097

IN THE SUPREME COURT OF FLORIDA

JAMES SARANTOPOULOS,

Petitioner,

vs. Case No. 80,485

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

ELAINE L. THOMPSON
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 816302
4000 HOLLYWOOD BOULEVARD
SUITE 505 SOUTH
HOLLYWOOD, FLORIDA 33021
(305) 985-4788

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

U.S. SUPREME COURT CASES

OTHER FEDERAL CASES

FLORIDA CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with possession of more than 20 grams of marijuana, manufacturing marijuana, and possession of diazepam in the circuit court for the Sixth Judicial Circuit in and for Pinellas County, Florida. (R 4-5) Petitioner filed a motion to suppress all evidence which was obtained as the result of a search conducted pursuant to a search warrant.(R 6-8)

On December 30, 1991, a hearing on the motion to suppress was held. (R 157) A detective for the Largo Police Department testified that he received information from a fellow officer that an unidentified individual had contacted the police and informed the police that marijuana was inside Petitioner's home and marijuana plants were growing in the backyard. (R 162) The officers went to the residence to verify the information. (R 162) The residence, a single family, one-story home, had a backyard surrounded by a six-foot wooden board-on-board fence. (R 163) The front yard did not have a fence. (R 163) The officers walked through an adjoining neighbor's unfenced yard without seeking the neighbor's permission. (R 196-7) The officers could not see through the fence into Petitioner's backyard. (R 614) From the neighbor's yard, a detective stood on his tip toes, looked over the fence, and saw several marijuana plants growing in five gallon buckets. (R 614) The officers used no other devices to view the property nor did they trespass onto Petitioner's property. (R 165-6) Based upon their observations and the

anonymous tip, the officers obtained a search warrant to search the residence and the backyard. (R 167-9)

The trial court suppressed the evidence seized pursuant to the search warrant. (R 79-80) The trial court ruled that law enforcement engaged in "extraordinary efforts" to overcome Petitioner's reasonable attempts to maintain the privacy of his curtilage. (R 80) Relying on West v. State, 588 So. 2d 248 (Fla. 4th DCA 1991), the trial court ruled that the actions constituted a search. (R 80)

The District court, however, reversed the ruling of the trial court stating that society is not prepared to honor Petitioner's expectation of privacy and that his expectation of privacy, viewed objectively, is unreasonable. (App. at 7) The court concluded that the police officer's entry into the neighbor's yard, without permission, to look over the fence into Petitioner's backyard, did not violate Petitioner's constitutionally protected right to privacy in violation of the Fourth Amendment. (App. at 10)

SUMMARY OF THE ARGUMENT

Petitioner lacks standing to complain about the trespass onto his neighbor's property. Petitioner has no legal interest in his neighbor's property and therefore, no reasonable expectation of privacy. Fourth Amendment rights may not be asserted vicariously. Where Petitioner had no legal interest and no expectation of privacy in his neighbor's property, Petitioner's Fourth Amendment rights have not been infringed. Therefore, Petitioner should not be heard to complain about the trespass onto his neighbor's property.

Fourth Amendment rights are infringed when the government, without proper authority, is in an area in which the defendant has a constitutional right to privacy. A backyard with a six-foot fence does create a limited zone of privacy. However, persons who are seven-feet tall and utility workers on poles are outside of that limited zone of privacy and therefore, no search occurs when those individuals that are outside of that limited zone peer into a defendant's backyard. Such viewing does not constitute a search within the meaning of the Fourth Amendment since a property owner reasonably should foresee that outsiders may look over his six-foot fence. Accordingly, it is unreasonable for Petitioner to believe that the enclosed area provided absolute privacy simply because he erected a six-foot fence. The ruling of the district court is correct and should be affirmed.

ARGUMENT

AN OFFICER HAS NOT CONDUCTED A SEARCH OF A DEFENDANT'S BACKYARD BY STANDING ON HIS TIP TOES AND PEERING OVER THE DEFENDANT'S FENCE

Petitioner maintains that looking over a fence while standing on one's tip toes is a violation of a defendant's right to privacy and that, therefore, any evidence resulting therefrom must be suppressed. (Pet. Br. at 6) The issue in this case must be resolved pursuant to Article 1, Section 12, of the Constitution of the State of Florida, which must be construed in conformity with the Fourth Amendment to the United States Constitution.

