COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3664-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DRU D. WEASLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

PER CURIAM. Dru Weasler appeals a judgment of conviction for felony manufacture of marijuana in violation of § 161.41(1)(H)1, STATS., 1993-94, on the grounds that the trial court failed to suppress physical evidence. He contends that sergeant Donald Johnson of the Shawano Police Department violated his home's curtilage by pulling himself up on Weasler's six-foot fence to

see the marijuana plants growing in the enclosed backyard. Weasler also asserts that the circuit court erred by taking judicial notice of its own specialized personal knowledge to resolve conflicts in the testimony. Because Johnson could see Weasler's eight-foot marijuana plants in plain view from outside the curtilage, we conclude that his observations did not constitute a search. We also determine that the circuit court did not take judicial notice of specialized knowledge. Accordingly, we affirm.

Johnson received information that Weasler was growing marijuana in his backyard. He investigated and found the backyard enclosed by a six-foot opaque fence. From the adjacent property, Johnson observed marijuana plants in Weasler's backyard during his two visits to the property at 4 a.m. and later at 5:30 a.m. Based on his observations, Johnson obtained and executed a search warrant. Johnson determined that Weasler owned the plants, and Weasler was subsequently charged.

The court held a preliminary hearing at which Johnson testified. At that time, Johnson, who is five feet ten to eleven inches tall, testified that he raised himself up along the fence and was able to see the marijuana plants. Weasler subsequently moved to suppress the evidence seized under the search warrant. Weasler's principal ground for suppression was his assertion that the warrant was based upon Johnson's violating the curtilage of Weasler's home by peering over the fence. At the motion hearing, Johnson testified to his observations at the time of his two visits. He stated that some of the plants were eight feet high and he could therefore observe them from a distance away from the fence. He went up to and peered over the fence by stretching up and looking over. He also stated he did not pull himself over the fence. Weasler introduced evidence that the adjoining property slopes down from the fence and that he was approximately Johnson's

height and could not have seen the marijuana plants from the fence without climbing up on it, or from several feet away.

The court denied Weasler's motion to suppress, determining that the plants were in plain view. It found that Johnson could see the eight-foot-high plants over the top of the fence, both up close and from a distance. The court found that Johnson, while next to the fence, did not climb it or pull himself up on the fence, but might have stood on his tiptoes. The court made a passing reference to its engineering background in determining that Johnson could see the eight-foot plants over the six-foot fence if he is standing back from the fence. The court also concluded that Weasler had no reasonable expectation of privacy in connection with the marijuana plants because they were observable over the fence. Weasler subsequently entered a negotiated plea, was convicted and sentenced. He seeks review of the suppression motion's denial.

Whether Johnson's view of the backyard and observation of the marijuana constituted a search under the Fourth Amendment presents a mixed question of fact and law. *See* ***State v. Bermudez***, 221 Wis.2d 338, 345, 585 N.W.2d 628, 632 (Ct. App. 1998). We will defer to the trial court's findings of historical fact unless clearly erroneous, but decide the constitutional facts de novo. ***Id***.

The marijuana was within Weasler's curtilage, and thus Johnson's view of it is subject to Fourth Amendment considerations.[1] It is well established, however, that only those government intrusions that infringe upon a privacy

[1] The State does not dispute that the fenced-in backyard was within the curtilage of Weasler's home.

interest violate the Fourth Amendment. ***State v. Bauer***, 127 Wis.2d 401, 405, 379 N.W.2d 895, 897 (Ct. App. 1985). A search occurs when the police infringe on an expectation of privacy that society considers reasonable. ***United States v. Jacobsen***, 466 U.S. 109, 113 (1984). If there is no such infringement, there is no search. ***Illinois v. Andreas***, 463 U.S. 765, 771 (1983). It follows that "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." ***Katz v. United States***, 389 U.S. 347, 351 (1967). This is true even when the location at issue is part of the curtilage, for there can be no reasonable expectation of privacy if the area in question is in plain sight or "open to the public." ***State v. Peck***, 143 Wis.2d 624, 638, 422 N.W.2d 160, 165-66 (Ct. App. 1988). This is commonly referred to as the plain view exception to the Fourth Amendment.

We first address whether Johnson penetrated Weasler's curtilage when making his observations. If Johnson physically penetrated the curtilage to obtain his view, his conduct would constitute a search under the Fourth Amendment. *See* ***State v. Lange***, 158 Wis.2d 609, 614-15, 620-21, 463 N.W.2d 390, 391, 394 (Ct. App. 1990) (officer entering curtilage and clipping marijuana bud constituted an illegal search). Weasler contends that Johnson penetrated the curtilage by using the fence in some manner to raise himself up to see over it. At the suppression hearing, Weasler suggested that in order for Johnson to see the marijuana plants from the fence, he would have to do more than raise himself up on his tiptoes. Weasler focuses on Johnson's preliminary hearing testimony that "I raised myself up along the fence." He dismisses as contradictory Johnson's motion hearing testimony that he might have put his hand on top of the fence while he looked over it but did not "pull myself up over the fence." Weasler's challenge here is in essence that the circuit court's finding that Johnson did not

pull himself up on the fence to see over it is clearly erroneous, although he does not specifically address that standard. We reject his contention.

The circuit court is the ultimate arbiter of the weight to be given evidence and the credibility of witnesses and its finding in that respect will not be questioned unless based upon caprice, an abuse of discretion, or an error of law. ***In re Estate of Dejmal***, 95 Wis.2d 141, 151, 289 N.W.2d 813, 818 (1980). It is not our function to review questions as to weight of testimony and credibility of witnesses. Deference to the circuit court's credibility determinations is justified, because of the circuit court's superior opportunity to observe the witnesses' demeanor and to gauge their testimony's persuasiveness. ***Id***.

