

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

KEVIN PETERSON

Defendant-Appellee.

CASE NO. 07-2232

ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT

COURT OF APPEALS  
CASE NO. 22008

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APPELLANT'S MERIT BRIEF

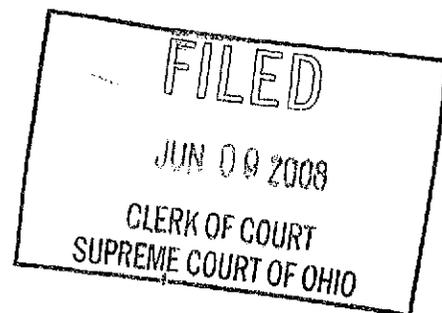
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## STATEMENT OF THE FACTS

### **Surveillance of 1609 Westona Drive corroborates anonymous complaints of drug activity**

On October 20, 2004 Detective Douglas Hall of the Dayton Police Department Narcotics Unit set up surveillance at 1609 Westona Drive after receiving multiple complaints of drug dealing at the residence. (6/19/06 MTS Tr. 10-11, 14) From the complaints, the police were given a rough physical description of a man involved with the alleged drug dealing along with information that there was a surveillance camera on the front door of the house. (6/19/06 MTS Tr. 12) One complaint stated drug traffic was heaviest after 9:00 p.m., so Hall began his surveillance near the home around that time. (6/19/06 MTS Tr. 12, 14, 18)

Between 9:00 and 9:30 p.m., Hall observed a minivan pull up in front of 1609 Westona. (6/19/06 MTS Tr. 15) The driver of the van remained in the vehicle while one passenger went inside the Westona residence. (6/19/06 MTS Tr. 15) A second passenger got out of the minivan, walked to the corner of Westona and Marimont, and began looking up and down the streets while talking on a cellular phone. (6/19/06 MTS Tr. 15) From Detective Hall's experience in the narcotics unit, he believed the passenger who stood at the corner of Westona and Marimont was acting as a lookout. Id. The passenger who had gone inside the residence returned to the van after approximately three minutes; then the lookout got back into the van, and they drove out of the area. (6/19/06 MTS Tr. 18) This activity observed by Hall was consistent with a drug delivery. (6/19/06 MTS Tr. 79)

### **Police decide to continue their investigation by conducting a "knock and advise"**

Based upon the drug hotline complaints and his personal observations, Detective Hall decided to perform a "knock and advise." (6/19/06 MTS Tr. 10, 19) The knock and advise is a tool police use to investigate complaints of drug activity during which the police speak with the

occupant of the suspect residence, inform him that drug complaints have been received about the residence, and ask the occupant if he knows why complaints were made. (6/19/06 MTS Tr. 115-116) Typically the police will also request the occupant's consent to enter the premises and search. (6/19/06 MTS Tr. 115)

In preparation for the knock and advise, Hall contacted additional officers and briefly informed them about the drug complaints and his surveillance observations. (06/19/06 MTS Tr. 19, 21) At 1609 Westona, Detective Hall, Sergeant Spears, and at least one uniformed officer<sup>1</sup> went to the front porch of the house. (06/19/06 MTS Tr. 22, 64, 80) Other officers stationed themselves around the home in case someone fled out the back of the house, or threw something out of a window. (06/19/06 MTS Tr. 22, 81) One of those officers, Detective David House, positioned himself on the north side of 1609 Westona close to the back corner of the residence. (6/19/06 MTS Tr. 80)

On the porch of the house, Detective Hall knocked on the door and announced "Dayton Police." (06/19/06 MTS Tr. 23) Over the police radio, Detective House heard that someone in the residence was approaching the front door and, after a few seconds, House moved along the north side of the home toward the front corner. (6/19/06 MTS Tr. 82-83) When Kevin Peterson opened the front door, Detective Hall explained that complaints of drug activity had been received regarding 1609 Westona. (06/19/06 MTS Tr. 25) While Detective Hall was speaking to Peterson, Detective House heard the sound of someone running inside the residence and down the basement stairs. (6/19/06 MTS Tr. 83) House then looked in a basement window, which is situated right next to the basement stairs, and saw a man running down those stairs cupping a glass jar in both hands as though it were hot. (6/19/06 MTS Tr. 83-84)

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<sup>1</sup> The majority of the officers were detectives and as such were in plain clothes though their badges were displayed. (06/19/06 MTS Tr. 19-20, 77-78)

### **Police enter the residence to prevent the destruction of evidence**

Believing the man to be carrying a hot jar of freshly prepared crack cocaine down to the basement with the intention of destroying evidence, House ran onto the porch and announced he was going to enter the residence. (06/19/06 MTS Tr. 84-86, 89) Detective Hall and other officers followed House into the home. (06/19/06 MTS Tr. 25-26, 87) Once inside, Detective House ran through the residence until he came to the basement stairs. (06/19/06 MTS Tr. 26) He and Hall yelled, "Dayton Police," and asked if anyone was there. (06/19/06 MTS Tr. 87) Then, as the detectives descended the stairs, they heard the sound of glass striking the floor or the basement wall. Id.