Petitioner raises as an issue the fact that the police officer who viewed his backyard was trespassing on his neighbor's property when he viewed the marijuana. Such a trespass, although technically illegal, does not affect Petitioner. Petitioner has no legal interest in his neighbor's property and therefore no reasonable expectation of privacy. Because Petitioner has no reasonable expectation of privacy in his neighbor's yard, he lacks standing to raise the issue. See Rakas v. Illinois, 439 U.S. 128, 134, 99 S. Ct. 421, 425, 58 L.Ed.2d 387 (1987); and Newberry v. State, 421 So. 2d 546, 560 (Fla. 4th DCA 1982).

Petitioner misunderstands the requirement that the police must have a legal right to be where they are at the time of the observation. If the police, without proper authority, are in an area which the defendant has a constitutional right to privacy then the Fourth Amendment is violated and the observations and seizures made while in that area are not admissible. Rakas,

supra, 439 U.S. 128, 99 S. Ct. 421, 58 L.Ed.2d 387 (1987). That requirement, however, does not alter the traditional principles of standing. Fourth Amendment rights are personal rights and therefore, a defendant may not assert constitutional rights belonging to others. Id.

The Court reiterated the principle in Rakas that a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. 439 U.S. at 134, 99 S. Ct. 425. See also United States v. Alonso, 790 F.2d 1489, 1495 (10th Cir. 1986)(if a defendant has no expectation of privacy in the property, he has no standing to assert a Fourth Amendment claim; standing may not be conferred by the government's activity, no matter how warrantless or illegal it might be, where no constitutionally protected right of the defendant's is violated).

As the Second District noted in its opinion, the United States Supreme Court held, in United States v. Dunn, 480 U.S. 294, 107 S. Ct. 1134, 94 L.Ed.2d 326 (1987), that even where the police were trespassing onto the defendant's land when they observed the contraband inside the defendant's barn, they were not trespassing in an area where the defendant had a reasonable expectation of privacy, and therefore no Fourth Amendment rights were implicated. See also, Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L.Ed.2d 214 (1984)(defendant had no legitimate expectation of privacy in open fields despite officers trespass onto defendant's property).

The police in this case, as in Dunn, were not trespassing in area where Petitioner had a reasonable expectation of privacy. The Fourth Amendment requires a warrant only to search in an area where the individual has a legitimate expectation of privacy. The protections of the Fourth Amendment do not depend upon a property right in the invaded place but upon whether the **person** who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. Katz, infra, 389 U.S. at 353, 88 S. Ct. at 512. No matter how egregious a violation of privacy may have been, the court will not even listen to a complaint unless it comes from one whose privacy was violated. State v. Hutchinson, 404 So. 2d 361, rev. denied, 412 So. 2d 466 (Fla. 1982). Where Petitioner's right to privacy was not violated by the trespass, he should not be heard to complain. The Petitioner is without proper standing to raise the trespass issue discussed in his brief.

The landmark case of Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967), established a two prong test for determining whether the government has intruded upon an individual's reasonable expectation of privacy. First, an individual must exhibit an actual subjective expectation of privacy. Second, society must be willing to recognize that expectation as reasonable. Id. *There is no* dispute that the first prong of the test has been satisfied. This court must decide if the second criterion has been met. It has not.

The District Court held that Petitioner has a reasonable expectation of privacy in his backyard from persons in adjoining

yards attempting to peer into Petitioner's property from six feet or lower. (App. at 6) Officer Atkinson, however, was 6'2" tall and simply looked over the fence. (R 165) Although the fence was erected to serve as a privacy fence, its height only served to prevent people from looking if they were standing flat on the ground and they were less than six feet tall.

Petitioner has not created a zone of privacy from a person in an adjoining yard standing on a ladder trimming trees or repairing a roof, See, California v. Ciraolo, 476 U.S. 207, 106 S. Ct. 1809, 1813, 90 L.Ed.2d 210 (1986), nor has he created such an expectation from individuals seven-feet tall, or utility pole workers. It is not uncommon in today's society for homeowners to trim their trees or repair their roofs. Nor is it unusual for utility workers to climb tall poles to repair electricity or telephone wires. Indeed, there are probably millions of people who are over six-feet-two-inches tall and therefore could see over Petitioner's fence by standing on their tip toes.

