

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1325-CR

Cir. Ct. No. 2004CF382

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS D. FLYNN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
RICHARD REHM, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Thomas Flynn appeals from a judgment convicting him of two drug felonies. The issue is whether the evidence used to charge and convict him was the product of an illegal police intrusion onto his property. We conclude that it was not, and therefore affirm.

¶2 The City of Portage Police Department received information that Flynn was growing marijuana in his backyard. Detective Dan Garrigan went to investigate and found no one home or willing to answer the front door. Garrigan could not see the backyard on his approach to the door, or from the road, because of an embankment and thick woods. However, Garrigan walked from the road through the woods to the edge of the mowed and maintained area behind Flynn's house, where he was approximately sixty to eighty feet from the house. From there, Garrigan could see marijuana growing in the backyard. During his observations Garrigan was on Flynn's property but remained in the thickly wooded area. He did not cross the tree line into Flynn's mowed and maintained backyard.

¶3 Garrigan's report of his investigation, and his photos of the backyard, provided the basis for a search warrant and subsequent seizure of the evidence used in this prosecution. Flynn moved to suppress the seized evidence, arguing that when Garrigan approached his house through the woods he infringed on the constitutionally protected area of Flynn's property. The trial court denied Flynn's motion, a decision that resulted in Flynn's conviction and this appeal.

¶4 The constitutional protections against unlawful searches and seizures extend to the land immediately surrounding and associated with the home, known as the curtilage. *Oliver v. United States*, 466 U.S. 170, 180 (1984). The extent of the curtilage is determined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." *Id.* Those factors include its proximity to the home, whether it is enclosed, the owner's use of it, and the steps the owner takes to protect it from observation. *United States v. Dunn*, 480 U.S. 294, 301 (1987). Because there are no disputes of historical fact in this case, the scope of Flynn's curtilage is a

question of constitutional fact, which we decide de novo. *State v. Kennedy*, 193 Wis. 2d 578, 583, 535 N.W.2d 43 (Ct. App. 1995).

¶5 As Flynn acknowledges, it is not unconstitutional for an officer to observe the curtilage from an adjacent area open to the public. *See id.* at 586. Consequently, the issue here is whether Garrigan entered the curtilage when he stood in the woods behind Flynn’s house, or remained in an unprotected “open field” adjacent to it.

¶6 The woods behind Flynn’s home were not part of the curtilage surrounding the home. Flynn did not use the woods for any purpose nor maintain them in any way. He did not post signs to warn trespassers, nor enclose the woods with a fence. And while the tree line lay within eighty feet of Flynn’s house, that is by no means close enough to automatically include it in the curtilage. *See State v. Martwick*, 2000 WI 5, ¶¶39-40, 231 Wis. 2d 801, 604 N.W.2d 552 (in which tree line twenty feet from house marked the boundary of the curtilage).

¶7 Flynn contends that the curtilage began at the outside edge of the woods surrounding his home because the woods and terrain were so thick and forbidding that they formed a natural barrier comparable to a fence. However, so far as the record shows, the woods were in their natural state. Flynn admittedly did nothing to alter them. He made no attempt to create a barrier or enclosure out of them. The presence of woods surrounding a home does not, by itself, create an observation-free zone for criminal activity; it does not create an expanded zone of constitutionally protected privacy by its density. *See id.*, ¶42.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