In the basement, Detective House and Detective Hall came in contact with Darryl Loran. (06/19/06 MTS Tr. 88) Loran was standing near an open duffle bag where the detectives saw drugs and a gun. (06/19/06 MTS Tr. 28, 91) They also observed a mixing jar or beaker on the ground and liquid running down the wall where it had apparently been thrown. (06/19/06 MTS Tr. 28, 92) Eventually, a search warrant was obtained, and, when executing the warrant, officers discovered additional drugs and contraband in the house. (06/19/06 MTS Tr. 56)

## **ARGUMENT**

### **Proposition of Law:**

**Law enforcement officers acting within the scope of their duties and in good faith are privileged to enter a residential property for the purpose of making contact with the residents therein.**

### **Introduction**

In a previous appeal, the Second District Court of Appeals held that Peterson was an overnight guest at 1609 Westona Drive on the night of October 20, 2004 and therefore had a legitimate expectation of privacy in the residence that permitted him to challenge the warrantless

search of the house by Dayton Police officers. *State v. Peterson*, 166 Ohio App.3d 112, 2006 Ohio 1857, 849 N.E.2d 104, at ¶¶11-16, relying upon *Minnesota v. Olson* (1990), 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85. Thus, the court of appeals remanded the matter to the trial court for further hearing. On remand, the trial judge found the police officers' testimony to be credible, and the defense witnesses to have been entirely lacking in credibility. (8/7/06 Tr. 3-9) Although the trial judge did not discuss on the record the application of Fourth Amendment law to the facts of this case, he overruled Peterson's motion to suppress the evidence seized as a result of the police officers' warrantless entry into 1609 Westona.

Again, Peterson appealed, and again, the court of appeals reversed the trial court. In its Opinion, the court of appeals rejected the State's contention that Detective House's observation through the basement window was not an unlawful search because Loranzan's act of running down the basement stairs carrying what appeared to be a jar of crack cocaine was seen in plain view by the officer who was privileged to be on the property while in the performance of his lawful duties. Instead, the court of appeals held the police conduct was unlawful since, "Citizens have an objectively reasonable expectation that police will not enter onto the side yards of their homes in the night time and peer into their basement windows." *State v. Peterson*, 173 Ohio App.3d 575, 2007 Ohio 5667, 879 N.E.2d 806, at ¶29. The court of appeals also noted its agreement with Peterson's claim that Detective House was trespassing on the curtilage of 1609 Westona when he made his observation. Therefore, according to the appellate court, the evidence recovered during the warrantless and warrant searches should have been suppressed as fruit of the poison tree of the police officer's allegedly unlawful conduct. *Id.*, citation omitted.

### **The Fourth Amendment and police officers' entry into a home**

The Fourth Amendment to the United States Constitution provides, in part, that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The touchstone of Fourth Amendment analysis is whether a person has a “constitutionally protected reasonable expectation of privacy” that has been violated. *Oliver v. United States* (1984), 466 U.S. 170, 177, 104 S.Ct. 1735, 80 L.Ed.2d 214, citing *Katz v. United States* (1967), 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576. But the Amendment does not protect the merely subjective expectation of privacy; it protects only those “[expectations] that society is prepared to recognize as ‘reasonable.’” *Oliver*, at 466 U.S. 177, citing *Katz*, at 389 U.S. 361.

It is without dispute that a warrantless entry into a home to make a search or arrest is per se unreasonable. See, generally, *State v. Nields* (2001), 93 Ohio St.3d 6, 15, 752 N.E.2d 859, citations omitted. Therefore, “[b]efore agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.” *Nields*, at 15, citations omitted. Furthermore, the protection of the Fourth Amendment has been deemed to extend to the curtilage of a residence. *Oliver*, at 466 U.S. 180.

Nevertheless, not all police observation of the area within the curtilage of a home is barred. *California v. Ciraolo* (1986), 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210. “The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders

the activities clearly visible.” *Ciraolo*, at 476 U.S. 213, citation omitted. “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” *Ciraolo*, at 476 U.S. 213, citing *Katz*, at 389 U.S. 351.

