IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

EUGENE C. BAIN,

Respondent.

Case No. 85,294

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the appellant in the Fourth District Court of Appeal and the defendant in the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida. Petitioner was the appellee and prosecution below. In this brief the parties will be referred to as they appear before this Court. The symbol "R" will denote the Record on Appeal, which includes the relevant documents filed in the Circuit Court. The symbol "T" will denote the Trial Transcript.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case subject to the following. In addition to the ground upon which reversal was granted, respondent also argued that reversible error occurred when the court instructed the jury that it could find him guilty of burglary of a structure if it found that he entered the "area immediately surrounding the structure that would commonly be used by the persons who occupy, or use, that structure", rather than in accordance with the standard jury instruction on structure, which defines a structure as "any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure." The jury instruction issue was rendered moot by the decision reached by the district court.

STATEMENT OF THE FACTS

Respondent accepts petitioner's statement of the facts subject to the following description of the school property. The school grounds, of which the cafeteria was a part, was fenced along its northern boundary, separating it from the neighboring apartment complex. The fence running along the northern boundary was the only fence bordering the property. No evidence suggested that other obstacles to entry lined the remaining three borders of the school. A parking lot was situated on the southern portion of the school property. The cafeteria sat adjacent to and north of the parking lot. Other wings of the school were located east and west of the cafeteria. There was nothing to suggest that the cafeteria was secluded or surrounded by the other wings. Between the northern fence and the cafeteria sat the administration building (T 20). Neither the cafeteria nor the area surrounding it was enclosed by a fence (T 24-25).

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

The decision of the district court of appeal finding the evidence insufficient to support a conviction of burglary of a structure because the property surrounding the structure, the interior of which was not entered by respondent, was unenclosed, correctly applied the law of burglary and should be affirmed. While one may be convicted of burglary of a structure for entering its "curtilage" with intent to commit an offense therein, the term "curtilage" has never been defined by the legislature. "Curtilage" first appeared in Florida's burglary statute in 1892 and it is likely that the legislature intended it to possess its common-law definition, viz, the area surrounding a dwelling-house enclosed by a common fence. In addition, this Court expressed its belief in 1941 that "curtilage" was marked by a fence or other form of enclosure. Although the legislature may abrogate the common-law, and has done so with the remaining elements of burglary, it has never evinced an intent to delete the enclosure aspect of "curtilage".

The courts of this jurisdiction have never squarely addressed the parameters of "curtilage" for purposes of the burglary statute. Although the concept of "curtilage" developed in the area of search and seizure law does not require enclosure, the interest protected by the Fourth Amendment of the United States Constitution and Article I, Section 12 of the Florida Constitution is so different from that protected by the burglary statute as to require a different definition. No definitive answer to the question addressed herein is provided by reviewing the case law and statutory law of other jurisdictions.

Petitioner's strongest argument in support of its view that "curtilage" need not be enclosed is that the issue is subject to debate. Burglary is a penal statute and, as such, when ambiguity exists it must be interpreted in favor of he against whom the statute operates. Respondent asserts that "curtilage" requires enclosure, but acknowledges that it is not unreasonable to conclude that the term is ambiguous. However, under no circumstances can it be said that the burglary statute plainly and unambiguously evinces a legislative intent to

employ an unenclosed definition of "curtilage". Accordingly, the statute must be interpreted in the manner most favorable to respondent, viz, "curtilage" requires enclosure.

In the case at bar the evidence failed to establish enclosure and, as a result, the existence of "curtilage". The evidence also failed to establish "curtilage" under the test employed in search and seizure cases. Therefore, the district court properly vacated respondent's conviction for burglary of a structure. Contrary to petitioner's assertion respondent's conviction may not be reduced to attempted burglary.

ARGUMENT

POINT ON APPEAL

THE DECISION OF THE DISTRICT COURT, DECIDING THAT THE TERM "CURTILAGE", FOUND IN THE BURGLARY STATUTE, REQUIRES ENCLOSURE, CORRECTLY STATED THE LAW AND SHOULD BE AFFIRMED.

