet before modifying an award of the trial court, but since the judge or jury is in the better position to evaluate actual damages, this is the better standard.

Ernest L. Nix, Jr.

THE POST-KATZ PROBLEM OF
WHEN "LOOKING" WILL CONSTITUTE SEARCHING
VIOLATIVE OF THE FOURTH AMENDMENT

Several days after receiving a phone call from defendant Fearn's neighbor concerning his observation of some strange looking plants in Fearn's back yard, the police went to the neighbor's home to determine what the plants were. A deputy testified that he could identify the plants as marijuana while standing on the neighbor's property. After arresting the defendant, the deputy went to the back yard and seized the plants. The trial court granted the defendant's motion to suppress the plants as having been unconstitutionally seized. The Louisiana Supreme Court affirmed and *held* that the fourth amendment guarantee¹ against unreasonable seizures was violated since the plants were in an area in which the defendant had a reasonable expectation of privacy and that their warrantless seizure could not be justified by any exception. *State v. Fearn*, 345 So. 2d 468 (La. 1977).

The fourth amendment to the United States Constitution guarantees that individuals shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."² Many courts used

1. The court cited the "right to privacy" in article I, section 5 of the Louisiana Constitution of 1974 as a basis for its decision, but based its arguments solely on the United States Constitution. *State v. Fearn*, 345 So. 2d 468, 469 (La. 1977). Art. I, § 5 provides:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise its illegality in the appropriate court.

2. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and

the concept of curtilage to broaden the scope of these specific guarantees, and to protect a defendant against warrantless searches and seizures within the boundaries of his property.³ In the landmark decision of *Katz v. United States*,⁴ the Supreme Court rejected the curtilage concept and supplied a new standard for determining when the fourth amendment was violated.⁵ Reasoning that the fourth amendment protects people and not places, the Court determined that the scope of protection depends upon the defendant's "reasonable expectation of privacy," irrespective of his whereabouts.⁶

The new test increased an individual's protection in some situations by no longer requiring a physical trespass as an essential element of a search.⁷ But in other cases, protection was reduced since an object within the individual's curtilage was no longer automatically protected.⁸ Thus "what a person knowingly exposes to the public even in his own home or office, is not a subject of fourth amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."⁹

However, not all searches and seizures in areas where the defendant has a reasonable expectation of privacy violate the fourth amendment. Since the fourth amendment proscribes only *unreasonable* searches and seizures, some invasions of privacy, such as those authorized by a warrant based on probable cause, are not prohibited. Conversely, the Supreme Court has said that searches conducted outside the judicial process are per

effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. Places which have been found to be within the range of curtilage are a barn, *Russell v. State*, 37 Okla. Crim. 71, 256 P. 758 (1927), a hen house, *People v. Lind*, 370 Ill. 131, 18 N.E.2d 189 (1938), and a shed, *Marshall v. Wheeler*, 124 Me. 324, 128 A. 692 (1925). This concept did not extend to "open fields," however, even though the field was lawfully in the defendant's possession. *Hester v. United States*, 265 U.S. 57, 59 (1924).

4. 389 U.S. 347 (1967).

5. In *Katz*, the government had attached an electronic listening device to a public phone booth where the defendant made his calls. *Id.* at 348.

6. *Id.* at 351.

7. *Id.* at 353.

8. *United States v. Santana*, 427 U.S. 38, 42 (1976) (holding the doorway of a private home a public place for fourth amendment purposes, where the police may conduct a warrantless arrest based upon probable cause).

9. *Katz v. United States*, 389 U.S. 347, 351 (1967).

se unreasonable, with a few specifically established and well-delineated exceptions.¹⁰

