APPENDIX

APPENDIX A

VERMONT SUPREME COURT

ENTRY ORDER

2019 VT 81

SUPREME COURT DOCKET NO. 2018-362

MAY TERM, 2019

STATE OF VERMONT

v.

CLYDE S. BOVAT

APPEALED FROM:

Superior Court, Chittenden Unit, Criminal Division

DOCKET NO. 373-2-18 Cncr

Filed: Nov. 8, 2019

In the above-entitled cause, the Clerk will enter:

Affirmed.

FOR THE COURT

/s/ M. Skoglund
Marilyn S. Skoglund,
Associate Justice

Dissenting:

/s/ Paul L. Reiber
Paul L. Reiber,
Chief Justice

/s/ Beth Robinson
Beth Robinson,
Associate Justice

Concurring:

/s/ Harold E. Eaton, Jr.
Harold E. Eaton, Jr.,
Associate Justice

/s/ Karen R. Carroll
Karen R. Carroll,
Associate Justice

VERMONT SUPREME COURT

2019 VT 81

No. 2018-362

STATE OF VERMONT

v.

CLYDE S. BOVAT

SUPREME COURT

On Appeal from

Superior Court, Chittenden Unit, Criminal Division

May Term, 2019

Filed: Nov. 8, 2019

David R. Fenster, J.

David Tartter, Deputy State's Attorney, Montpelier, for Plaintiff-Appellee.

Samantha V. Lednicky of Murdoch Hughes Twarog Tarnelli, Burlington, for Defendant-Appellant.

PRESENT: Reiber, C.J., Skoglund, Robinson, Eaton and Carroll, JJ.

¶ 1. **SKOGLUND, J.** Defendant, Clyde Bovat, was convicted of shooting a deer in violation of Vermont

big-game-hunting laws and failing to immediately tag the deer. On appeal he claims the trial court erred in denying his motion to suppress evidence allegedly obtained in violation of his constitutional right to be free from warrantless government intrusions. For the forthcoming reasons, we affirm.

¶ 2. In the early morning hours of Thanksgiving 2017, a resident of Huntington, Vermont was awoken by a gunshot close to his home on Hinesburg Hollow Road. The concerned resident called the state game warden to report a possible deer jacking. The warden arrived at the scene and spoke with the resident, who advised that the gun shot woke him shortly before 4:00 a.m. and that it rattled his windows. The resident said that he looked out his window and saw a dark-colored truck with "running lights on top." A preliminary search by the warden revealed no evidence of a deer jacking. The warden returned later that morning, at approximately 7:00 a.m., to inspect the scene more closely and located deer tracks along the southern shoulder of the road. At the approximate location the resident had described seeing the truck parked, the warden found what he believed to be deer hair and blood. He collected samples for evidence.

¶ 3. In the course of the investigation, the warden interviewed E.S., who reported shooting a six-point buck at 7:00 a.m. on Thanksgiving morning in Hinesburg. After some equivocation, E.S. informed the warden that he had not shot the deer and that defendant had sold him the deer carcass at "Clark's Barn." The partially butchered carcass was seized as evidence. Then the warden, along with other law

enforcement officers, went to defendant's residence to investigate further.

¶ 4. Law enforcement officers proceeded up defendant's driveway to the two-bay detached garage. Through a window in the garage door, the wardens observed the rear tailgate and license plate of defendant's black pickup truck. The wardens also saw what appeared to be deer hair and blood on the top of the truck's rear tailgate, which was "approximately one arm's length" from the wardens' vantage point. As the tailgate was closed, the wardens were unable to see into the bed of the truck or the interior side of the tailgate.

¶ 5. The wardens went to defendant's front door, spoke with his wife, and asked for her permission to enter the garage. Defendant's wife said that she couldn't find the key and was therefore unable to open the garage door.

¶ 6. Based in part on their observations through the garage window, the wardens obtained a search warrant to seize defendant's truck and collected samples of the blood they had observed, which matched a sample from the deer at issue. They did not photograph the truck until approximately five days after the seizure, during which time the truck had been left outside in inclement weather. Due to exposure to the elements, a smaller amount of blood than originally observed was visible, and the deer hair was no longer visible.

¶ 7. Prior to trial, defendant sought to suppress the evidence obtained through the search warrant, arguing that: (1) his garage falls squarely within the curtilage of his home and is protected from warrantless government intrusions; (2) law

enforcement had no lawful basis to peer through his garage window; (3) even if the garage is not within the curtilage of his home, sufficient steps were taken to exclude its interior from public view; (4) absent the unlawful intrusion into his garage, there was no probable cause to issue a search warrant and the evidence obtained must be suppressed; and (5) the warden included false and misleading statements as well as material omissions in his affidavit of probable cause.