Any of those scenarios would allow an individual to look over Petitioner's fence. Petitioner's backyard, therefore, was at all times readily observable for viewing by a substantial number of individuals during their daily experiences. None of those individuals would need Petitioner's consent to look into his back yard. Because of that fact, it is unreasonable for Petitioner to believe that the area was private simply because he erected a six-foot fence. A property owner should reasonably foresee that neighbors or others persons on the adjoining lands may use ordinary devices which place those persons in a position

to view over a six-foot fence. (App. at 6)[1] If the public can generally be expected to view what a defendant seeks to hide, his expectation of privacy is not reasonable. See generally United States v. Mara, 410 U.S. 19, 93 S. Ct. 774, 35 L.Ed.2d 99 (1973)(no Fourth Amendment right to privacy of one's handwriting); United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L.Ed.2d 67 (1973)(no Fourth Amendment right to privacy of one's voice); Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L.Ed.2d 676 (1969)(no Fourth Amendment right to privacy of one's fingerprints).

Petitioner is relying on West v. State, 588 So. 2d 248 (Fla. 4th DCA 1991), to support his argument. West, however, is legally unsound and should be overruled. First, the court in West cited to the dissenting opinion from Ciraolo to support its position. It is well established that the dissenting opinion does not constitute the law of the case. Furthermore, the quote from Ciraolo cited in West is simply speculation. If one could claim a reasonable expectation of privacy by simply erecting a fence, then Ciraolo and Florida v. Riley, 488 U.S. 445, 109 S. Ct. 693, 102 L.Ed.2d 835 (1989), would have no effect.

In Ciraolo, the defendant's home was enclosed by a ten-foot fence which was surrounded by a six-foot fence. Despite the use of a ten-foot fence, the police looked into the defendant's yard by simply flying over it. The police, in Riley, looked through openings of a roof of the defendant's greenhouse. Riley, supra,

---

[1] Petitioner's neighbor testified that on several occasions he looked over Petitioner's fence. (R 199)

448 U.S. ___, 109 S. Ct. 695. Those cases hold that where an object is knowingly exposed to the public, even in one's home or office, it is not a subject of Fourth Amendment protection because there is no intention to keep the object to oneself. West, Ciraolo, and Petitioner all had fences around their backyards to prevent ground-level viewing. Those fences, however, do not indicate that the defendants manifested a subjective expectation of privacy from "all" observations since a policeman or a citizen perched on the top of a truck or two-level bus, or a power company repair mechanic on a pole overlooking the yard might still see over the fence. [2] Where the backyard was readily observable by any number of individuals, it is unreasonable for West or Petitioner to expect that their marijuana plants were constitutionally protected.

The only distinction between Ciraolo, Riley, and the facts of this case is that Officer Atkinson did not get into an aircraft (in an area where air traffic is common) but simply used his natural physical abilities to look over the fence. There is no reason why the investigating agency should have to spend hundreds of taxpayers' dollars to fly in an aircraft to observe the identical thing an officer could see by simply standing on his tip toes.[3]

---

[2] See Ciraolo, supra, 476 U.S. at 215, 106 S. Ct. at 1813; Ciraolo, supra, 476 U.S. at 211, 106 S. Ct. at 1812.

[3] To the extent that State v. Parker, 399 So. 2d 24 (Fla. 3d DCA 1981), may stand for the proposition that police may not stand upon adjoining land and look for contraband or fruits of a crime within the curtilage of a defendant's residence, it has been overruled by Ciraolo and Riley.

Petitioner's argument, taken to the next logical step, would provide absolute protection to any property owner who erects a fence around his property no matter how low the fence is. If a six-foot fence is sufficient to require a warrant before looking over it, then why not a five-foot fence? As to ground-level views, a fence can only prevent viewing by a limited group of individuals- those who remain on the ground and are shorter than the fence. Therefore, a fence can only provide a limited zone of privacy.

A defendant, by erecting a six-foot fence, cannot create a reasonable expectation of privacy enforceable against a police officer, who is 6'2" tall and stands on his tip toes to view the defendant's marijuana harvest. Accordingly, the motion to suppress was properly denied.

CONCLUSION

Based on the foregoing facts, authorities and arguments, this court should affirm the ruling of the district court.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ELAINE L. THOMPSON
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 816302
4000 HOLLYWOOD BOULEVARD
SUITE 505 SOUTH
HOLLYWOOD, FLORIDA 33021
(305) 985-4788

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been sent by U.S. Mail to Denis de Vlaming, Counsel for Petitioner, 1101 Turner Street, Clearwater, FL 34616 on this 17th day of November, 1992.

COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

JAMES SARANTOPOULOS,

Petitioner,

vs. Case No. 80,485

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX

State v. James Sarantopoulos, Case No. 92-00403 (Fla. 2d DCA August 26, 1992).

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Appellant, v. JAMES SARANTOPOULOS, Appellee.	)	Case No. 92-00403

Opinion filed August 26, 1992.

Appeal from the Circuit Court for Pinellas County; Anthony Rondolino, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Susan Henderson, Assistant Attorney General, Tampa, and Elaine L. Thompson, Assistant Attorney General, Hollywood, for Appellant.

Denis M. deVlaming, Clearwater, for Appellee.

PARKER, Judge.

The State of Florida appeals a trial court order which granted a motion to suppress marijuana and diazepam seized

pursuant to a search warrant. We reverse, concluding that although James Sarantopoulos manifested a subjective expectation of privacy in the curtilage of his home, society is not prepared to recognize his expectation as reasonable. Thus the officers seized the contraband during a lawful search.

The parties provided the following evidence to the trial court at the hearing on the motion to suppress. A detective for the Largo Police Department testified that he received information from a fellow officer that an unidentified individual had contacted the police and informed the police that marijuana was inside James Sarantopoulos's home and marijuana plants were growing in the backyard. The officers went to the residence to verify the information. The residence, a single-family, one-story home, had a backyard surrounded by a six-foot wooden board-on-board fence. The front yard did not have a fence. The officers walked through an adjoining neighbor's unfenced yard without seeking the neighbor's permission. The officers could not see through the fence into Sarantopoulos's backyard. From the neighbor's yard, a detective stood on his tip toes, looked over the fence, and saw several marijuana plants growing in five gallon buckets.[1] The officers used no other devices to view the property nor did they trespass onto

---

[1] The detective testified that he was six feet two inches and could stand on his tip toes and see the plants on the other side of the fence. The neighbor testified that he was six feet one inch and he would have to stand on the lower rail of the fence to see into Sarantopoulos's backyard. Sarantopoulos testified that he was six feet and could not look over the fence without standing on something.

Sarantopoulos's property.[2] Based upon their observations and the anonymous tip, the officers obtained a search warrant to search the residence and the backyard.

The trial court, however, suppressed the evidence seized pursuant to this search warrant. In its order granting the motion to suppress the evidence, the trial court made the following findings:

> The photographs of the location, the testimony of the officer and the testimony of the defendant regarding the construction, maintenance and location of the fence and the adjacent structures make it clear that Mr. Sarantopoulos had a reasonable expectation of privacy in the subject location. The Court finds law enforcement engaged in "extraordinary efforts" to overcome the defendant's reasonable attempts to maintain the privacy of his curtilage. On the basis of West v. State, 588 So. 2d 148 (DCA 1991) [sic] the actions constitute a search.

Since the only other information contained in the affidavit for the search warrant was from an unnamed tipster, the trial court concluded that the search warrant must fail.

We recognize that the area of Sarantopoulos's fenced backyard is clearly within the curtilage of his home[3] and

---

[2] We note that the trial court never made a finding that the detective was untruthful as to what the detective saw or the method the detective used to make his observations. We, therefore, must accept the detective's testimony as truthful.

[3] In United States v. Dunn, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987), the Supreme Court stated:

> Drawing upon the Court's own cases and the cumulative experience of the lower courts

warrants fourth amendment protection. See Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). Thus the issue in this case must be resolved pursuant to Article 1, Section 12 of the Constitution of the State of Florida,[4] which should be construed in conformity with the Fourth Amendment to the United States Constitution.

> that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the 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.

Dunn, 480 U.S. at 301 (citations omitted) (footnote omitted).

[4] That constitutional provision states:

> **Searches and seizures.**--The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

A fourth amendment analysis must begin with the two-part inquiry to determine whether a person has a constitutionally protected reasonable expectation of privacy, which the Supreme Court set forth in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society prepared to recognize that expectation as reasonable? See Rakas v. Illinois, 439 U.S. 128, 143-44 n.12, 99 S. Ct. 421, 430 n.12, 58 L. Ed. 2d 387, 401 n.12 (1978). See also Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220, 226-27 (1979).

Clearly, Sarantopoulos with his solid six-foot fence has manifested a subjective expectation of privacy in his backyard. Thus he meets the first prong of the inquiry.