**Ohio courts have recognized that police are privileged to go onto private property in the exercise of their duties**

Many Ohio appellate courts have recognized that police officers are privileged to enter private property in order to carry out their duties. See, e.g., *State v. Buzzard*, 163 Ohio App.3d 591, 2005 Ohio 5270, 839 N.E.2d 469, at ¶19, citation omitted, reversed on other grounds, 112 Ohio St.3d 451, 2007 Ohio 373, 860 N.E.2d 1006 (Police are privileged to go upon private property when in the proper exercise of their duties.); *State v. Huff* (June 10, 1999), Highland App. No. 98CA23, 1999 Ohio App. LEXIS 2907, at \*12, citing *State v. Israel* (Sept. 26, 1997), Hamilton App. No. C-961006, 1997 Ohio App. LEXIS 4413, at \*11 (There is no question that police are privileged to go upon private property in the exercise of their duties.); *State v. Hart* (Dec. 23, 1997), Athens App. No. 97CA18, 1997 Ohio App. LEXIS 5994, at \*8 fn. 8 (Police officers are privileged to go upon private property when in the proper exercise of their duties, and mere technical trespasses do not give rise to a Fourth Amendment violation).

When discussing the approach of a home by the police, the Second District Court of Appeals has acknowledged, “We do think the police must have some freedom to investigate complaints of unlawful activity, and to choose, for safety reasons, how they should best approach homes where such activity may be afoot.” *State v. Ritchie* (Aug. 25, 2000), Miami App. No. 2000-CA-20, 2000 Ohio App. LEXIS 3848, at \*7-\*15.

**Detective House's observation through the basement window did not amount to an unlawful search**

The court of appeals erred in this case when it determined that the observation of Loranzan running down the basement steps to destroy drug evidence, which was the exigent circumstance that led to the warrantless entry and search of 1609 Westona, was the result of unlawful police activity. Here, the police reasonably suspected that criminal activity was ongoing at 1609 Westona; they had received multiple complaints about drug activity there, and Detective Hall's surveillance earlier in the evening of October 20, 2004 revealed what appeared to be a drug delivery being made to the residence. Thus, there is no question that the police were entitled to further investigate the drug complaints and were privileged to enter the property at 1609 Westona in order to do so.

The so-called knock and advise procedure has been recognized by several courts as a legitimate investigative technique. See, e.g., *United States v. Thomas* (2005), 430 F.3d 274, 277 (6<sup>th</sup> Cir.). And the Second District Court of Appeals has commented that the knock and advise may be an aggressive technique in "the often competitive enterprise of ferreting out crime," but that it is not an illegal one. *State v. Barber*, Montgomery App. No. 19017, 2002 Ohio 3278, at ¶20, citation omitted. Moreover, as noted above, the police must be given some latitude in determining the safest and most appropriate manner in approaching a house to investigate complaints. *Ritchie*, supra.

When Detective House entered the property, he did so to facilitate the knock and advise procedure. He walked to the yard on the north side of the home – an area that was not fenced and was accessible from the street by simply walking up the grass. (6/19/06 MTS Tr. 81-82) House took a position on the side of the residence in part to watch for people who might attempt to flee the residence or for evidence that might be thrown out of a window. (6/19/06 MTS Tr.

81) The detective also played a supportive role in terms of ensuring the safety of the officers who approached the front door, as evidenced by the fact that House moved closer to the front of the residence once he heard over the radio that someone inside was coming to answer the door. (6/19/06 MTS Tr. 82-83) In short, Detective House did not enter the curtilage of the residence in order to conduct a search, and, in fact, no search was conducted.

On the contrary, House's attention was only drawn to the basement window when he heard the footsteps of Loranzen running down the basement stairs. The detective could see into the basement window from where he stood a few feet from the residence without changing his vantage point in any way. The basement light was turned on and there was no covering over the window. (6/19/06 MTS Tr. 83-85) Thus, Loranzen exposed his unlawful activity of attempting to destroy evidence to public view, and the officer's observation of that unlawful action, seen from his own lawful vantage point while participating in the knock and advise procedure, was a sufficient exigent circumstance that allowed a warrantless entry and search of 1609 Westona.

