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### Search & Seizure

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People v. Reilly<sup>235</sup>  
(decided Jan. 20, 1994)

The defendant claimed that his right to be free from illegal searches and seizures was violated under both the State<sup>236</sup> and Federal<sup>237</sup> Constitutions when two deputies conducted a warrantless search of his property.<sup>238</sup> The defendant claimed that the area the deputies entered was constitutionally protected under the doctrine of "curtilage."<sup>239</sup> The court held that, although the area was not within the curtilage, it was constitutionally protected because of the defendant's affirmative acts to maintain privacy.<sup>240</sup> Thus, the court concluded that the deputies illegally entered the defendant's property.<sup>241</sup>

The controversy at issue arose when two deputies walked onto the defendant's property.<sup>242</sup> They gained access by walking through a field, along a fence, through a heavily wooded area,

235. 195 A.D.2d 95, 606 N.Y.S.2d 836 (3d Dep't 1994).

236. N.Y. CONST. art. I, § 12. This provision provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." *Id.*

237. U.S. CONST. amend. IV. This section states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." *Id.*

238. *Reilly*, 195 A.D.2d at 98, 606 N.Y.S.2d at 837. Defendant's property consisted of a 10 acre parcel which included a cottage located 425 feet from defendant's residence within an area of mown grass and landscaped surroundings. *Id.* at 97-99, 606 N.Y.S.2d at 837-39. No fence surrounded the residence, and there was an unmowed area of brush and small trees about 160 to 180 feet from the residence which separated the residence, its yard and the outbuildings from the cottage. *Id.* at 99, 606 N.Y.S.2d at 839.

239. *Id.* at 98, 606 N.Y.S.2d at 838 ("Curtilage is generally defined as an area that is related to the 'intimate activities of the home.'" (quoting *People v. Reynolds*, 71 N.Y.2d 552, 558, 523 N.E.2d 291, 297, 528 N.Y.S.2d 15, 21 (1988)). See BLACK'S LAW DICTIONARY 348 (6th ed. 1990) (defining curtilage as "the land or grounds surrounding the dwelling, which are necessary and convenient and habitually used for family purposes and carrying on domestic employment").

240. *Reilly*, 195 A.D.2d at 99-100, 606 N.Y.S.2d at 838-40.

241. *Id.* at 99, 606 N.Y.S.2d at 840.

242. *Id.* at 97, 606 N.Y.S.2d at 837.

and then proceeding through a break in the fence.<sup>243</sup> Having gained access to the defendant's property, the deputies stood near a cottage located near the defendant's residence.<sup>244</sup> While there, they smelled marijuana from the vent of the air conditioner located in the cottage.<sup>245</sup> Next, they walked through a "small wooded" area located near the defendant's residence and found marijuana plants growing.<sup>246</sup> Finally, they left the premises and obtained a search warrant for the cottage.<sup>247</sup> The warrant was executed and marijuana plants were seized from the defendant's property.<sup>248</sup> The defendant was subsequently arrested on a charge of "criminal possession of marijuana in the first degree and unlicensed growing of marijuana."<sup>249</sup>

On appeal, the defendant claimed that the deputies had illegally entered the "curtilage" of his residence.<sup>250</sup> The court held that

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243. *Id.* The deputies entered the property by:

[W]alking over an adjacent field, following the fence along defendant's east line more than 1,400 feet and into a heavily wooded area north of defendant's property, and then traversing a break in the fence line at the rear of defendant's property. They then walked out of the woods and across defendant's property several hundred feet to a cottage behind defendant's residence . . . .

*Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 97, 606 N.Y.S.2d at 837-38.

247. *Id.* at 97, 606 N.Y.S.2d at 838.

248. *Id.*

249. *Id.*

250. *Id.* at 98, 606 N.Y.S.2d at 839. First, the cottage was 425 feet away, and the brush area and small trees were 160 to 180 feet from the residence. *Id.* at 99, 606 N.Y.S.2d at 839. Second, there was no fence surrounding the residence, and an unmowed portion of brush and trees separated the residence from the cottage. *Id.* Although the court noted that the cottage itself was within an area of mown grass and was surrounded by a pond, gazebo and lawn furniture, this was still insufficient to satisfy the second factor as analyzed. *Id.* Third, even though there was no "objective data" possessed by the deputies to indicate that the cottage "was not being used for intimate activities of the home," the cottage was vacant and a strong odor of marijuana emanated from it. *Id.* Although the defendant had testified at the suppression hearing that the area was used for "backyard" activities, the cottage contained marijuana plants, hoses for irrigation and a timer to control the lights and temperature.