¶ 8. The trial court denied the suppression motion. The court held that the garage, which "is located a significant distance from the home, . . . separated by a row of trees" and a small stone wall, was not part of the curtilage. However, the court noted that even if the garage was part of the curtilage, the warden had a legitimate right to be on defendant's driveway and the garage window was in plain view, emphasizing that the wardens entered the driveway to conduct legitimate police business.

¶ 9. On appeal, defendant argues that the court erred in denying his motion to suppress because: (1) his garage is within the curtilage of his home; (2) his truck's tailgate and license plate were not clearly visible from a lawful public vantage point; and (3) the warden included false or misleading statements and material omissions in his affidavit in support of the search warrant which constituted a Franks violation. See Franks v. Delaware, 438 U.S. 154 (1978).

¶ 10. We agree with defendant that his garage is within the curtilage of his home. We are unpersuaded by his remaining arguments. The wardens were conducting a legitimate police

investigation, during which they observed defendant's truck in plain view from a semiprivate area. We decline to address the merits of defendant's Franks challenge because the challenged statements were not necessary to the probable cause to issue a search warrant.[1] Accordingly, we affirm.

¶ 11. When reviewing a motion to suppress, we review the trial court's factual findings for clear error. State v. Dubaniewicz, 2019 VT 13, ¶14, __ Vt. __, 208 A.3d 619. The trial court's findings are upheld unless there is no reasonable or credible evidence to support them. State v. Weisler, 2011 VT 96, ¶ 6, 190 Vt. 344, 35 A.3d 970. If the trial court's findings are not clearly erroneous, we then review the legal issues de novo. Id. ¶ 7 (citation omitted).

¶ 12. First, defendant argues the trial court erred in concluding that his garage is not in the curtilage of his home. Yes, this was error. Curtilage is defined as "the land immediately surrounding the home and associated with it," State v. Byrne, 149 Vt. 224, 227, 542 A.2d 276, 278 (1988), into which the " 'privacies of life' may extend," State v. Rogers, 161 Vt. 236, 241, 638 A.2d. 569, 572 (1993) (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).

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[1] To succeed on a Franks challenge, defendant must show by a preponderance of the evidence that the government agent intentionally, knowingly, or with reckless disregard for the truth, included false information or omitted material information in the affidavit. 438 U.S. at 155-56. Here, defendant's Franks challenge is of no moment. Sufficient evidence supported the warrant without consideration of any of the alleged omissions or misleading statements and the claimed omissions or misleading statements would not affect the probable cause determination.

The United States Supreme Court has identified four factors to aid in determining if an area is curtilage: (1) the area's proximity to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation. United States v. Dunn, 480 U.S. 294, 301 (1987). These factors do not produce a "finely tuned formula" that can be mechanically applied; rather, they bear upon the central consideration of "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." Id. Vermont adopted the Dunn factors in State v. Hall, 168 Vt. 327, 330, 719 A.2d 435, 437 (1998), after first applying them in Rogers, 161 Vt. at 242 n.*, 638 A.2d at 572 n.*.

¶ 13. The Dunn Court found that the barn in question in that case was a substantial distance from the house (sixty yards away), it did not lie within the area surrounding the house that was enclosed by a fence, law enforcement had objective data that the barn was not being used for intimate activities of the home, and the defendant had done little to protect the barn area from observation by those standing in the open fields around the structure. 480 U.S. at 302-03. Based on these findings, the Court concluded the barn was not within the curtilage of the home. Id. at 301.

¶ 14. Following the Dunn analysis, this case calls for a different result. First, defendant's garage and home are in close proximity to one another, separated only by an area of driveway that can accommodate approximately two vehicles and plastic

garbage bins, and a small row of trees. While the trial court found the distance "significant" from viewing aerial photographs admitted at hearing, the photographs actually depict a continuity of space with a "walking path" to the house from the driveway. Second, a low, white split-rail fence stands along the road but, as the trial court found, it does not enclose anything. It begins along one side of the driveway and continues off toward an open field away from the residence. The fence does not separate the garage from the home in any way. Third, defendant uses the garage for domestic purposes—parking his vehicles and storing his hunting equipment. Finally, while defendant did not prevent observation of the garage itself by placing barriers or "no trespassing" signs, the garage door was closed and locked. The garage is properly considered to be within the curtilage of the home.