Florida law prohibits "entering or remaining in a structure ... with the intent to commit an offense therein ...." § Fla. Stat. 810.02(1)(1991). Structure is defined as "a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof." § 810.011(1), Fla. Stat. (1991).[1] An information was filed against respondent charging him with burglary of a structure (R 9). After a jury found respondent guilty as charged (R 26; T 152-153) he appealed to the Fourth District Court of Appeal seeking reversal on the ground that the evidence was insufficient to support his conviction because it failed to prove that he entered the interior of the structure, even though it established his presence on the unenclosed grounds of the structure. The district court agreed stating:

> We reverse the defendant's judgment and sentence for burglary .... There was no proof that the defendant entered the school cafeteria nor any curtilage, the building not having been enclosed in any manner. Hamilton v. State, 645 So. 2d 555 (Fla. 2d DCA 1994); State v. Rolle, 577 So. 2d 997 (Fla. 4th DCA 1991); DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978); Fla. Std. Jury. Inst. (Crim) 135, 135-136. (footnote omitted).

Bain v. State, 650 So. 2d 83, 84 (Fla. 4th DCA 1995).[2]

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[1] The standard jury instruction reads, "'[s]tructure' means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure." Fla. Std. Jury Inst. (Crim.). Over respondent's objection (T 117-121) the trial court instructed the jury that "[s]tructure means any building of any kind, either temporary or permanent, that has a roof over it, and the curtilage thereof. Curtilage is defined as the area immediately surrounding the structure that would commonly be used by the persons who occupy, or use, that structure." (T 145).

[2] Hamilton v. State, upon which the district court relied in reaching its decision, is currently pending before this Court under Case Number 84,783.

Petitioner sought and was granted review. The issue confronting this Court is the legal definition of the term "curtilage" as it applies to Florida's burglary statute.[3] If enclosure is necessary to establish "curtilage", as held by the district court, affirmance is required based upon insufficient evidence of enclosure. If enclosure is unnecessary affirmance is still appropriate because the school grounds do not meet the "curtilage" test posited by petitioner.

Florida's first statute proscribing burglary of a building made it a crime to "break[] and enter[] in the night-time, a building, ship, or vessel, with intent to commit the crime of murder, rape, robbery, larceny, or other felony." § 12, Sub-chapter 4, Chapter 1637 (Act of Aug. 6, 1868).[4] A separate statute protected dwellings. § 10, Sub-chapter 4, Chapter 1637 (Act of Aug. 6, 1868). "Curtilage" first appeared in the burglary statute in the Revised Statutes of 1892. The Revised Statutes defined burglary of a dwelling as "break[ing] and enter[ing] a dwelling house or any building or structure within the curtilage of a dwelling house, though not forming a part thereof, either in the night-time or in the day-time, with the intent to commit a felony ... ." § 2434, Rev. Stat. (1892). Burglary of buildings, ships, and vessels was also proscribed by the Revised Statutes without reference to "Curtilage". § 2435, Rev. Stat. (1892). Legislative amendments over the years resulted in respondent being charged under a statute, that by 1991, scarcely resembled its predecessors. See § 2, c. 4405, Laws (1895); § 2, c. 5411, Laws (1905); § 3282, Gen. Stat. (1906); § 5116, Rev. Gen. Stat. (1920); § 7217, Comp. Gen. Laws (1927); § 799, c. 71-136, Laws (1971); § 31, c. 74-383, Laws (1974); § 21, c. 75-298, Laws (1975); § 2, c. 82-87, Laws (1982); § 1, c. 83-63, Laws

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[3] At no time has petitioner asserted that respondent entered the interior of the school cafeteria.

[4] Florida was admitted to the Union on March 3, 1845. In 1847 the "Manual or Digest of the Statute Law of the State of Florida of a General and Public Character in Force at the end of the Second Session of the General Assembly of the State" was published. The punishment for burglary was set out in the "Manual". However, the "Manual" did not define the crime of burglary. Copies of the relevant portions of the "Manual" can be found at appendix number one.