**CONCLUSION**

Detective House's observation through the basement window at 1609 Westona Drive that gave the police probable cause and an exigent circumstance to enter the residence without a warrant was not the result of unlawful police conduct. Thus, the court of appeals' reversal of the denial of Peterson's motion to suppress the contraband discovered in the home, as a result first of a warrantless entry and search and later of a search conducted pursuant to a warrant, should be overturned by this Honorable Court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief was sent by first class on this 9<sup>th</sup> day of June, 2008, to Opposing Counsel: Daniel J. O'Brien, 1210 Talbott Tower, 131 North Ludlow Second Street, Dayton, Ohio 45402.

By: R. Lynn Nothstine

**R. LYNN NOTHSTINE**

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## IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 07- **07-2232**

Plaintiff-Appellant,

ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT

VS.

KEVIN PETERSON

COURT OF APPEALS  
CASE NO: 22008

Defendant-Appellee.

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**NOTICE OF APPEAL OF APPELLANT, STATE OF OHIO**

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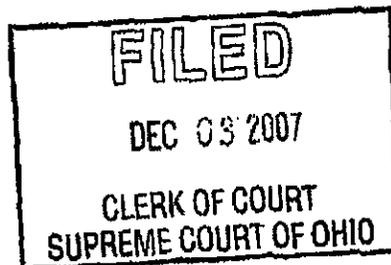
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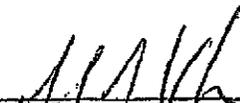
**NOTICE OF APPEAL OF APPELLANT, STATE OF OHIO**

Appellant, State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Kevin Peterson.*, Case No. 22008 on October 19, 2007.

This case presents a question of public or great general interest.

Respectfully submitted,

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**PROSECUTING ATTORNEY**

BY   
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Assistant Prosecuting Attorney  
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**COUNSEL FOR APPELLANT,**  
**STATE OF OHIO**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this notice of appeal was sent by first class mail on this 3<sup>rd</sup> day of December, 2007, to the following: Daniel J. O'Brien, 1210 Talbott Tower, 131 North Ludlow Street, Dayton, OH 45402 and David H. Bodiker, Ohio Public Defender Commission, 8 East Long Street - 11<sup>th</sup> Floor, Columbus, OH 43266-0587.

  
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IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

STATE OF OHIO

*Plaintiff-Appellee*

v.

KEVIN PETERSON

*Defendant-Appellant*

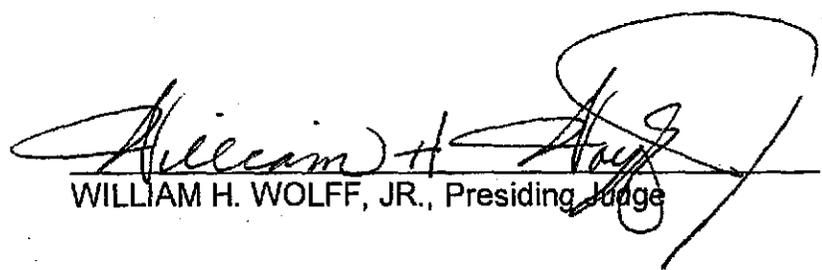
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: Common Pleas Court)

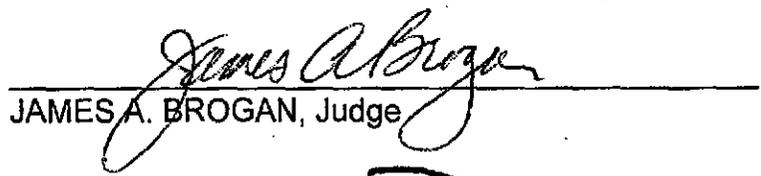
FINAL ENTRY

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Pursuant to the opinion of this court rendered on the 19th day  
of October, 2007, the judgment of the trial court is **Reversed** and **Remanded**.

Costs to be paid as stated in App.R. 24.

  
WILLIAM H. WOLFF, JR., Presiding Judge

  
JAMES A. BROGAN, Judge

  
MIKE FAIN, Judge

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IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

STATE OF OHIO

*Plaintiff-Appellee*

v.

KEVIN PETERSON

*Defendant-Appellant*

: Appellate Case No. 22008

: Trial Court Case No. 2004-CR-3894

: (Criminal Appeal from  
: Common Pleas Court)

.....  
OPINION

Rendered on the 19<sup>th</sup> day of October, 2007.  
.....

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Dayton, Ohio 45402  
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.....  
BROGAN, J.

Appellant, Kevin Peterson, appeals from his conviction of two counts of possession  
of cocaine in the Montgomery Court of Common Pleas pursuant to his no-contest plea after  
Peterson's suppression motion was overruled by the trial court.