¶ 15. We have held that curtilage includes outbuildings such as sheds and garages used for domestic purposes. State v. Potter, 148 Vt. 53, 61, 529 A.2d 163, 168 (1987) (determining that defendant's shed was part of curtilage because it was outbuilding used for storing family property). Here, defendant's garage merited "the same constitutional protection from unreasonable searches and seizures as the home itself." Rogers, 161 Vt. at 241, 638 A.2d at 572; see also State v. Bryant, 2008 VT 39, ¶ 13, 183 Vt. 355, 950 A.2d 467.

¶ 16. We nonetheless conclude that the warden's plain-view observations through the window of the garage from a place he had a right to be did not violate defendant's Fourth Amendment rights. In State v. Koenig, we held that Fourth Amendment

protections extend only to items which are not in plain view and cannot be seen by persons from a place they have a legitimate right to be. 2016 VT 65, ¶ 15, 202 Vt. 243, 148 A.3d 977 (citing United States v. Orozco, 590 F.2d 789, 792 (9th Cir. 1979)). The plain-view exception applies here.

¶ 17. The plain-view doctrine is grounded on two principles: "first, 'that when a police officer has observed an object in plain view' from a legal vantage point the owner's privacy interests are forfeited; and second, that requiring a warrant once the police 'have obtained a firsthand perception of [the object] would be a needless inconvenience.' " State v. Bauder, 2007 VT 16, ¶ 30, 181 Vt. 392, 924 A.2d 38 (quoting Texas v. Brown, 460 U.S. 730, 739 (1983)).

¶ 18. Regarding the first prong—that the police officer observes the object from a legal vantage point—we have previously stated that "police officers are entitled to enter residential property, including portions that would be considered part of the curtilage, to carry out legitimate police business." Koenig, 2016 VT 65, ¶ 16. Portions of the curtilage like driveways or walkways, which are normal access routes for anyone visiting the premises, are considered semiprivate places. State v. Pike, 143 Vt. 283, 287, 465 A.2d 1348, 1351 (1983) (citing United States v. Magana, 512 F.2d 1169, 1171 (9th Cir. 1975)); State v. Ryea, 153 Vt. 451, 453, 571 A.2d 674, 675 (1990); see also State v. Libbey, 154 Vt. 646, 646, 577 A.2d 279, 280 (1990) (mem.) ("We have found a significant difference between private areas within the curtilage of the home, and semiprivate areas, such as a driveway, steps and a walkway."). When state officials restrict their movement to semiprivate

areas to conduct an investigation, "observations made from such vantage points are not covered by the Fourth Amendment." Pike, 143 Vt. at 288, 455 A.2d at 1351 (citing United States v. Humphries, 636 F.2d 1172, 1179 (9th Cir. 1980)). In other words, a private area may still be open to visual inspection from a semiprivate area. See Rogers, 161 Vt. at 248, 638 A.2d at 578 (finding that trooper did not violate Fourth Amendment while "standing in a position from which he could lawfully make an observation" into defendant's garden within curtilage). Here, while the garage itself is a private area that the police would not have been justified to enter without a warrant, the wardens restricted their movements to defendant's driveway, a semiprivate area, where they observed what they believed to be incriminating evidence on defendant's truck. Because the wardens observed the truck from a legal vantage point, the first part of the plain-view exception is met.

¶ 19. An object must also be in plain view. Bauder, 2007 VT 16, ¶ 30. "Where the government observes that which is willingly exposed to the public, there is no invasion of privacy." Koenig, 2016 VT 65, ¶ 15. A person can reassert privacy interests in semiprivate areas by posting 'no trespassing' signs or erecting barriers to apprise others that the area is private. State v. Kirchoff, 156 Vt. 1, 10, 587 A.2d 988, 994 (1991). When a landowner has taken steps to indicate that strangers are not welcome, such that a reasonable person would conclude that the public is excluded from the land, an expectation of privacy is reasonable. Id.; State v. Blow, 157 Vt. 513, 517, 602 A.2d 552, 555 (1991). However, absent evidence of intent to exclude the public, and when the police

officer can readily observe the object from a lawful vantage point, the plain-view requirement is met. This is true here.

¶ 20. Defendant urges us to analogize the present case to State v. Ford, 2010 VT 39, 188 Vt. 17, 998 A.2d 684. We decline to do so. In Ford, an officer performing a welfare check walked around the defendant's house, bent down to a basement window, and saw marijuana plants under a grow-light through a gap in the curtains. Id. ¶¶ 3-4. However, that case looked at whether the emergency-aid exception applied under the facts of the case and did not address the plain-view exception at issue here. See id. ¶ 6. Moreover, there was no claim in Ford that the officer saw into the basement window from a semiprivate place that was a normal access route for visitors to the premises. See id. ¶¶ 9, 21.