This court, however, must consider the second prong of the inquiry and determine whether society is prepared to recognize his expectation as reasonable. The way society views the actions of Sarantopoulos defines the zone of privacy he may create for protection from searches under the fourth amendment.[5] We conclude that society is not prepared to honor Sarantopoulos's

---

[5] As an example, a ten-foot fence surrounded by a six-foot outer fence completely enclosing a residence yard obviously indicates a desire by a person that he does not welcome "peeping" into his yard. However, the Supreme Court, with those facts, held that if the police observe contraband from a public vantage point where the police have a right to be (from an aircraft in public navigable airspace), the defendant's expectation of privacy is unreasonable and is an expectation of privacy that society is not prepared to honor. California v. Ciraolo, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

expectation of privacy and that his expectation of privacy, viewed objectively, is unreasonable.

First, Sarantopoulos, by building a solid six-foot fence, has created his zone of privacy from persons in adjoining yards attempting to peer into his yard from six feet or lower. Sarantopoulos has not created a zone of privacy from a neighbor's observations over the fence if that neighbor is seven feet tall. He also has not created a zone of privacy for a person in an adjoining yard standing on a ladder trimming trees or repairing a roof, as the Supreme Court recognized in California v. Ciraolo, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986). A property owner reasonably should foresee that neighbors or other persons on the adjoining land may use devices which place those persons in a position to view over a six-foot fence. Further, as Sarantopoulos acknowledges, the Supreme Court has recognized that it would not be an unlawful search for law enforcement to fly over his property and view the backyard, so long as law enforcement does not violate any laws or Federal Aviation Administration (FAA) regulations. See Florida v. Riley, 488 U.S. 445, 109 S. Ct. 693, 102 L. Ed. 2d 835 (1989).

The trial court relied on West v. State, 588 So. 2d 248 (Fla. 4th DCA 1991) in finding that law enforcement's actions constituted a search. We, however, disagree with West[6] and certify conflict.

---

[6] We recognize that West quotes the four dissenting judges in Ciraolo who observed that:

In West, the First District Court held that a police officer's act of climbing a ladder in a neighbor's yard with the neighbor's permission and peering over a solid wooden fence into a defendant's yard violated the defendant's reasonable expectation of privacy within the curtilage of his home and was therefore a violation of his fourth amendment rights against unreasonable search. West recognized, however, that had the defendant's next door neighbors occupied two-story homes, the defendant's expectation of privacy would not have existed. If this is true, we conclude that the zone of privacy Sarantopoulos has created protects him only from people on adjoining property who remain on the ground and are unable to see over a six-foot fence unaided. However, for people who can see over the fence from adjoining yards, be they roof repairmen, tree trimmers, power company pole climbers, or seven-foot basketball players, there is no zone of privacy within a backyard surrounded by a six-foot fence that society is prepared to recognize.

Sarantopoulos also relies upon State v. Parker, 399 So. 2d 24 (Fla. 3d DCA), review denied, 408 So. 2d 1095 (Fla. 1981)

> Since [the officer] could not see into this private family area from the street, the Court certainly would agree that he would have conducted an unreasonable search had he climbed over the fence, or used a ladder to peer into the yard without first securing a warrant. [Emphasis added]

West, 588 So. 2d at 250 (quoting Ciraolo, 476 U.S. at 222 (Powell, Brennan, Marshall, Blackmun, JJ., dissenting)). Based upon Ciraolo and Riley, we are not confident that the majority of the Supreme Court would agree with this statement.

as support for a violation of his fourth amendment rights. In Parker, eight or nine police officers in Washington, D.C., entered the home of the defendant without permission in search for the defendant and a handgun. After the defendant was located, the search continued into the backyard of the residence. From the yard next door, the police noticed a handgun stuck in a crevice of a basement stairwell and seized it. The Third District Court, in upholding the trial court's suppression of the evidence, concluded that the defendant satisfied both requirements of the Rakas standard for a reasonable expectation of privacy. As to the second requirement (privacy which is recognized as reasonable by society), the Third District Court stated:

> Although the defendant's back yard was visible to his neighbors, he still had a reasonable expectation of privacy there as to the public in general, especially as to the location of the revolver, since it was secreted in a crevice not readily visible to the untrained eye.

Parker, 399 So. 2d at 28. To the extent that Parker may stand for the proposition that police officers may not stand upon adjoining land and look for contraband or fruits of a crime within the curtilage of a defendant's residence, we disagree and certify conflict.