On October 18, 2004, Detective Douglas Hall of the Dayton Police Department was made aware of two complaints received on the drug hotline concerning drug activity at 1609 Westona Drive in Dayton, Ohio. The following day, Detective Hall received a handwritten note also complaining of drug activity at 1609 Westona Drive. The note described the activity as heaviest after nine p.m. and indicated that the residence had a surveillance camera on the front door. On October 20, 2004, based upon the complaints, Detective Hall set up surveillance just across the intersection of Westona and Marimont sometime between nine and nine-thirty that night. During this surveillance, Hall watched as a mini van pulled up in front of 1609 Westona and the front passenger got out of the van and entered the residence. Meanwhile, another passenger got out of the rear of the mini van and walked up the street to the corner of Westona and Marimont while talking on a cell phone and looking up and down both streets. The front passenger remained in the residence for approximately three minutes and then returned to the mini van. The rear passenger also returned to the mini van, and the van drove away. Hall then contacted members of the narcotics unit and uniformed officers from the second police district to assist him in conducting a knock and advise.<sup>1</sup> The additional officers were briefed on the information known by Hall. The team then proceeded back to 1609 Westona to conduct the knock and advise. One of the two uniformed officers and Sergeant Mark Spears accompanied Hall onto the front porch. The remaining officers took up positions around the sides of the house as is standard practice to ensure that no one runs out the back or

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<sup>1</sup>Detective Hall testified at the motion to suppress hearing that a knock and advise is a procedure used by the police department to investigate drug complaints. This type of investigation is done by knocking on the door and advising the occupants that there have been complaints of drug activity and then seeking consent to search. (Tr. 53.)

throws anything out a window. Detective Darrel House and Detective Shawn Emerson walked across the lawn to the rear of the north side of the residence. After being informed over the police radio that the officers on the front porch were about to make contact, House proceeded to walk back toward the front of the residence. Hall then knocked on the front door, and when Kevin Peterson answered the door, Hall told him about the complaints of drug activity. Peterson responded that he had only lived at the address about a month and a half.

While moving toward the front of the residence, House testified at the hearing that he heard the heavy footsteps of someone running down stairs. At that point he looked down into a basement window from a standing position on the north side of the house and saw a person running down the stairs holding a glass jar cupped in both hands as if the jar was hot. House testified he immediately ran around to the front of the house because he believed the individual was trying to destroy crack cocaine that had just been cooked. House then ran onto the porch and yelled that he was going into the basement. Hall followed House through the residence and into the basement where the two found a male, later identified as Darrel Loranzen, with his hand in a duffle bag that had a piece of crack cocaine and a spoon lying on top of it. The officers also observed a part of a gun inside the duffle bag. After leaving the basement, Hall observed a police scanner on top of a kitchen counter as well as a plate with what appeared to be crack cocaine residue on top of the refrigerator. The plate and the piece of crack cocaine from the duffle bag tested positive. Hall then left the residence to obtain a search warrant. After getting the search warrant, the police recovered cocaine and handguns and other items linking Peterson to the bedroom searched and residence. He was then arrested.

On December 13, 2004, Peterson moved to have the evidence from the search suppressed. Kristen Brandenburg testified at the suppression hearing for the defendant that she babysat for the defendant's sons and was present in the home at the time of the search. She testified she had just finished a load of laundry in the basement when the police arrived. She said the basement windows on the north side of the house were covered with foil from the inside so no one could see into the basement from the outside. She also testified there was a plastic cover over the basement window closest to the front of the house. She testified she felt secure in the basement because the windows were covered with foil.

Alicia Erwin, the defendant's girlfriend, who lived occasionally at the residence with the defendant and his small child, also testified at the hearing. Ms. Erwin testified she was upstairs watching television when she looked outside and saw five men around the side of the house and two of them crouched down looking in the basement windows. Erwin testified she started to go downstairs when the police entered the house through the front door and she and the defendant were handcuffed. She testified one of the basement windows had a plastic cover over it and every window had aluminum foil covering them so you could not see into the basement.

Peterson testified at the hearing that the front basement window that Officer House said he looked through was covered by a plastic covering on the outside and aluminum foil on the inside. The defendant testified the foil was placed on the windows because the women in the house didn't want people looking in on them when they were downstairs doing laundry.

In rebuttal, the State produced the testimony of Detective Emerson, who testified he was present when the officers entered the defendant's home, and the basement windows were not covered when the officers looked into the basement.