¶ 21. We are also unconvinced by defendant's argument that his detached garage, with closed doors, connotes a reasonable expectation of privacy. Defendant did little, if anything, to indicate that expectation. As the trial court found, the garage was not in an enclosure. Defendant posted no signs and erected no large barriers around his garage. And, as the trial court found, the "small white split-rail fence does not protect the area from observation in any way." The windows in the garage doors were not covered or blocked in any way. Any adult standing on defendant's driveway could see into the interior of his garage where his truck was parked because nothing was done to prevent someone from seeing into the garage from the driveway.

¶ 22. Defendant also relies on Collins v. Virginia, 138 S. Ct. 1663, 1668 (2018), where an officer

investigating a traffic infraction and theft uncovered a suspect vehicle from under a tarp on the defendant's driveway. Without a warrant, the officer removed the tarp, ran the license plate number, and photographed the uncovered vehicle. Id. The United States Supreme Court held that the officer's actions invaded defendant's Fourth Amendment interests in the curtilage of his home and the vehicle searched. Id. at 1675. Collins, however, concerned the automobile exception to the warrant requirement—not the plain-view exception. Furthermore, the warden here did not move or uncover anything to see defendant's truck. Therefore, we find defendant's reliance on Collins misplaced.

¶ 23. For the foregoing reasons, we conclude that the plain-view exception to the prohibition on warrantless searches and seizures applies. Accordingly, the trial court correctly denied defendant's motion to suppress.

Affirmed.

FOR THE COURT:

/s/ M. Skoglund

Associate Justice

¶ 24. **REIBER, C.J., dissenting.** The majority holds that defendant's truck was in the plain view of the game wardens from a lawful vantage point, and therefore their observations were not an unconstitutional search within the meaning of the Fourth Amendment to the United States Constitution and Article 11 of the Vermont Constitution.[2] I disagree. In my view, the majority's analysis undervalues "the deeply-rooted legal and societal principle that the coveted privacy of the home should be especially protected." State v. Blow, 157 Vt. 513, 518, 602 A.2d 552, 555 (1991). In addition, the majority has misapplied the plain-view doctrine and the knock-and-talk exception, resulting in a bright-line rule that permits law enforcement officers to freely wander and observe while on a person's driveway, without reference to the particular circumstances of the search. Based on the facts of this case and our principles of search-and-seizure jurisprudence, I would reverse the decision of the trial court and grant defendant's motion to suppress. Accordingly, I respectfully dissent.

¶ 25. Our fundamental inquiry is whether the game wardens invaded defendant's reasonable expectation of privacy when looking through his garage-door window to view his truck. See State v. Byrne, 149 Vt. 224, 226-27, 542 A.2d 276, 278 (1988) ("[T]he touchstone of [Fourth] Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of

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[2] Because I conclude that this search violates the requirements of both Article 11 and the Fourth Amendment, I need not address any possible differences in analysis under the respective provisions.

privacy." (quotations omitted)); State v. Ford, 2010 VT 39, ¶ 10, 188 Vt. 17, 998 A.2d 684 (explaining Article 11 "protects the people's right to be free from unreasonable government intrusions into legitimate expectations of privacy" (quotation omitted)). Whether a law enforcement officer's actions are constitutional must be evaluated according the particular facts of that case. Ohio v. Robinette, 519 U.S. 33, 39 (1996) (holding that "touchstone of the Fourth Amendment is reasonableness" and "emphasizing the fact-specific nature of the reasonableness inquiry" (quotation omitted)); see also State v. Bauder, 2007 VT 16, ¶ 12, 181 Vt. 392, 924 A.2d 38 (rejecting "bright-line tests" in determining reasonableness in search-and-seizure jurisprudence "because these tests fail to do justice to the values underlying Article 11" (quotation omitted)).