Despite Weasler's assertions, Johnson's testimony was not contradictory; rather his preliminary hearing statement that he raised himself up along the fence is merely ambiguous. He did not state that he used the fence to pull himself up. His motion hearing testimony confirmed, and the circuit court found, that he did not use the fence to pull himself up.[2] The circuit court's finding that Johnson did not physically violate the curtilage was based on testimony that it found credible and is thus not clearly erroneous. There being no physical violation of the curtilage, we turn to whether the plain view factors are satisfied.

The plain view exception has three prerequisites. The officer must have a prior justification for being in the position from which the "plain view" discovery was made; the evidence must have been in plain view of the discovering

[2] Weasler claims the court made no such finding. We disagree. When deciding the motion, the circuit court noted Johnson's testimony that he did not climb the fence or pull himself up on the fence. The court obviously determined this testimony was credible because the court relied on it.

officer; and the item seized, in itself or together with facts known to the officer at the time, provides probable cause to believe there is a connection between the evidence and criminal activity. ***State v. Guy***, 172 Wis.2d 86, 101-02, 492 N.W.2d 311, 317 (1992).

Weasler offers no argument on the first prerequisite, whether Johnson was justified in being in the position from which he observed the plants, and we therefore deem that he has admitted it exists.[3] *See* ***Reiman Assocs. v. R/A Adver., Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed are deemed abandoned). Because the marijuana plants themselves are evidence of a crime, the third prerequisite is met and needs no further discussion. We therefore examine whether the plants were in plain view.

Weasler asserts that the court did not find when or if Johnson recognized the plants as marijuana, only that it was possible to see the plants from a distance. We disagree. Johnson testified that at his 4 a.m. visit, he determined that the plants were marijuana. Johnson also stated that he could observe the plants from over fifty feet away, several feet from the fence and while next to the fence on his tiptoes. The court obviously determined that Johnson identified the

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[3] Although Weasler claims the court made inadequate findings, and presumably this was one, the court found

> that the officer received information regarding marijuana. The officer went to the home before dawn. The officer testified that he could see the marijuana away from the fence; that he did go up to the fence and he did shine his light on the tops of the marijuana plants.

The court's findings were adequate to determine that Johnson was justified in being in the position from which he made the observations. Johnson was on another's property at the time of his view because of information he derived from a confidential informant.

plants as marijuana. The finding that Johnson saw the marijuana plants in plain view is not clearly erroneous.

We now examine Weasler's contention that he had an expectation of privacy, having created a private enclave in the backyard, screened from public view by the house and the fence. Whether Weasler had a reasonable expectation of privacy involves a two-fold analysis. *See* ***State v. Rewolinski***, 159 Wis.2d 1, 13, 464 N.W.2d 401, 405 (1990). First, whether the individual, by his conduct, exhibited an actual, subjective expectation of privacy. Second, we examine whether the expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable. ***Id***.

The trial court did not address Weasler's subjective intent, nor need we, because we determine that even if he had a subjective expectation of privacy, it was objectively unreasonable for two reasons. First, Weasler could have no objectively reasonable expectation of privacy with respect to the marijuana plants that were taller than the fence.[4] Those plants were plainly visible from outside his yard. A reasonable person would recognize that a six-foot fence might not veil or conceal eight-foot plants inside the fence. Second, a six-foot fence does not

[4] The ***Rewolinski*** court discussed six factors relevant to the determination whether the defendant had a reasonable expectation of privacy. *See* ***State v. Rewolinski***, 159 Wis.2d 1, 17-18, 464 N.W.2d 401, 407-09 (1990). We do not address all six factors because it is obvious that what one exposes to the public, in plain view, is not reasonably expected to be private. *See* ***Katz v. United States***, 389 U.S. 347, 351 (1967).

protect the backyard from observation because some people are tall enough to see over it.[5]

Finally, we reject Weasler's contention that the trial court impermissibly relied on its own engineering knowledge to resolve what Weasler argues were conflicts in the testimony. The court's reference to engineering did not constitute taking judicial notice of its engineering background. In fact, the court stated it did not want to base its decision on personal knowledge: "I don't want to go into my mathematical background, my engineering background here, but I want to tell you if he's standing back another ten feet he probably can see an eight-foot plant very easily …." The court simply observed that it does not require specialized knowledge to know that an eight-foot plant could easily be seen from several feet away from a six-foot fence. This is an observation on the effects of perception as one moves farther away from a barrier that is based on common knowledge and common sense.

We conclude that Johnson did not violate Weasler's curtilage in making his observations, and that Weasler had no reasonable expectation of privacy in connection with the eight-foot plants that were in plain view over the top of the fence. We also conclude that the court did not take judicial notice of

[5] Our decision is in accord with decisions from other jurisdictions. *See*, *e.g.*, ***People v. Smola***, 435 N.W.2d 8, 9 (Mich. Ct. App. 1989) (officers observed marijuana by standing on car bumper and looking over a six-foot fence was not a search; Smola had no reasonable expectation that the fence would shield his backyard from observation); ***State v. Corra***, 745 P.2d 786, 787-88 (Ore. Ct. App. 1987) (officer's view of marijuana while standing on a rock to peer over a six-foot fence was not search: many people were tall enough to see what he saw over the fence); ***United States v. McMillon***, 350 F. Supp. 593, 596-97 (D.D.C. 1972) (view from a neighbor's porch into fenced yard did not constitute a search); ***Sarantopoulos v. State***, 629 So.2d 121, 123 (Fla. 1993) (officer standing on tip toes to look over six-foot fence did not search the enclosed yard: the fence created no reasonable expectation of privacy since it shielded the yard from view of only those not tall enough to see over it).

specialized engineering knowledge to make its decision. Accordingly, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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