



POLICE / PROSECUTOR UPDATE

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The law is clear that if police utilize normal means of access to and egress from a private residence for some legitimate purpose, such as to make inquiries of the occupant, it is not a search for the police to see or hear or smell from that vantage point what is happening inside the dwelling. A recent court of appeals case illustrates the limits of this rule.

A deputy sheriff received an anonymous phone call that the defendant had recently harvested marijuana and was dealing it out of his residence. The caller described the location of the residence and stated that the defendant also owned a house adjacent to the residence. The deputy and a state trooper went to the residence to attempt to speak to the defendant. They knocked on the front and back doors but received no answer. The officers then walked through the defendant's backyard and through an open gate in the privacy fence behind the residence to gain access to the other property owned by the defendant. The trooper testified that they proceeded through the yard as a shortcut and not to look for evidence. By this route, the officers came out in the drive of the second property.

They noticed a barn adjacent to the driveway with the door open. One officer called into the barn to determine if anyone was inside. The other went to the front door then to the side door and knocked, but received no answer. He then walked to the back of the house and looked in the windows. A truck was parked about four feet behind the house. The deputy walked around the truck, and smelled the odor of marijuana coming from the house. A second officer also smelled the marijuana. The officers had to get approximately 18" away from the house in order to smell the marijuana. The officers then left, obtained a search warrant based on the odor of marijuana and executed the warrant.

The officers exceeded their lawful authority. As stated earlier, when police enter onto private property in order to conduct an investigation or for another legitimate purpose and restrict their entry to places that other visitors would be expected to go, any observation made from these areas is constitutionally permissible. However, this implied invitation extends only to those with legitimate business, and applies only to recognized access routes reasonable under the circumstances.

Here, legitimate police business brought the officers to the defendant's property. However, with regard to the first property, they failed to limit their visit to areas that could reasonably have been viewed as open to them for that visit and remained on the property after it became clear that the purpose of their visit could not be fulfilled. "Common experience" teaches that under normal circumstances, uninvited visitors coming to a residence to speak with an owner or resident are expected to come to the residence's most direct, obvious, and prominent entryway, which in most cases is the front door. They are also expected to leave by the same route after knocking on the door and receiving no response. The officers should not have crossed through the private backyard of the first property and through the privacy gate to the second property. They should have proceeded along the *most direct public way* from the first property to the second property.

The officers' probable cause observation at the second property was the result of constitutionally impermissible presence on the property for two reasons. First, after there was no response from any occupant of the property, the officers were no longer there for a legitimate investigatory purpose and should have left. Second, when they walked around the truck and within 1 1/2 feet of the house, they were clearly in a place where visitors would not be expected to go; they had invaded the "curtilage" of the defendant's property.

Divello v. State, 782 N.E.2d 433 (Ind. App. 2003).