¶ 26. We have long held that the reasonable expectation of privacy—and thus a person's protection against warrantless governmental intrusion—is at its highest in the home and its curtilage. Ford, 2010 VT 39, ¶ 10 (reasoning that "[t]he home is a repository of heightened privacy expectations, and as such, it receives heightened protection under Article 11," and recognizing same protection for curtilage as for home (quotation omitted)); Byrne, 149 Vt. at 227, 542 A.2d at 278 (affirming heightened privacy expectation for home and curtilage under Fourth Amendment); see also State v. Bryant, 2008 VT 39, ¶ 27, 183 Vt. 355, 950 A.2d 467 (recognizing that "Vermonters normally have high expectations of privacy in and around their homes"). As the United States Supreme Court

has stated, "At the [Fourth] Amendment's very core stands the right of a [person] to retreat into [the] home and there be free from unreasonable governmental intrusion." Florida v. Jardines, 569 U.S. 1, 6 (2013). Because "[t]his right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with immunity," or could "enter a [person's] property to observe [the person's] repose from just outside the front window," the home's constitutional protections extend to the area "immediately surrounding and associated with the home." Id. (quotation omitted).

¶ 27. Both the garage, the area the game wardens observed, and the driveway, the area from which the wardens made their observation, are part of the curtilage of defendant's home. See State v. Hall, 168 Vt. 327, 330, 719 A.2d 435, 437 (1998) (listing factors courts consider in determining whether area is part of curtilage); see also ante, ¶¶ 14, 18 (holding that garage was part of curtilage and assuming driveway was part of curtilage). Because the garage and driveway are part of defendant's curtilage, we begin with the presumption that the wardens' warrantless intrusion on defendant's property and the resulting observations were unconstitutional. Bauder, 2007 VT 16, ¶ 14 ("Searches outside the normal judicial process are . . . presumptively unconstitutional . . . "); see also Jardines, 569 U.S. at 7 (describing curtilage as "constitutionally protected area" and explaining that law enforcement officer's intrusion within curtilage is "sharply circumscribed").

¶ 28. This presumed protection is not absolute, however, and warrantless searches may be

permissible if an exception to the constitutional protection applies. Bauder, 2007 VT 16, ¶ 14 (stating warrantless searches "are . . . permissible only pursuant only to a few narrowly drawn and well-delineated exceptions"). It is the State's burden to show such an exception applies. Ford, 2010 VT 39, ¶ 12. In this case, the State argues that the "plain-view" exception applies, and the majority agrees. See ante, ¶ 16. Under the plain-view exception, "constitutional protections do not attach to activities or possessions that a person knowingly exposes to the public." State v. Rogers, 161 Vt. 236, 244, 638 A.2d 569, 573-74 (1993) (quotation omitted); see also State v. Kirchoff, 156 Vt. 1, 7, 587 A.2d 988, 993 (1991) ("[A] person cannot rely on Article 11 to protect areas or activities that have been willingly exposed to the public. Article 11 protects the people from governmental intrusion into their private affairs; to the extent their affairs are willingly made public, the provision has no application.").

¶ 29. As the majority explains, the plain-view exception depends on an object's being in plain view from a lawful vantage point. Bauder, 2007 VT 16, ¶ 30; see also ante, ¶ 17. "[T]he place of observation is normally more important than the place observed." Rogers, 161 Vt. at 243, 638 A.2d at 573. There would be no reasonable expectation of privacy in an object located within the home but plainly visible from a public street. See, e.g., Claverie v. L.S.U. Med. Ctr. in New Orleans, 553 So. 2d 482, 486 (La. Ct. App. 1989) (reasoning "observation of plaintiff's residence from a public street [did not] constitute[] either a search or an invasion of privacy"). Nor would we recognize a reasonable expectation of privacy in an

object located within the curtilage but plainly visible from a portion of private property outside of the curtilage, unless the defendant has taken steps to shield that area from the public. See Rogers, 161 Vt. at 248-49, 638 A.2d at 576 (holding state trooper's observation of defendants' garden from nearby woods—which was observation of area inside curtilage from point outside curtilage—was constitutional because "defendants [had] taken no steps to prevent the public from reaching the place of observation or to prevent the observation," and therefore "they [had] knowingly exposed the garden to the public").

¶ 30. Where, as here, law enforcement officers make observations from within the curtilage itself, the observations cannot be considered in plain view unless the officers have lawfully intruded into the defendant's curtilage to the point of observation. See Jardines, 569 U.S. at 7 ("While law enforcement officers need not shield their eyes when passing by the home on public thoroughfares, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." (quotation omitted)). Without naming it, the majority relies on the "knock-and-talk" exception to establish that the wardens lawfully entered defendant's property prior to viewing the truck. See ante, ¶ 18. Under this exception, "police officers are entitled to enter residential property, including portions that would be considered part of the curtilage, to carry out legitimate police business," such as to "approach[] a residence to knock on the door, or otherwise approach[] the residence to speak to the

inhabitants." State v. Koenig, 2016 VT 65, ¶ 16, 202 Vt. 243, 148 A.3d 977 (explaining "knock-and-talk" is "also an exception to the protections against warrantless searches" and is distinct from plain-view exception).