Katz also left lower courts with the problem of analyzing a "looking" into a suspect's property from outside the premises. In *United States v. McMillon*,¹¹ an officer, acting on information from an informant, secured a vantage point on a porch in an adjacent yard with the owner's consent to observe marijuana plants in the defendant's back yard.¹² Based on his observations, he secured a warrant and seized the plants. Since the seizure was authorized by a warrant, the sole issue was whether the initial view was a search, and if so, whether it was reasonable although made without prior judicial authorization. Although the federal district court found that the yard was an area where the defendant had a reasonable expectation of privacy, it concluded that "[t]his course of events could hardly be construed as unreasonable conduct in the performance of police duties, and indeed indicates a good faith effort by the police to comply with the requirements of the law."¹³ Similarly, the Texas Court of Criminal Appeals in *George v. State*¹⁴ decided that officers were not required to get a warrant to look through fence cracks to observe marijuana plants in a constitutionally protected area.¹⁵ However, in *People v. Fly*,¹⁶ an officer who squeezed into a narrow area between a neighbor's garage and the defendant's fence to reach his vantage point, which was almost blocked by heavy foliage, was found by the California appellate court to have conducted an illegal search by looking without prior judicial approval.¹⁷ Evidence seized during execution of a search warrant based on the officer's observations was inadmissible because the view from the neighbor's yard was "from a vantage point as to which the defendant had a reasonable expectation of privacy."¹⁸

In the instant case the court categorized Fearn's expectation of priva-

10. *Coolidge v. New Hampshire*, 403 U.S. 443, 453-55 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967).

11. 350 F. Supp. 593 (D.D.C. 1972).

12. *Id.* at 596.

13. *Id.* at 597.

14. 509 S.W.2d 347 (Tex. Crim. App. 1974).

15. *Id.* at 348.

16. 34 Cal. App. 3d 665, 110 Cal. Rptr. 158 (Ct. App. 1973).

17. This holding is significant because the court had the opportunity to rest its decision on more traditional grounds—the legality of the use of a telescope on a second occasion prior to the seizure—but chose to delineate the limits of visual intrusion with the unaided eye. 34 Cal. App. 3d at 667, 110 Cal. Rptr. at 159.

18. *Id.*

cy as reasonable although not fully justified.¹⁹ Thus, the warrantless seizure had to be justified by a special exception to the fourth amendment.

The prosecution tried to justify the seizure by invoking "plain view," a doctrine which has caused far more confusion than clarity in fourth amendment cases. As expounded by the United States Supreme Court in *Coolidge v. New Hampshire*,²⁰ plain view can justify a warrantless seizure only if a lawful search is in progress and the police inadvertently come upon evidence.²¹ Thus an important justification for the warrantless seizure is that no real privacy interest is involved since the individual's privacy has already been invaded by the prior justified intrusion.²² The Louisiana Supreme Court decided that these elements, a prior justification for the original intrusion and an inadvertent discovery of evidence, were not present in *Fearn*.²³ The neighbor's permission to view the plants from his yard was not a prior valid intrusion because the court found that the only intrusion in this case occurred after the defendant was arrested. Because the discovery was the result of a phone call requesting inspection, it was not found to be inadvertent.

Furthermore, applying the principle in *Coolidge* that "no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances,"²⁴ the Louisiana court held that a plain view sighting of evidence alone could never justify a warrantless seizure.²⁵ Absent some further justification, the officers could not seize the contraband, even if they could look at it without trespassing. Even though what they saw could establish probable cause, that probable cause alone could not allow entrance into a protected area to effectuate a seizure.²⁶ Since all justices seemed to agree that the plain view doctrine did not apply,²⁷ one may

19. 345 So. 2d at 470. The plants were growing in a ditch among high weeds. Although some plants were visible only on close inspection, others were visible from the neighbor's house and could be identified without entering the defendant's property. The court noted that the plants could not be seen from a public street but in his dissent, Chief Justice Sanders stated that "one could position himself on the street to see that portion of the yard where the marijuana grew." *Id.* at 472.

20. 403 U.S. 443 (1971).

21. *Id.* at 466-68.

22. *Id.* at 466-67.

23. 345 So. 2d at 470.

24. 403 U.S. at 468.

25. 345 So. 2d at 471.

26. However, if the court found no reasonable expectation of privacy, and the area was thereby unprotected, a warrantless seizure would be permissible, constituting no intrusion under *Katz*. *State v. Nine*, 315 So. 2d 667, 671-72 (La. 1975).

27. In the dissenting opinions, no allegation was made that the plain view

assume that the distinction between "plain view" looking and "plain view" seizing will be maintained in Louisiana, and that the elements necessary for the doctrine to apply will be strictly construed.