On August 7, 2006, the trial court overruled Peterson's suppression motion. The trial court stated he did not find the defense witnesses credible. The trial court also stated the defendant failed to meet his burden of proof upon his motion. The court did not address the question of whether Detective House had a right to be where he was when he observed the activity in the basement that prompted the police officers to enter Peterson's residence without a search warrant.

On appeal, Peterson raises the following assignment of error:

"The trial court in denying [sic] defendant-appellant his constitutional rights under the Fourth Amendment to the United States Constitution and Article 1, Section 14, of the Ohio Constitution, by overruling his motion to suppress the evidence obtained by the police after entering the premises at 1609 Westona Drive, Dayton, Ohio without any warrant of any kind." Specifically, Peterson argues that Detective House's observations that gave rise to the initial warrantless search were made while he was trespassing upon the curtilage of Peterson's property. He, therefore, argues the evidence recovered from the search of his home should have been suppressed by the trial court.

It is fundamental that searches conducted outside the judicial process, without a warrant, are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *Katz v. United States*, (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. The burden is on those seeking an exemption from the constitutional process to show the need for it. It is undisputed that the police entered Peterson's

residence without a search warrant and, therefore, the State bore the burden of establishing that the warrantless search fell within an exception to the Fourth Amendment warrant requirement. *City of Athens v. Wolf*, (1974), 38 Ohio St.2d 237, 67 O.O.2d 317, 313 N.E.2d 405. The State, for its part, argues that Detective House had a right to be on Peterson's property to execute the "knock and advise" and, therefore, his observations were made in plain view and gave him grounds to conduct an immediate search of Peterson's home to apprehend the individual he saw in the basement carrying suspected drugs under the "exigent circumstances" exception.

Analysis of Fourth Amendment law is primarily focused with whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz*, 389 U.S. at 360 (Harlan, J., concurring). "[T]here is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation is one that society is prepared to recognize as 'reasonable.'" *Id.* at 361.

"[O]bservations of things in plain sight made from a place where a police officer has a right to be do not amount to a search in the constitutional sense. On the other hand, when observations are made from a position to which the officer has not been expressly or implicitly invited, the intrusion is unlawful \* \* \* ." *Lorenzana v. Superior Court* (1973), 9 Cal.3d 626, 634, 511 P.2d 33.

In *Oliver v. United States*, (1984), 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214, the United States Supreme Court held that police did not violate the defendant's Fourth Amendment rights when they trespassed onto the defendant's farm field several hundred feet from the defendant's farm house. Justice White noted that an individual may not legitimately demand privacy for activities conducted out of doors, except in the area

immediately surrounding the home. *Id.* at 178. He noted that open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. *Id.* at 179. The Court noted that only the curtilage warrants the Fourth Amendment protections that attach to the home. *Id.* at 180.

Even if property is within the curtilage, a visual inspection of that property from "outside" the curtilage does not constitute a search. *United States v. Hatfield* (C.A. 10, 2003), 333 F.3d 1189. In *Hatfield*, police officers' observations of a backyard while standing on a paved parking pad next to a house, during which an officer formed opinion that marijuana plants might be growing in yard, did not constitute search under the Fourth Amendment because the driveway was open to the public. Circuit Judge Ebel noted in the opinion: "Furthermore, the Court said that, 'the fact that the objects observed by the officers lay within an area that we have assumed ... was protected by the Fourth Amendment does not affect our conclusion.' The Court emphasized that 'the officers never entered the barn, nor did they enter any other structure on respondent's premises.' Instead, '[o]nce at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front.' Thus, 'standing as they were in the open fields, the Constitution did not forbid them to observe the [drug] laboratory located in respondent's barn.'" *Id.* at 1197 (citations omitted). The Court further observed at pages 1197 and 1198 of the opinion:

"Similarly, *Fullbright* involved law enforcement officers who, while trespassing on the defendant's open fields, observed from a distance the interior of an open shed located in the property's curtilage. 392 F.2d at 433-34. We held the officers' observation of an illegal distilling operation in the shed was not a search prohibited by the Fourth Amendment. *Id.*

at 434. We explained, however, that '[i]f the investigators had physically breached the curtilage there would be little doubt that any observations made therein would have been proscribed. But observations from outside the curtilage of activities within are not generally interdicted by the Constitution.' *Id.*; see also 1 LaFare, [Search and Seizure (1996) 515, Section 2.3(g)] supra, § 2.3(g), at 515 (reasoning that police observation of incriminating objects or activity 'is unobjectionable-even if what is seen is itself within the protected area called the "curtilage"-if the police vantage point was itself in the "open fields" ')."