¶ 31. The plain-view and knock-and-talk exceptions may work together to allow law enforcement officers to enter private property "to conduct an investigation or for some other legitimate purpose," and then, once there, officers' "observations made from such vantage points are not covered by the Fourth Amendment" or Article 11. 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(f), at 782, 784-87 (5th ed. 2012); see also Koenig, 2016 VT 65, ¶¶ 16, 22 (quoting LaFave, Search and Seizure § 2.3(f), at 782-87 and applying same reasoning to searches under Article 11). When officers enter private property in this way, they must "restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches)." LaFave, Search and Seizure § 2.3(f), at 782-84; Koenig, 2016 VT 65, 17 ("In carrying out their duties during a knock-and-talk, the police are limited to the areas where the public would be expected to go."). "[I]f police utilize normal means of access to and egress from the house for some legitimate purpose, such as to make inquiries of the occupant, . . . it is not a Fourth Amendment search for the police to see . . . from that vantage point what is happening inside the dwelling." LaFave, Search and Seizure § 2.3(c), at 752-55 (quotation omitted). "On the other hand, if the police stray from that path to other parts of the curtilage in order to conduct the surveillance," in that circumstance a visual observation "is a search

within the meaning of the Fourth Amendment." Id. § 2.3(c), at 756-57. In sum, the knock-and-talk exception allows law enforcement officers to enter a person's curtilage in the same manner as a "reasonably respectful" member of the public; and the public-view exception allows officers to "keep their eyes open" while they do so. See State v. Seagull, 632 P.2d 44, 47 (Wash. 1981) (en banc) (holding that "[a]n officer is permitted the same license to intrude as a reasonably respectful citizen" and "[i]n doing so they are free to keep their eyes open").

¶ 32. Contrary to the majority's representation, this Court has never held that the knock-and-talk exception categorically allows a law enforcement officer to enter a person's driveway for legitimate police business. See ante, ¶ 18. Our case law has never established a "semiprivate" area that is categorically exempt from the reasonable expectation of privacy. Rather, we have offered a driveway as an example of a part of the curtilage that the public could be expected to go, as part of the usual way to access the home, and therefore could be considered held open to the public. For example, in State v. Pike, this Court concluded that the state trooper's observations, which were made from the driveway, were permissible because the driveway was "that portion of the curtilage which is the normal route of access for anyone visiting the premises" and so was "only a semiprivate area." 143 Vt. 283, 287, 465 A.2d 1348, 1351 (1983) (quotation omitted). We further reasoned, "[W]hen state officials come onto private property to conduct an investigation and restrict their movements to driveways which visitors could

be expected to use, observations made from such vantage points are not covered by the Fourth Amendment." Id. at 288, 465 A.2d at 1351. Our inquiry in Pike was whether the officer accessed the defendant's property in the same way as the public could be expected to do in approaching the property's residents—not a categorical review of whether the officer stayed on the driveway, regardless of the other circumstances of the case. See United States v. Magana, 512 F.2d 1169, 1171 (9th Cir. 1975) ("It would be equally unwise to hold, as a matter of law, that all driveways are protected by the Fourth Amendment from all penetrations by police officers as to hold that no driveway is ever protected from police incursions.").

¶ 33. We followed this reasoning in later cases, as well. In State v. Ryea, we held that observations made on defendant's driveway were constitutional because "[a] driveway serves as the normal access route for anyone visiting the premises," so although the "driveway may fall within the curtilage, it nevertheless constitutes a semiprivate area." 153 Vt. at 453, 571 A.2d at 675. Similarly, in State v. Byrne, we held that evidence found around the steps leading to the defendant's residence was constitutionally obtained because the steps were within "that portion of the curtilage which is the normal route of access for anyone visiting the premises." 149 Vt. at 228, 542 A.2d at 279 (quotation omitted). More recently, in State v. Koenig, we held that a state trooper's warrantless entry into a three-walled, structure attached to the residence, which the trooper entered after identifying the suspect car from a public street, was "permissible because it was reasonable under

these facts for the officer to conclude the doorway inside the structure was an entrance for the public to use to access the home." 2016 VT 65, ¶ 22. In each case, we have emphasized that the officer's observations were constitutional because, based on the facts in those cases, the observations were made within a portion of the curtilage that the public would access in visiting the home. Therefore, that portion of the curtilage could be considered publicly exposed and without a reasonable expectation of privacy.