(1983).[5] Although the burglary statute underwent drastic change over the years two things remained the same, the use of the term "curtilage" and the failure of the legislature to provide it with a definition. This Court is not without guidance in divining the definition intended by the legislature to accompany "curtilage" when it was made part of the burglary statute in 1892.[6] The common-law of England, prior appellate decisions of the courts of this state, including its own, interpreting "curtilage", decisions of the court's of other states, definitions supplied by other state legislatures, and the rule of lenity may be relied upon.

The common law crime of burglary consisted of five elements; (1) breaking, (2) entering, (3) a dwelling house, (4) at night, and (5) with intent to commit a felony. Baker v. State, 636 So. 2d 1342, 1344 (Fla. 1994). Protection was also afforded to outbuildings lying within the curtilage of the dwelling house. Foreman v. State, 546 So. 2d 977, 979 (Ala. Crim. App. 1986). Under the common-law of England "curtilage" referred to that portion of property surrounding a dwelling house that was enclosed by a fence. The American Students' Blackstone, Commentaries on the Laws of England by Sir William Blackstone (3rd Ed. 1900); DeGeorge v. State, 358 So. 2d 217, 219 (Fla. 4th DCA 1978); Black's Law Dictionary (Rev. 4th Ed. 1968); Ballentine's Law Dictionary (3rd Ed. 1969).[7] Florida's first statute proscribing burglary of a dwelling was a codification of the common-law crime of burglary. See § 10 Sub-chapter 4, Chapter 1637 (Act of Aug. 8, 1868). At the same time that the Florida Legislature

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[5] Appendix number two includes a copy of all burglary statutes cited.

[6] Because "curtilage" has never been defined by the legislature and other amendments evince no intent to alter its original meaning there is no reason for its definition to be any different today than it was in 1892. The only legislative changes affecting "curtilage" are that it is no longer restricted to dwelling houses only and it is now a crime to enter the curtilage with intent to commit a crime without the necessity of entering an outbuilding located on the curtilage. Outbuildings are now protected in their own right.

[7] The relevant portion of Blackstone is included in appendix number three.

codified the crime of burglary it adopted the common law of England in regard to crimes and misdemeanors through what is now Section 775.01, Florida Statutes (1991).[8]

By 1892 the legislature saw fit to alter the night-time element of common-law burglary and to statutorily recognize that dwellings included the outbuildings within their curtilage. However, no definition of "curtilage" was provided by the legislature. The decision of the legislature to statutorily alter the common-law in one aspect while employing the term "curtilage" without supplying a definition evinces an intent to employ the meaning supplied by the common-law. See Hamilton v. State, 645 So. 2d 555, 560 (Fla. 2d DCA 1994). Respondent's argument is buttressed by the failure of the legislature to provide a contrary definition for "curtilage" after this Court noted in Kelly v. State, 145 Fla. 491, 199 So. 764, 765 (Fla. 1941), that "curtilage" was marked by a fence or other enclosure. See State v. Houck, 20 Fla. L. Weekly S49, 50 (Fla. Feb. 2, 1995)(if a word means something other than that announced by this Court the legislature must supply that definition). The failure of the legislature to initially define "curtilage" or to provide a definition contrary to this Court's stated belief in Kelly lends strong support to the argument that the burglary statute employs "curtilage" in its common-law sense. See also DeGeorge, 358 So. 2d at 219. Although the common-law crime of burglary has been abrogated by statute, Baker, 636 So. 2d at 1344, the definition of the term "curtilage", other than to what it attaches,[9] has not. See Linehan v. State, 476 So. 2d 1262, 1265 (Fla. 1985)(codification of common-law crime of arson evinced no intent to change common-law intent element); Egan v. State, 287 So. 2d 1, 6 (Fla. 1973) (statute alters common-law no farther than the words and circumstances import); Corren v.

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[8] § 6, Sub-chapter 12, Chapter 1637 (act of August 8, 1868). The intent to adopt the English common-law was also evidence in the "Manual" at the Fourth Division, Title First, Chapter One, Section 1.