The failure to obtain a warrant after the initial view but prior to the seizure enabled the court to avoid deciding whether the initial view of the plants was a search which required a warrant.²⁸ The opinion did indicate, however, that the seizure would have been justified if the officer had secured a warrant after the view and before the seizure. The court stated that "the intrusion into the protected area did not take place until after the defendant was arrested,"²⁹ thus implying that the only invasion of the defendant's privacy was the warrantless entry and seizure. Moreover, by stating that the "initial view was made at a time when the police could have obtained a warrant,"³⁰ the court implied that the police had probable cause and that any subsequent warrant based on that probable cause would not be tainted by the viewing. The court rejected the prosecution's argument that the seizure was lawful as incident to the defendant's arrest, not on the ground that probable cause was lacking, but because the plants were not in the defendant's immediate control.³¹ The court seemingly concluded that the deputy's view, although intruding into an area where the defendant had a reasonable expectation of privacy, did not constitute a search.

However, an argument can be made for classifying a planned "looking" by police into an area where a defendant has a reasonable expectation of privacy as a search. Such a classification comports with the spirit of *Katz* and with the word's common usage. However, such an intrusion should be deemed reasonable when made in certain circumstances even without a warrant. In determining when a viewing is reasonable, the court should balance the state's interest in not having to obtain a warrant whenever a policeman is asked to look at something against the privacy interest of the individual. Where the intrusion is limited and reasonable, as where there are no gymnastic feats or extensive trespass, the state's interest in law enforcement outweighs the individual's interest in such a limited invasion of privacy.³² However, if the intrusion becomes more

doctrine was not dealt with properly in the majority opinion. In fact, the doctrine was not mentioned at all. 345 So. 2d at 472-74.

28. *Id.* at 471-72. The court simply held that the seizure without a warrant was illegal since it could not be justified by any of the special exceptions.

29. *Id.* at 470.

30. *Id.*

31. *Id.*

32. Courts often undertake such a balancing process in determining when the

extensive, as, for example, if artificial sensory devices are employed or a physical trespass occurs, the individual's interest should prevail, and a warrant should be necessary.

Applying the balancing test to the situation in *Fearn*, the warrantless looking, even though a search, may be justified whereas the warrantless seizure is not reasonable because it is a greater intrusion. Even if the search had been more intrusive—if, for example, the deputy had trespassed to obtain his view³³—the search here might still have been reasonable since the yard was unfenced and the police did not trespass into the area where there was actually a reasonable expectation of privacy. Additionally, the plants were not well enough hidden by the defendant to preclude their observation from the neighbor's property. However, had the officer entered the area around the shed where the weeds partially hid the plants or had the plants not been visible from the neighbor's premises, it is suggested that such a trespass would constitute an unreasonable warrantless search.

Similarly, the use of extra-sensory means of probing increases the extent of intrusion and the likelihood that a court will consider a search unreasonable. In *Fearn*, the officer made his observation with the unaided eye. While it may not be unreasonable for officers standing on adjacent property to use ordinary means to look at what is plainly visible, it could be unreasonable to use binoculars or to fly over the yard in a helicopter. In *Katz*, where the defendant was preserving his privacy from the uninvited ear, a bugging device on a public phone constituted an unreasonable invasion.³⁴ Yet the Ninth Circuit in *United States v. Fisch*³⁵ upheld the admissibility of conversations overheard by state agents who were in an adjoining motel room listening to the defendants without the use of

fourth amendment has been violated. *United States v. Fisch*, 474 F.2d 1071, 1078 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973). The Supreme Court has also struck a balance in the "stop and frisk" area by concluding that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest" *Terry v. Ohio*, 392 U.S. 1, 27 (1967). The Supreme Court has enunciated a different rule concerning a warrantless search of an automobile for purposes of law enforcement efficacy, based upon the fact that a "vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Chimel v. California*, 395 U.S. 752, 764 (1969).

33. Indeed, there is some indication that the officer did in fact cross the property line. The deputy stated that "he affirmatively identified the suspect plants before he crossed the property line." 345 So. 2d at 469.

34. 389 U.S. at 352-53.

35. 474 F.2d 1071 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973).

electronic equipment.³⁶ No violation of privacy was found in view of the non-trespassory origin of the information received and the absence of artificial means of probing. Had an electronic device been used, the scales might have been tipped in the defendant's favor because of the increased extent of the intrusion.