The curtilage is an area around a person's home upon which he or she may reasonably expect the sanctity and privacy of their home. *Oliver*, 466 U.S. at 180. Because the curtilage of a property is considered to be part of an individual's home, the right of the police to come into the curtilage is highly circumscribed. *State v. Woljevach*, 160 Ohio App.3d 757, 2005-Ohio-2085, 828 N.E.2d 1015, at ¶ 29. Absent a warrant, police have no greater rights on another's property than any other visitor has. *Id.* The only areas of the curtilage where the officers may go are those impliedly open to the public. *Id.*

In *Lorenzana*, supra, observations were made by an officer after he went to the back of an apartment by traveling down the adjacent driveway. *Id.* at 630. When he could not get a clear view from his position on the adjacent driveway, he crossed the lawn of the apartment and stood beneath a window on the east side of the apartment. *Id.* The window shade was pulled all but two inches from the bottom of the window sill. *Id.* From this position, the officer put his face within one inch of the window and was able to overhear a phone conversation discussing the acquisition of narcotics. *Id.* The court held that the observations made by the officer and conversations heard by him violated the defendant's right to privacy. *Id.* at 641. Justice Tobriner wrote the following on behalf of

the California Supreme Court:

"The crucial question we face here is whether a citizen may properly be subjected to the peering of the policeman who, without a search warrant, walks over ground to which the public has not been invited but which has been reserved for private enjoyment, stands by a window on the side of a house and peeks through a two-inch gap between the drawn window shade and the sill, and thus manages to observe the conduct of those within the residence. We conclude that the questioned police procedure too closely resembles the process of the police state, too dangerously intrudes upon the individual's reasonable expectancy of privacy, and thus too clearly transgresses constitutional principle; the prosecution cannot introduce into evidence, and the courts cannot be tainted with, that which the intrusion yields." *Id.* at 629.

As for the contention that the defendant had no justified expectation of privacy because he had not succeeded in totally concealing his criminal activity from such surveillance by the natural senses, the *Lorenzana* court responded:

"The fact that apertures existed in the window, so that an unlawfully intruding individual so motivated could spy into the residence, does not dispel the reasonableness of the occupants' expectation of privacy. \* \* \* To the contrary, the facts of this case demonstrate that by drawing the window shade petitioner Lorenzana exhibited a reasonable expectation to be free from surveillance conducted from a vantage point in the surrounding property not open to public or common use. Surely our state and federal Constitutions and the cases interpreting them foreclose a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box." *Id.* At 636-37.

In *People v Camacho* (2000), 23 Cal. 4<sup>th</sup> 824, 3 P.3d 878, the California Supreme Court held that the defendant had a reasonable expectation of privacy as to police officers' warrantless search by looking into side windows of defendant's home. *Id.* at 837. In *Camacho*, police responded to Camacho's home on the report of a loud party disturbance. *Id.* at 828. Officers Wood and Mora arrived at the home at 11:00 p.m. and heard no loud noise. *Id.* The officers did not knock on the front door, but Mora walked onto the side yard of the single-story house. *Id.* There was no entrance accessible to the house from the side yard. *Id.* Officer Moore came upon a large side window which was visible from the public street or sidewalk, but the inside of the room was not. *Id.* The neighbors on the side of the house would have difficulty seeing into the window, and the yard had no exterior lighting. *Id.* Officer Wood looked through the window and saw the defendant manipulating some clear plastic baggies. *Id.* at 829. Wood saw several plastic baggies with a white powdery substance on the bed and dresser in the room, as well as a cellular phone and pager. *Id.* The police then entered the home through the window and arrested the defendant. *Id.*

In affirming the court of appeals' reversal of the trial court's denial of the defendant's suppression motion, Justice Werdegar of the California Supreme Court wrote:

"Respondent contends that Officers Wood and Mora's observations were constitutionally permissible because 'nothing prohibited access to and from [the] side yard from the street along the side of the house.' We might add that, from the photographs of the scene included in the record, one might expect that at some point, a neighbor's child, should the need arise, might retrieve an errant ball or loose pet from the side yard of defendant's home. Similarly, an employee of the local utility company might at some point enter the yard to read the meter, were one located there. Admittedly there was no fence,

no sign proclaiming 'No trespassing,' no impediment to entry.