[9] In 1974 Florida combined its many burglary statutes into one with "Curtilage" applying to all structures, not just dwellings. §§ 30 & 31, Chapter 74-385, Laws (1974).

Corren, 47 So. 2d 774, 776 (1950) (legislation abrogating common-law should be positive and unambiguous).

Prior to the decisions rendered in Bain v. State, 650 So. 2d 83 (Fla. 4th DCA 1995) and Hamilton v. State, 645 So. 2d 555 (Fla. 2d DCA 1994) no court in this state squarely addressed the question of whether "curtilage", as used in the burglary statute, required enclosure.[10] The belief displayed in Kelly that "curtilage" required enclosure was echoed in Baker. In holding that the backyard entered by the defendant was equivalent to the interior of the house itself, this Court noted that it was enclosed by a fence and surrounded by shrubs. Baker, 636 So. 2d at 1343. Although a number of decisions of the district courts of appeal have upheld convictions for burglary based upon entry onto the curtilage, those decisions either fail to set for the facts sufficient to establish upon what the finding of "curtilage" was based, M.M. v. State, 610 So. 2d 55 (Fla. 3rd DCA 1992); J.E.S. v. State, 453 So. 2d 168 (Fla. 1st DCA 1984); State v. Spearman, 366 So. 2d 775 (Fla. 2d DCA 1978), or do not address the specific question here at issue, DeGeorge, 358 So. 2d at 219.

The case most closely akin to that at bar is DeGeorge. However, the issue addressed in DeGeorge was whether "curtilage" applied to commercial structures, not the nature of the definition. Id. at 219. Without seeking to determine "the varied geographical arrangements which may constitute the curtilage of a single structure", id. at 220, the court upheld the defendant's burglary conviction where "[t]he premises were composed of a structure, and an immediately adjacent paved area, partially enclosed by a fence, a brick wall, and the structure itself." Id. at 218; See also Tobler v. State, 371 So. 2d 1043, 1045 (Fla. 1st DCA 1979)(entry

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[10] In Phillips v. State, 177 So. 2d 243 (Fla. 1st DCA 1965), a case involving search and seizure law, the district court stated:

> The noun "curtilage" has a distinctive meaning in legal parlance. It has been described as the yard, courtyard, or piece of ground lying around or near to a dwelling house, included within the same fence. State v. Taylor, 45 Me. 322.

Id. at 244.

into fenced area surrounding warehouse was burglary of a structure) cert. denied, 376 So. 2d 76 (Fla. 1979); Greer v. State, 354 So. 2d 952, 953 (Fla. 3rd DCA 1978)(conviction for burglary of a structure upheld where defendant scaled wall into enclosed parking area surrounding business structure with intent to commit offense).

A review of burglary statutes in other jurisdictions and decisional law interpreting the meaning of "curtilage" provides no definitive answer to the question at bar. Only three other jurisdiction have burglary statutes which contain the word "curtilage".[11] Those jurisdiction, like Florida, fail to provide a legislative definition of curtilage. Decisional law interpreting "curtilage", whether it be in terms of a burglary statute or in another context, is split over whether enclosure is necessary to constitute "curtilage". Compare State v. Fields, 337 S.E. 2d 518, 520-521 (N.C. 1985)(adopting comfort (use) and convenience (proximity) test to determine what is within the curtilage) and James v. State, 234 P. 2d 422, 426 (Okla. Crim. App. 1951)(small piece of ground around dwelling that is not necessarily enclosed) with State v. Stewart, 274 A. 2d 500, 502 (Vt. 1971)(open space around dwelling surrounded by common enclosure) and Italian American Building and Loan Association of Passiac County v. Russo, 28 A. 2d 196 (N.J. I942) (ground within a common enclosure belonging to a dwelling house). Other judicial decisions recognize that "curtilage" has both a historical and modern definition, the former requiring enclosure, that latter not necessarily so requiring. United States v. Romano, 388 F. Supp. 101, 104 n. 4 (E.D. Pa. 1975); Charch v. Pa. Pub. Ut. Comm'n, 132 A. 2d 894, 896 n. 2 (Pa. Super. Ct. 1957); State v. Egan, 272 S.W. 2d 719, 724 (Mo. Ct. App. 1954).

