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The "curtilage" of a residence, which includes those areas and structures immediately surrounding or connected to the residence intended for private use, are protected from intrusion by the Fourth Amendment.

QUESTION: When is an area considered "curtilage" of a residence and thus entitled to Fourth Amendment protection?

ANSWER: "Curtilage" is an area intimately linked to the residence where privacy expectations are heightened. It extends to the areas immediately surrounding and associated with the residence which are intended to be private.

CASE: *Carrie McGurk v. State of Maryland*, Court of Special Appeals Decided September 7, 2011

In this case, the Court of Special Appeals of Maryland considered two interesting and challenging questions: (1) whether a second floor balcony was part of the "curtilage" of a dwelling and thus protected by the Fourth Amendment, and (2) whether exigent circumstances justified the officer's warrantless entry onto the balcony. The facts established that at 3:15 a.m. on June 29, 2009, Carrie McGurk and Roberto Villagra, a male companion, were on the second floor balcony of a house located at 608 Philadelphia Avenue, Ocean City, Maryland. Philadelphia Avenue is a two way street that runs north and south. The address is on the east side of Philadelphia Avenue and has a front porch and a balcony. The floor of the balcony is 10 feet above ground. A waist high wooden railing is on the west and a portion of the north side of the balcony. Both the front porch and the balcony face Philadelphia Avenue. A person on the balcony can gain entrance into the living quarters of the dwelling by accessing a door at the rear (east side) of the balcony.

At the time, the balcony was decorated with flowers and plants. A glass table was positioned towards the south-end of the balcony. Additionally, there was a "two-person style" rocking chair and at least one other chair on the balcony. Below the balcony, on the west side of the front porch, there is a very narrow lane that is adjacent to the sidewalk that borders on Philadelphia Avenue. The first step on the staircase that leads to the balcony is very close to the sidewalk. From the stairs, the entrance onto the balcony is on the north side.

The dwelling was being leased by Brady Cox, and Ms. Carrie McGurk had planned to stay the night. At 3:15 a.m., Ocean City police officer Michael Valerio, in uniform, was riding his patrol bicycle south-bound on Philadelphia Avenue when he smelled the odor of burnt

marijuana. He turned his bicycle around and peddled approximately 60 feet north of 608 Philadelphia Avenue in an attempt to locate the source of the odor. He then looked back towards the south and saw two people sitting on a balcony. Officer Valerio approached the staircase that led to the second floor balcony at 608 Philadelphia Avenue and radioed for assistance to help him locate the source of the marijuana.

Before any other officers arrived, Officer Valerio, without asking for or receiving permission, walked up the stairway to the second-floor balcony. Once there, he identified himself to Ms. McGurk and her companion and asked them, "What are you up to tonight?" Villagra answered that they were just watching the traffic go by. Officer Valerio then moved closer to Villagra and asked, "Are you doing anything else?" As he did so, he determined, based on his training and experience that the marijuana odor was emanating from Villagra. The officer asked Villagra if he had any marijuana on him and Villagra said that he did not. Essentially ignoring the response, Officer Valerio asked Villagra if he had just "a little bit" or "a lot more" marijuana on him. The officer asked this question several times. Finally, Villagra answered that he had smoked a "roach" but had thrown it off the balcony. Officer Valerio went down to the front yard where he found a "roach" that was still warm. He picked it up, walked back up the balcony and asked Villagra if this was his "roach." When Villagra answered yes, he was arrested.

By this time, several other officers had arrived on the scene. Officer Charles Kelley climbed the steps to the balcony to assist Officer Valerio. He initiated a conversation with Ms. McGurk, essentially asking her questions related to her knowledge of Villagra. As he stood near Ms. McGurk, Officer Kelley detected the odor of marijuana coming from her. He then asked her for identification. Ms. McGurk opened her purse to get it, and, when she did, Officer Kelley observed a prescription bottle containing, in his words, a "glassine cellophane type baggie" that contained a "greenish-brownish leafy vegetable like substance." From his training and experience, Officer Kelley knew the substance was marijuana. He ordered Ms. McGurk to give him the prescription bottle. Instead of surrendering it, Ms. McGurk tried to conceal it with her hand. She also tried to remove other items from her purse and shove them in her front pocket. Officer Kelley announced that Ms. McGurk was under arrest. Ms. McGurk was handcuffed removed from the balcony and searched. $813.00 was found in her rear pants pocket and when Ms. McGurk's swim suit top was pulled away from her body, six "cream colored rocks" of cocaine fell to the ground. A female officer on the scene conducted a more invasive search and found another prescription bottle and a crack pipe on Ms. McGurk's person.

Ms. McGurk was charged with possession of marijuana and possession of cocaine with the intent to distribute, and various other drug offenses. Prior to trial, she moved to suppress the evidence seized from her person. She contended that, when the officers entered the balcony, they had intruded into a "constitutionally protected area" (*i.e.*, an area where Ms. McGurk had a reasonable expectation of privacy, and, therefore, the evidence they seized must be suppressed.) Specifically, she contended that the balcony was part of the "cartilage" of the dwelling, and, as such, permission was needed to enter it. The trial court denied the motion and Ms. McGurk was found guilty and sentenced to a suspended period of imprisonment and a period of probation. She appealed.

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On appeal, the Court of Special Appeals reversed the convictions, finding that the motion to suppress should have been granted. In doing so, the court first reviewed the definition of cartilage: "An area is considered to be part of the cartilage of a dwelling house if it 'is so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection.'" Whether an area is curtilage or not depends on four factors: (1) the proximity of the area to the home; (2) whether the area is included in an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. Applying these factors, the court concluded, based upon the balcony's location, railing, and use, that the second story balcony was part of the home itself. The court said, "Certainly an occupant of the balcony at issue would not expect an uninvited stranger to climb the steps and enter onto the balcony in the middle of the night." This was especially true because entry into 608 Philadelphia Avenue is not normally accomplished by walking up the steps to the balcony. Instead, the normal entryway to the house was through the ground level front door. So, in the absence of a warrant or consent, the officers' intrusion onto the balcony violated the Fourth Amendment.

NOTE: This case is limited to its somewhat peculiar facts. Officers should understand that, unlike the second story balcony here, there generally is no Fourth Amendment protection (*i.e.*, no reasonable expectation of privacy) in areas of curtilage that a visitor could reasonably be expected to use or cross when approaching the front door or attempting to speak with occupants—for example, the driveway, front sidewalk, and front porch. This is because the property owner has impliedly consented to have members of the public use a particular "path" when attempting to access the home. The same implied consent is extended to police officers who enter the curtilage, and while on the premises, restrict their conduct to those activities reasonably contemplated by the homeowner. This "implied consent," however, may be overcome by the erection of physical barriers and/or the posting of "no trespassing" or "private property" signs. Finally, as to whether or not the odor of burning marijuana and Villagra's discarding of the "roach" amounted to "exigent circumstances," the court said no. Even though the odor of burning marijuana provides probable cause to believe marijuana is present, the presence of marijuana does not itself authorize the police to search any place or to arrest any person in the vicinity. *Additional factors must be present to localize the presence of marijuana such that its placement will justify either the search or the arrest.* Confined locations, such as automobiles or apartments are exceptions. Here, however, Officer Valerio admitted that he did not know that the odor was coming from the balcony until *after* he entered it. Thus, he lacked any probable cause prior to entering the balcony. Further, the officer did not discover the "roach" until after he had entered the balcony. Consequently, he could not use the discovery to establish exigency to enter in the first place.

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