If there is no reasonable expectation of privacy in an area, then a warrantless search or seizure is permissible. Thus the extremely liberal definition of reasonable expectations of privacy in *Fearn* is of great significance. The plants in Fearn's yard were in an area where he had a reasonable expectation of privacy even though they were visible to his neighbor.³⁷ This finding contrasts sharply with many other state decisions in which, once the plants were found to be in plain sight of an officer, warrantless seizures were allowed, visibility cancelling any reasonable expectations of privacy.³⁸ In an earlier Louisiana case, *State v. Nine*,³⁹ the court found no reasonable expectation of privacy in an enclosed side yard used as an entry.⁴⁰ Whether the "reasonable although not justified" rationale of *Fearn* is to be used in the future is debatable since the majority opinion rests on the narrowest of margins. Both Chief Justice Sanders and Justice Marcus found no reasonable expectation of privacy.⁴¹ Justice Summers also dissented, and although Justice Dennis concurred, he found the evidence conflicting.⁴²

Although the court has laid some significant groundwork here in

36. *Id.* at 1076-78.

37. 345 So. 2d at 470.

38. For instance, the Supreme Court of California upheld a warrantless seizure, deciding that a fenced yard was not constitutionally protected, even though the plants were partially covered by foliage and could not be identified except from a foot away. *People v. Bradley*, 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969). Likewise, the Supreme Court of Nevada held the seizure of marijuana from the defendant's yard legal since the plants were open to public view. *Wallace v. State*, 84 Nev. 532, 533, 445 P.2d 29, 29-30 (1968). And the Supreme Court of Colorado held that driving up a driveway to obtain a view of plants in the picture window of defendant's house located 100 to 150 yards off the street did not constitute a search since the defendant did not have a reasonable expectation of privacy in his picture window. *People v. McGahey*, 179 Colo. 401, 404-405, 500 P.2d 977, 978-79 (1972).

39. 315 So. 2d 667 (La. 1975).

40. *Id.* at 672. The facts were somewhat extreme in *Nine*, however: marijuana was thrown out the window of the house while officers were present at the front door looking for runaway juveniles believed to be inside. A person could not reasonably expect to preserve his privacy and at the same time throw marijuana from the window.

41. 345 So. 2d at 472-73 (Sanders, C.J., dissenting), 473-74 (Marcus, J., dissenting).

42. *Id.* at 472 (Dennis, J., concurring).

determining when reasonable expectations exist and in explaining the plain view doctrine, the dimensions of permissible search and seizure in Louisiana after *Katz* remain somewhat undefined. The "right to privacy" enshrined in article I, section 5 of the 1974 Louisiana Constitution⁴³ and cited, but not discussed, by the court as a basis for its decision,⁴⁴ is yet another factor to be considered in structuring the protection to be given Louisiana citizens against unreasonable searches and seizures.

Susan Ann Swanner

MATRIMONIAL REGIME REFORM—A CONSTITUTIONAL NECESSITY

Incarcerated as a result of state criminal charges brought against him by his wife, and in need of security for his debt incurred in order to pay attorney's fees, a husband executed a mortgage on the family home, a community asset with title in the name of both spouses. Learning of the mortgage only upon institution of foreclosure proceedings following default, the wife claimed that the Louisiana provision allowing a husband to mortgage the family home without the wife's consent was unconstitutional as a violation of the equal protection clause and a denial of due process. The federal district court *held* that due to the contractual nature of Louisiana's matrimonial regime system, there was no violation of the United States Constitution. *Kirchberg v. Feenstra*, 430 F. Supp. 642 (E.D. La. 1977).

Within the last few years, statutory provisions outlining different standards for males and females have been subjected to careful consideration by the United States Supreme Court to determine whether they deny the Constitution's guarantee of equal protection.¹ Although the Court has not yet directed its attention to the management provisions of any state's community property system, Louisiana's designation of the husband as the head and master, or manager and controller, of the community of gains,² could become a prime candidate for equal protection analysis.

43. See note 1, *supra*.

44. 345 So. 2d at 469.

1. U.S. CONST. amend. XIV, § 3 provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws"

2. LA. CIV. CODE art. 2404: "The husband is the head and master of the