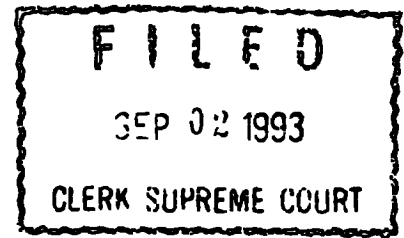


IN THE COURT OF APPEALS OF IOWA

No. 3-291 / 92-293



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STATE OF IOWA,

Appellee,

vs.

DENNIS DEAN HODGES,

Appellant.

Appeal from the Iowa District Court for Woodbury
County, Phillip S. Dandos, Judge.

Hodges appeals his convictions, following a jury trial,
of possession with intent to deliver and failure to affix a
drug tax stamp in violation of Iowa Code sections
204.401(1)(d) and 421A.12 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S.
Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell,
Assistant Attorney General, Thomas S. Mullin, County
Attorney, and Mark Campbell, Assistant County Attorney, for
appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett,
JJ.

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SCHLEGEL, J.

The defendant, Dennis Dean Hodges, appeals his conviction of possession of a controlled substance with intent to deliver and of failure to affix a drug tax stamp in violation of Iowa Code sections 204.401(1)(d) and 421A.12 (1991). Hodges' principal claim is the district court erred in overruling his motion to suppress evidence allegedly obtained by an illegal warrantless search of his premises. We affirm.

Law enforcement officers received two tips from confidential informants that the defendant was engaged in growing and processing marijuana for sale at the premises where he lived. The officers made observations of the property from a street and from property other than that occupied by Hodges. Having seen growing plants of marijuana from these locations, the police entered the property rented by Hodges and again observed the growing marijuana plants. Based upon this surveillance, the officers obtained a search warrant, entered the home of the defendant, and conducted a search which uncovered various amounts of marijuana seeds and buds. The evidence indicating the growing of marijuana was found in the basement of the house.

The police also searched a patch of growing marijuana behind the residence and seized fifty-six plants from the property. The patch in which the marijuana was growing was located approximately twenty to twenty-five feet from the

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back of the house where defendant lived. At that location, the officers found a garden hose and implements used to cultivate the marijuana. The area where the marijuana was growing was elevated approximately ten feet above the lot upon which the house was located. In addition, woods and brush piles existed on three sides of the area, obscuring the area from view from the public streets.

The sole question for our review is whether the officers' entry upon the plot where the marijuana was growing constituted an illegal search under the Fourth Amendment of the United States Constitution. Since the defendant is alleging error involving a constitutional right, we conduct an independent evaluation of the totality of the relevant circumstances to determine if such error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987). This is the equivalent of de novo review.

The Fourth Amendment protects against governmental intrusion into a person's legitimate expectation of privacy. State v. Flynn, 360 N.W.2d 762, 764 (Iowa 1985). While referring to the concept of legitimate expectation of privacy in Oliver v. United States, 466 U.S. 170, 182, 104 S. Ct. 1735, 1743, 80 L. Ed. 2d 214, 227 (1984), the Court stated:

The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.

Hodges claims he had a reasonable expectation of privacy in the area containing the marijuana patch because it was within the curtilage of his house--not within an open field. This reference to "open field" is a reference to the doctrine followed by the line of cases after the decision in Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), where the "open fields" doctrine was stated as follows:

[T]he special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

Id. at 59, 44 S. Ct. at 446, 68 L. Ed. at 900.

With respect to whether the patch was within the curtilage of Hodges' house, the United States Supreme Court has more recently clarified the "open fields" doctrine, establishing a four-factor test for determining what is included within the curtilage of the home and what is considered to fall within an "open field" for the purpose of defining the defendant's legitimate expectation of privacy. These factors are discussed in United States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326, 334-35 (1987), and include:

[T]he 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.

The Dunn Court continued:

We do not suggest that combining these factors produces a finely tuned formula that, when

mechanically applied, yields a "correct" answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration--whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.

Dunn, 480 U.S. at 301, 107 S. Ct. at 1139-40, 94 L. Ed. 2d at 335.

Having applied these four factors to the evidence in the present case, we conclude the marijuana patch in question was not a part of the curtilage. More specifically, we find the sole "nature of the use to which the area was put" was cultivating marijuana. We cannot say that the government's intrusion in the present case infringes upon legitimate personal and societal values protected by the Fourth Amendment.

Although the plot was quite close to the house, the plot was separated from the yard by an embankment of six to ten feet in height; the patch was clearly not readily accessible from the house. The existence of the embankment separated the marijuana patch from the house and the area immediately surrounding the house. In addition, the patch was not used for any of the normal activities associated with the use of a home. Instead, the patch was used exclusively for growing and cultivating marijuana.

The existence of the marijuana was confirmed through the police officers' observations from nearby property prior to the policemen's entry upon the land where the marijuana was grown. The entry onto the property

constituted entry upon an "open field" and was not illegal. The entry was carried out to confirm what had been observed from a distance. Accordingly, the defendant's constitutionally-protected reasonable expectation of privacy was not violated as a result of the search.

Hodges also claims the application for the search warrant contained false information. However, the defendant has waived this issue by failing to raise the issue in district court. Even if the issue had been properly preserved for appellate review, we would have found the claim to be without merit. Specifically, the defendant claims the application falsely stated that the marijuana had been observed from a public street whereas the marijuana had actually been observed from adjacent property owned by the defendant's parents. The important part of the affidavit, however, is the fact that the marijuana had been observed growing in a field behind the defendant's house. No prejudice results from the fact that the stated place from which the marijuana was observed may have been incorrect. No intentional distortion of the facts was made.

Having considered the record in this case in light of the applicable authorities, we affirm the trial court's ruling and the defendant's conviction.

AFFIRMED.