Petitioner's reliance upon the definition of "curtilage" developed in the context of search and seizure law is educational but does not further the search for a definition under the burglary statute. The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

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[11] § 97-17-33, Miss. Code Ann. (1993); §§ 14-51 & 14-54, N.C. Gen. Stat. (1993); § 11-8-1.1, R.I. Gen. Laws (1994).

searches and seizures..." The Florida Constitution does likewise. Art. I, § 12, Fla. Const. Both the Fourth Amendment and Article 1, Section 12 protect the interest of the individual in being free from unreasonable governmental intrusion into the realm of private life. Oliver v. United State, 466 U.S. 170, 178, 104 S.Ct. 1735, 1741, 80 L.Ed. 2d 214 (1984); Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). While a warrantless search of the "open fields" in the vicinity of ones' home does not impinge upon constitutional liberties, Hester v. United States, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924), an identical search of ones' home is presumptively unconstitutional, Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed. 2d 854 (1973). The home, under Fourth Amendment jurisprudence, has come to include its "curtilage". United States v. Dunn, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 L.Ed. 2d 326 (1987). Because the Fourth Amendment protects people, not places, Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed. 2d 576 (1967), a definition of "curtilage" restricted to an enclosed area surrounding the home would unduly restrict its operation. The purpose of the Fourth Amendment requires a broad, unrestricted, unenclosed definition of "curtilage".

The burglary statute was not adopted to protect individuals against unreasonable intrusion into their private lives by agents of the government. Burglary is a disturbance to habitable security, Adirim v. State, 350 So. 2d 1082, 1084 (Fla. 3rd 1977) cert. denied, 365 So. 2d 709 (Fla. 1978), and statutes proscribing such conduct are aimed at punishing the criminal invasion of the possessory property rights of another, Potter v. State, 91 Fla. 938, 109 So. 91, 94 (Fla. 1926); Anderson v. State, 356 So. 2d 382, 384 (Fla. 3rd DCA 1978) overruled on other grounds 370 So. 2d 797 (1979). "Curtilage" in the burglary context need only be so broad as to include those areas where one objectively demonstrates an intention to habitat.[12] Enclosing the area surrounding to structure enlarges the area of habitation. In

[12] There may be a difference between the concept of "curtilage" as it applies to private dwellings and structures, whether they be commercial or governmental. The yard attached to a dwelling is understood to be for the use and enjoyment of the occupants of the dwelling. Others may use the yard only with permission. However, where a structure such as a

essence the enclosed area becomes an additional room entitled to security. The privacy interests protected by the Fourth Amendment and the property interests protected by Florida's burglary statute are very different. Accordingly, the definition of "curtilage" found under one is not necessarily appropriate for the other.

Reviewing the relevant authorities leads to the conclusion that the Florida Legislature intended "curtilage" to mean an enclosed area. The English common-law employed that definition and as late as 1941 this Court evinced its belief that "curtilage" was marked by enclosure. The legislature has made no attempt to override that judicial expression. Petitioner's contention that a plain reading of the statute defines "curtilage" as unenclosed due to the failure to insert "fenced", "enclosed", "secluded", or "protected" before "curtilage" is unconvincing.[13] Respondent can just as easily argue that the failure to insert "unfenced", "unenclosed", "unsecluded", or "unprotected" before "curtilage" leads to a contrary conclusion.[14] Viewing the definition of "curtilage" in the light most favorable to Petitioner the best that can be said is that ambiguity[15] surrounds its definition. When, as the result of ambiguity, a criminal statute can be interpreted in two manners, one favorable to the defendant and the other unfavorable, the ambiguity must be resolved in favor of the defendant. Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992); Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991); § 775.021(1), Fla. Stat. (1991). If the legislature wants to define "curtilage" as the unenclosed area surrounding a structure it can do so. See Overstreet v. State, 629 So. 2d 125,

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government building is involved the issue is not so clear cut. Therefore, there may be a greater need for enclosure where structures are involved.