¶ 34. Other courts have also focused on the public's access to the house in deciding whether a law enforcement officer's incursion violated a reasonable expectation of privacy. The Arizona Court of Appeals concluded in State v. Blakely that the officer's actions in that case were unconstitutional because he had "walked past the pathway that led directly to the front door and continued walking down the driveway into an area ordinarily not used by visitors" rather than "approaching the front door to make contact with any occupants of the residence." 243 P.3d 628, 633 (Ariz. Ct. App. 2010). In State v. Maxfield, the Washington Supreme Court held that an investigator's observations were constitutional where the investigator, upon entering the defendant's property, went to the front door and knocked, then, when he received no answer, walked to the garage door and knocked, and the observations were made while proceeding along those walkways. 886 P.2d 123, 133 (Wash. 1994) (en banc). The court reasoned the officer "did not substantially and unreasonably depart from the area impliedly open to the public." Id. at 133; see also People v. Freeman, 460 N.E.2d

125, 131 (Ill. App. Ct. 1984) (holding police officer's observation of garage's interior through window unconstitutional because "[t]he evidence does not show the officer had to pass by the garage in order to lawfully execute the search warrant for the house, or for any other reason"). But see, e.g., People v. Crapo, 479 N.Y.S.2d 779, 780 (N.Y. App. Div. 1984) (holding "officer's action in walking up defendant's driveway to the door of his garage and then looking through the garage door window was no more intrusive an event than ordinarily occurs during the daily incidents of life in an urban neighborhood"); State v. Buzzard, 2007-Ohio-373, 860 N.E.2d 1006, at ¶¶ 1, 15 (holding officers' action in "looking through a small opening in a locked double door of a residential garage" was constitutional because "the police are free to observe whatever may be seen from a place where they are entitled to be").

¶ 35. Following a related line of reasoning, some courts have held law enforcement officers' actions unconstitutional even when the officers adhered to the public's usual route of access if the officers nonetheless exceeded their "implicit license" to enter the property. Jardines, 569 U.S. at 8. In Florida v. Jardines, the United States Supreme Court held that a law enforcement officer's purpose in entering a defendant's property is relevant to whether the officer exceeded the "implicit license" that permits the public to enter a person's curtilage "to approach the home by the front path." Id. at 8-9. The Court reasoned: "To find a visitor knocking on the door is routine," but "to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello or

asking permission, would inspire most of us to . . . call the police." Id. at 9. Explaining that "the background social norms that invite a visitor to the front door do not invite [the visitor] there to conduct a search," the Court concluded that in that case, where the officers had walked a drug-sniffing dog along the pathway to the front door, the officers' purpose was to "conduct a search, which is not what anyone would think [the officers] had license to do." Id. at 9-10. Similarly, in State v. Johnson, the Washington Court of Appeals held that law enforcement officers' observations were unconstitutional where the officers "never attempted to approach the house or contact the occupants," even though the officers physically remained within the public's normal access route to the home. 879 P.2d 984, 991 (Wash. Ct. App. 1994). And in Griffin v. State, the Arkansas Supreme Court adopted the same view, holding the officers' actions in that case—in which they "checked out a shed and walked around the premises" prior to obtaining consent from the occupants—did not comply with the implied consent of a "knock and talk" and were unconstitutional. 67 S.W.3d 582, 589-90 (Ark. 2002). These cases, like the cases that focus on the public's access route to the house, emphasize that a law enforcement officer may enter a defendant's curtilage only in the same manner as a member of the public. Furthermore, although an officer may see what is plainly visible when doing so, the officer has no license to conduct a warrantless search within the curtilage even in an area that is impliedly held open to the public.

¶ 36. Here the trial court found that the game wardens "went to Defendant's residence and approached the residence via the driveway," and "[a]t one point, both wardens looked into Defendant's two-bay detached garage that was located at the back of Defendant's driveway some distance from the road . . . [t]hrough a window in the garage door" and "observed Defendant's black pickup truck parked in the garage." The court made no findings about how large the window was, how close to the window the wardens stood when viewing the truck, whether the wardens looked through the window before or after approaching the residence, or at what point the wardens attempted to contact the residence's occupants.[3]

¶ 37. The findings do not establish that the truck was in plain view from a public vantage point. On the contrary, the findings establish that the truck was not in plain view from the public street or from a portion of defendant's property outside of the curtilage. In order to bring the truck into view, the wardens had to enter defendant's driveway, which was part of the curtilage and "a constitutionally protected area." Jardines, 569 U.S. at 7. Because the place of observation was within the curtilage, the truck could not be considered publicly exposed unless the State showed, and the trial court found, that the wardens came to the point of observation and made the observation in the same manner as a "reasonably