"Nevertheless, we cannot accept the proposition that defendant forfeited the expectation his property would remain private simply because he did not erect an impregnable barrier to access. Recalling that the lodestar of our inquiry is the reasonableness of defendant's expectation of privacy, we assume for the sake of argument the meter reader or the child chasing a ball or pet may have implied consent to enter the yard for that narrow reason, for a limited time, and during a reasonable hour. Certainly the same cannot be said for the unconsented-to intrusion by police at 11 o'clock at night. (See Pen.Code, § 647, subd. (i) [a person commits misdemeanor of disorderly conduct '[w]ho, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant']; see also *Bond, supra*, 529 U.S. at pp. 337-338, 120 S.Ct. at p. 1465, 146 L.Ed2d at p. 370 [placing one's baggage in the overhead compartment in a bus, where other passengers may touch and move it, does not relinquish the expectation of privacy in the bag's contents, such that police may feel the bag in an exploratory manner to try and determine its contents].)" *Id.* at 836.

It is important to note that the police were at Peterson's residence initially to execute a "knock and advise" and not to execute a search warrant. The purpose of the knock and advise program, as stated in the General Order of the Dayton Police Department, is to notify the resident or residents of the structure that a complaint has been received alleging drug activity at the premises. (See Def. Ex. C.) This, of course, can be accomplished by going to the front door of the residence and knocking and advising the resident of the purpose of the visit. In executing a search warrant, the warrant normally authorizes officers

to enter the residence, the surrounding curtilage, and any detached garage or outbuildings listed in the warrant.

The State argues that we have held that police officers are privileged to be on private property while in the performance of their official duties, citing *State v. McClain* (2003) Mont. App. 19710, 2003-Ohio-5329. In that case, however, the observations of the police officer were made through the passenger window of a car parked in a front driveway accessible to the public.

In this matter, Detective House testified at the suppression hearing that the window he looked through was on the side of the appellant's residence, which he accessed by walking on the lawn. (Tr. 82.) Further, House testified that there was no driveway or sidewalk by the window and that he was standing a few feet from the side of the house. (Tr. 83, 128.) Similar to the officer in *Lorenzana*, House made his observations while standing on land not expressly open to the public.

Citizens have an objectively reasonable expectation that police will not enter onto the side yards of their homes in the night time and peer into their basement windows. We agree with the appellant that Detective House's observations were made while he was trespassing on the curtilage of Peterson's property. As such, the evidence recovered by the police during the warrantless and warrant searches was the product of the initial unlawful police conduct. The evidence was the "fruit of the poison tree" and must be suppressed. *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441.

In suppressing drug evidence in *Camacho*, Judge Werdegard noted that the line the court drew lets an unquestionably guilty man go free, but he observed "that 'constitutional

lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government.' " *Agostini v. Felton* (1997), 521 U.S. 203, 254, 117 S.Ct. 1997, 138 L.Ed.2d 391 (Souter, J., dissenting).

The appellant's assignment of error is Sustained. The Judgment of the trial court is Reversed and Remanded for further proceedings.

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WOLFF, P.J., and FAIN, J., concur.

Copies mailed to:  
Mark J. Keller  
Daniel J. O'Brien  
Hon. A. J. Wagner



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2007 SEP 14 AM 11: 29

GREGORY A. BRUSH  
CLERK OF COURTS  
MONTGOMERY CO., OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY3, OHIO

CRIMINAL DIVISION

STATE OF OHIO,

Plaintiff,

v.

KEVIN PETERSON,

Defendant.

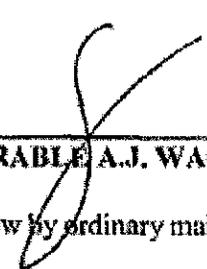
CASE NO. 2004 CR 3894/2

JUDGE A.J. WAGNER

DECISION, ORDER AND ENTRY  
OVERRULING DEFENDANT'S  
MOTION TO SUPPRESS

This cause comes before the Court on the Defendant's Motion to Suppress. As reported accordance with the decision stated in open Court on Monday, August 7, 2006, the Defendant's Motion to Suppress is hereby **OVERRULED**.

SO ORDERED:

  
HONORABLE A.J. WAGNER

Copies of the above were sent to all parties listed below by ordinary mail on this date of

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# AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

*Articles in addition to, and amendments of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.*

## AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(Effective 1791)

## AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

(Effective 1791)

## AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

(Effective 1791)

## AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Effective 1791)

## AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Effective 1791)

## AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

## AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(Effective 1791)

## AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(Effective 1791)

## AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(Effective 1791)

## AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(Effective 1791)

## AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(Effective 1798)

## AMENDMENT XII

The Electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives; open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the