[13] "Enclosed curtilage", under the English common-law definition is an unnecessary redundancy.

[14] In State v. Hamilton, Case No. 84,783 the State conceded that it was only arguable that "curtilage" extended to unenclosed areas. Petitioner's Brief at 10.

[15] Although this Court announced in Baker that the burglary statute was clear and unambiguous it did so not in the context that "curtilage" was clearly defined, but in the context that the statute clearly makes entering the curtilage of a structure or dwelling synonymous with entering the interior of the structure of dwelling.

126 (Fla. 1993). To date it has not. Therefore, respondent was entitled to a definition of "curtilage" that required enclosure.[16]

The facts adduced below do not support a finding that the cafeteria building was enclosed in a manner that would allow respondent to be convicted of burglary of a structure based, not upon entering the interior of the structure, but for entering its "curtilage" with the intent to commit an offense therein. The school grounds, of which the cafeteria was a part, was fenced along its northern boundary, separating it from the neighboring apartment complex. The fence running along the northern boundary was the only fence bordering the school property. No evidence was presented suggesting that other obstacles to entry lined the remaining three borders of the school. A parking lot was situated on the southern portion of the school property. The cafeteria sat adjacent to and north of the parking lot. Other wings of the school were located east and west of the cafeteria. There was nothing to suggest that the cafeteria was secluded or surrounded by the other wings. Between the northern fence and the cafeteria sat the administration building (T 20). Neither the cafeteria nor the area surrounding it was enclosed by a fence (T 24-25). No evidence was presented suggesting that respondent entered the cafeteria, rather, it showed only that he attempted to enter it from the exterior by removing and prying upon a window.

Respondent stood on the property surrounding the cafeteria but did not enter its interior. Because the property surrounding the cafeteria was unenclosed it did not constitute "curtilage". Accordingly, the district court acted correctly in concluding that respondent could not be convicted of burglary and its decision should be affirmed. Petitioner's contention that respondent's conviction should be reduced to attempted burglary pursuant to Section 924.34, Florida Statute (1991) is without merit. Attempted burglary of a structure is neither a lesser statutory degree, § 777.04(4)(c), Fla. Stat. (1991); Swain v. State, 492 So. 2d 752, 753 (Fla. 1st DCA 1986), nor a necessarily lesser included offense of burglary of a structure. See Wilson

[16] That is consistent with the standard jury instruction.

v. State, 635 So. 2d 16, 17 (Fla. 1994). Therefore, reduction to attempted burglary is not authorized. Taylor v. State, 608 So. 2d 804, 805 (Fla. 1992); Gould v. State, 577 So. 2d 1302, 1305 (Fla. 1991).[17]

Should this Court determine that Florida's burglary statute unambiguously adopts a definition of "curtilage" consistent with that set out by the United States Supreme Court in United States v. Dunn, 480 U. S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987), reversal is still required. Dunn developed a four-part "curtilage" test to be applied under the Fourth Amendment. Id. 480 U. S. at 301, 107 S. Ct. at 1139. The four factors are "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." Id. In the case at bar the factors do not support a finding of "curtilage". While the area upon which respondent stood was close to the cafeteria structure, it was not within an enclosure surrounding the cafeteria. In addition, there was no attempt to shield the area from observation by passers-by. The property entered by respondent does not pass the "curtilage" test under Dunn. Accordingly, affirmance is required.

[17] It appears that the reduction to trespass in a structure was also improper. Although respondent requested that remedy from the district court, this Court can correct manifest injustice. Conviction of a crime for which the defendant was not charged is manifest injustice.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, respondent respectfully requests this Court affirm the decision rendered by the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Georgina Jimenez-Orosa, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 28th day of June, 1995.

DAVID McPHERRIN
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