Second, Sarantopoulos had no legitimate expectation of privacy in his neighbor's property, and his fourth amendment rights were not violated by the detective's presence on that property. Cf. Oliver, 466 U.S. at 183 (trespass of officers onto

defendant's open fields is not a search proscribed by the fourth amendment because society does not recognize an expectation of privacy in open fields). Sarantopoulos cannot create his zone of privacy in his backyard upon the premise that his adjoining neighbors will not permit police officers or others to enter the neighbor's backyard and use means to peer over a six-foot fence. Such a reliance is unrealistic. Most neighbors who were not suspects of a criminal violation likely would permit a police officer to enter his or her backyard to gain evidence concerning a crime occurring nearby.

Finally, since the zone of privacy Sarantopoulos has created by his fence is at best a limited zone of privacy, the observations of the detective cannot be an illegal search unless the detective's entry into the neighbor's yard, without permission, is a factor which makes the detective's actions an illegal search. We conclude that the police officer's entry into the neighbor's yard, without permission,[7] to look over the fence

---

[7] We hesitate to describe the detective's presence on the adjoining property, without permission, as a trespass without pointing to the difference in the civil and criminal laws as they relate to trespass. Section 810.09, Florida Statutes (1991) requires active or constructive notice that one is trespassing by an authorized person to create a criminal trespass on real property.

> **810.09 Trespass on property other than structure or conveyance.--**
>
> (1) Whoever, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given, either by actual communication to the

into Sarantopoulos's backyard, did not violate Sarantopoulos's constitutionally protected right to privacy in violation of the fourth amendment.

We are aided in this conclusion by the Supreme Court's case of United States v. Dunn, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). In Dunn, government agents, without a warrant, entered the defendant's property by climbing a perimeter fence, walked one-half mile, crossed several barbed wire fences, climbed a wooden fence enclosing the front of a barn, and peered through fishnet to determine that contraband was located inside the barn. Although the barn was not within the curtilage of a nearby home, obviously the officers were trespassing upon the defendant's property to observe the contents of the barn. The Supreme Court upheld the government's actions to make observations in the face of the government trespass upon the defendant's land, concluding that the open fields doctrine

---

> offender or by posting, fencing, or cultivation as described in s. 810.011, commits the offense of trespass on property other than a structure or conveyance.

As to civil trespass, a trespass to real property is an injury to or use of the land of another by one having no right or authority. Brown v. Solary, 37 Fla. 102, 19 So. 161 (1896). See also Guin v. City of Riviera Beach, 388 So. 2d 604 (Fla. 4th DCA 1980). To be entitled to recover damages for a trespass, a plaintiff must have been the owner or in possession of the land at the time of the trespass. Vincent v. Hines, 79 Fla. 564, 84 So. 614 (1920). The measure of damages in an action for trespass to lands is the difference in value of the land before and after the trespass. Gasque v. Ball, 65 Fla. 383, 62 So. 215 (1913). When the trespass occurs, and no actual damages are proven, the plaintiff is entitled to a judgment for nominal damages and costs. Leonard v. Nat Harrison Associates, Inc., 122 So. 2d 432 (Fla. 2d DCA 1960).

permitted such law enforcement activity. Further, in Oliver, the majority of the Supreme Court rejected Justice Marshall's desire to adopt a rule that "[p]rivate land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment." Oliver, 466 U.S. at 195. Therefore, in this case the officers' civil trespass on adjoining land to look into the curtilage of Sarantopoulos's home should not make the search illegal.

We believe our supreme court has answered this question in State v. Rickard, 420 So. 2d 303 (Fla. 1982). Although confronted with a different issue, the supreme court considered the following pertinent facts in determining whether the defendant's fourth amendment rights had been violated. The defendant's neighbor informed the police that he observed marijuana plants growing in the defendant's backyard. Because the police could not see the plants from the neighbor's yard, the neighbor took the officer to a privately owned citrus grove behind the defendant's yard where the officer observed the marijuana plants. The supreme court, holding that the officers were required to obtain a search warrant before they could seize the contraband, noted that the "defendant's backyard was open to view by police, possibly grove workers, and meandering neighbors." Rickard, 420 So. 2d at 305-06. Thus the Rickard court inferred that officers may make observations, without permission, from private property which is adjacent to the defendant's property without intruding into a protected area.

We reverse the trial court's order suppressing the evidence seized by search warrant and remand for further proceedings consistent with this opinion.

Reversed and remanded.

PATTERSON and BLUE, JJ., Concur.