the deputies had not, in fact, entered the defendant's curtilage.<sup>251</sup> The court reasoned that the proximity of the area claimed to be within the curtilage of the defendant's residence was too far removed from such residence to be within the curtilage.<sup>252</sup> The court concluded that defendant's cottage, the immediate area surrounding it, and the unmowed area where the patches of marijuana were seen, did not fall within the definition of curtilage.<sup>253</sup>

The court, however, held that the defendant's suppression motion should have been granted.<sup>254</sup> The court determined that the defendant had a reasonable expectation of privacy in the area on which the deputies walked, and stated that:

[T]he property was bounded on the south by a road, on the north by heavy woods and a low wire fence and on the east and west by a pretension steel fence that appeared electrified. [T]he cottage was surrounded by a well-mown lawn, lines of shrubs, a pond containing a dock and diving board, as well as a gazebo and patio.<sup>255</sup>

All of the precautions, despite the absence of "No Trespassing" signs, demonstrated the owner's expectation of privacy.<sup>256</sup> The court held that where a person's property is substantially enclosed on all sides and well cared for, the landowner has

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*Id.* at 99, 606 N.Y.S.2d at 839. These facts indicated to the deputies that the cottage was not "associated with the activities and privacies of domestic life" as they would have been had the cottage been part of defendant's residence. *Id.* (quoting *United States v. Dunn*, 180 U.S. 291, 303 (1987)). In addition, in *Dunn*, the Court stated that the third factor — use put to the area — was an "especially significant" factor. *Id.* at 98, 606 N.Y.S.2d at 839 (quoting *Dunn*, 480 U.S. at 302). Fourth, even though the area may not be readily visible to the public, the defendant did not have fences to prevent persons from observing the area and cottage which were 750 feet from the road. *Id.* at 98, 606 N.Y.S.2d at 839.

251. *Id.* at 99, 606 N.Y.S.2d at 839.

252. *Id.*

253. *Id.*

254. *Id.* at 101, 606 N.Y.S.2d at 840.

255. *Id.*

256. *Id.*

indicated an expectation of privacy therein.<sup>257</sup> Since the application for the search warrant was based upon observations made by deputies during their illegal entry, the warrant was not legally sufficient and all of the evidence obtained through the execution of the warrant was suppressed.<sup>258</sup>

The court based its holding upon the proposition stated in *People v. Scott*.<sup>259</sup> The court in *Scott* held that when persons "post 'No Trespassing' signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, . . . their privacy rights will be respected and . . . they will be free from unwanted intrusions . . . ." <sup>260</sup>

257. *Id.*

258. *Id.*

259. *Id.* See *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992). The court in *Reilly* determined that *Scott* could be applied retroactively. *Reilly*, 195 A.D.2d at 100, 606 N.Y.S.2d at 840. The court applied a "three-factor test" to determine the retroactivity of *Scott*. *Id.* at 100, 606 N.Y.S.2d at 839. The three-factor test required consideration of "(1) the purpose served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of the retroactive application of the new rule." *Id.* at 100, 606 N.Y.S.2d at 839-40 (citations omitted). Using this test, the court determined that *Scott* would apply retroactively in this case. *Id.* at 101, 606 N.Y.S.2d at 840. In this regard, the court refused to follow *Oliver v. United States*, 466 U.S. 170 (1984), which reaffirmed the "open fields" doctrine, stating that there is no personal or societal privacy expectation in open fields and therefore warrantless observations are allowed. *Id.* at 99, 606 N.Y.S.2d at 838.

260. *Scott*, 79 N.Y.2d at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930. The defendant lived in a mobile home near a two-lane highway. *Id.* at 479, 593 N.E.2d at 1331, 583 N.Y.S.2d at 923. In 1987, a person was deer hunting and followed the deer onto the defendant's property. *Id.* at 479, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922. When on the property, he saw what seemed to be the remains of marijuana plants. *Id.* In July of 1988, the hunter went onto defendant's property again and he saw about 50 marijuana plants growing. *Id.* He reported this to the police and the police asked him to get a leaf from one of the plants, which he did. *Id.* A police officer went back with the hunter to the defendant's property to observe the plants; these visits were not authorized by the defendant. *Id.* Thereafter, the police used the hunter's statement as probable cause to obtain a warrant to search the defendant's property. *Id.* The defendant had 'No Trespassing' signs conspicuously posted around his property. *Id.* at 479, 593 N.E.2d at 1330-31, 583 N.Y.S.2d at 922-23.

The federal standard for determining whether land is within “curtilage” was most recently summarized in *United States v. Dunn*.<sup>261</sup> The Court in *Dunn* explained that curtilage is the place that is “so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.”<sup>262</sup> The Court articulated four factors which it believed should be considered when determining if an area is within the constitutionally protected curtilage area.<sup>263</sup> Those four factors are:

[T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the

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261. 480 U.S. 294 (1987). In 1980, the defendant was found by the Drug Enforcement Administration [hereinafter DEA] to have purchased equipment that was used to produce amphetamine and phenylacetone. *Id.* at 296. The DEA agents obtained a warrant which permitted them to install beepers at the defendant’s home in various locations. *Id.* The beeper transmissions indicated that one of the containers of chemicals was being taken to a ranch which was owned by the defendant. *Id.* at 297. Two days later, officers entered the property without a warrant. *Id.*

Respondent’s ranch comprised approximately 198 acres and was completely encircled by a perimeter fence. The property also contained several interior fences, constructed mainly of posts and multiple strands of barbed wire. The ranch residence was situated a half a mile from a public road. A fence encircled the residence and a nearby small greenhouse. Two barns were located approximately fifty yards from this fence. The front of the larger of the two barns was enclosed by a wooden fence and had an open overhang. Locked, waist-high gates barred entry into the barn proper, and netting material stretched from the ceiling to the top of the wooden gates.

*Id.* A DEA agent entered the defendant’s property by “cross[ing] over the perimeter fence and one interior fence.” *Id.* At that point, the agents smelled phenylacetic acid from the barn. *Id.* They went toward the barn by crossing over a barbed wire fence. *Id.* The officers saw nothing incriminating in the barn. *Id.* Next, they proceeded to a larger barn owned by the defendant by crossing over another barbed wire fence and a wooden fence. *Id.* at 297-98. The officers shone a light into the barn and saw a phenylacetone laboratory. *Id.* at 298. The officers obtained a warrant to enter the ranch after subsequently visiting the barn two more times. *Id.* The defendant was subsequently arrested. *Id.* at 298-99.

262. *Id.* at 301.

263. *Id.*

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.<sup>264</sup>

Using these considerations, the Court determined that the defendant's barn and the area immediately surrounding it were not within the curtilage, and it was proper to enter upon it.<sup>265</sup>

The New York Court of Appeals refused to follow the "open fields" doctrine enumerated in *Oliver v. United States*,<sup>266</sup> thereby affording defendants greater protection from unreasonable searches and seizures under New York law than they receive under federal law.

#### FOURTH DEPARTMENT

People v. LaMendola<sup>267</sup>  
(decided November 16, 1994)

The People brought this action to appeal the decision by the Genesee county court to suppress evidence obtained from pen registers<sup>268</sup> having the capability of monitoring conversations.<sup>269</sup> In making this determination, the county court retroactively applied the rule stated in *People v. Bialostok*,<sup>270</sup> holding that pen

264. *Id.*

265. *Id.*

266. 466 U.S. at 178-79 (holding that there is no legitimate expectation of privacy in "open fields").

267. 206 A.D.2d 207, 619 N.Y.S.2d 901 (4th Dep't 1994).

268. A "pen register" is an instrument that "records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on a telephone line." *Id.* at 208, 619 N.Y.S.2d at 902. See N.Y. CRIM. PROC. LAW § 705.00 (McKinney Supp. 1995).

269. *LaMendola*, 206 A.D.2d at 208, 619 N.Y.S.2d at 902.

270. 80 N.Y.2d 738, 610 N.E.2d 374, 594 N.Y.S.2d 701 (1993). In *Bialostok*, pen registers were utilized to determine the nature of defendant's illegal betting. *Id.* at 742, 610 N.E.2d at 375-76, 594 N.Y.S.2d at 702-03. The court held that where a pen register has the capacity to monitor telephone conversations, although malfunctioning, such pen registers will be treated as an