[3] The court observed that defendant's wife "testified that the wardens were walking around and looking through the window of the garage" for "approximately 15 minutes before she went outside to speak to" them. However, the court did not adopt or reject this testimony in a finding.

respectful" member of the public. See Seagull, 632 P.2d at 47; see also Jardines, 569 U.S. at 8-9 (considering whether officers' entry adhered to implied license permitting visitors to approach home). The findings do not establish this. They are silent on how the wardens came to be looking in the garage-door window or whether that spot was part of the public's access route to the house. It does not suffice that the wardens' point of observation was on the driveway. The driveway is not categorically exempted from protection against governmental intrusion. The State must show more, and the court's findings do not establish that it did so.

¶ 38. Nor does the evidence indicate that the game wardens came to the point of observation as a member of the public would when accessing the home. The photograph of defendant's property submitted at the motion-to-suppress hearing shows that his driveway proceeds onto his property a short way and then opens to the left into a small parking area. Immediately behind the parking area is the two-door garage, which is detached from the residence. To the right of the driveway is a walkway that proceeds to the house. The photograph suggests that if the wardens parked in the driveway, or anywhere in the parking area other than directly in front of the garage-door window, they would have had to walk away from the normal access route to the house in order to get close to the garage-door window. Additionally, the photograph and a game warden's testimony at the hearing indicates that the window was not large—around eight to twelve inches. Given that size, the wardens likely would not have been able to look through the window and view

the truck while walking from their parked vehicles to the front door. They would have had to walk directly to the garage-door window and stand right in front of it. Furthermore, defendant's wife's testimony indicates they did just that. As the court recounted, defendant's wife "testified that the wardens were walking around and looking through the window of the garage" for "approximately fifteen minutes before she went outside to speak with the warden." The game warden's testimony did not contradict wife's; the warden testified that they "had looked through the window pretty soon after arriving," and he could not remember whether they looked through the window first or went to the front door first. The game warden also testified that they went to defendant's property in order to find the truck, not to contact defendant, and when they did not see the truck upon arriving at defendant's property, they "went to—up to the window of one of the garage bays so [they] could look in."

¶ 39. According to this evidence, the game wardens went to defendant's property for the purpose of conducting a search for the truck, and before contacting anyone at the property, they walked away from the home, directly to the small window in the garage door, which was located far back from the public road, and peered in from a vantage point necessarily close to the window. This the wardens were not permitted to do. The fact that the driveway itself is visible from the street, or that the public may enter part of the curtilage on the way to the home, does not give law enforcement officers permission to wander freely around the driveway and investigate. This is not a situation in which observation was

unavoidable from a lawful vantage point; they would not have had to "turn [their] head[s] from observing" the garage's interior "even though standing in a position from which [they] could lawfully make an observation." Rogers, 161 Vt. at 248, 638 A.2d at 576. Their observations were an unconstitutional search.

¶ 40. The majority notes that defendant did not create a reasonable expectation of privacy in his garage. See ante, ¶ 21. A defendant must take affirmative steps to demonstrate a reasonable expectation of privacy in an area outside of the curtilage. See State v. Dupuis, 2018 VT 86, ¶ 11, __ Vt. __, 197 A.3d 343 ("[T]his Court has reaffirmed that a landowner must signal an intent to exclude the public from 'open fields' in order to maintain a constitutionally cognizable expectation of privacy."). An area inside the curtilage is presumed to have a reasonable expectation of privacy unless the defendant has willingly exposed the area to the public. See Rogers, 161 Vt. at 244, 638 A.2d at 573-74. The interior of the garage was not exposed to the public. The garage's interior was not plainly observable from the public street or from an area outside of the curtilage. It also was not plainly observable to a member of the public accessing the house. The garage's interior therefore retained its presumed reasonable expectation of privacy.

¶ 41. Furthermore, the fact that the driveway itself was plainly exposed to public view does not put everything that can be seen from the driveway within public view. As the Eighth Circuit said in United States v. Wells, "[A] homeowner may expose portions of the curtilage of his home to public view while still maintaining some expectation of privacy

in those areas." 648 F.3d 671, 678 (8th Cir. 2011). In that case, the court reasoned that the defendant "certainly exposed his unpaved driveway to public view, and therefore could not reasonably expect that members of the public would not observe whatever he might do there." Id. However, the defendant "could reasonably expect that members of the public would not traipse down the drive to the back corner of his home, from where they could freely observe his entire backyard." Id. In the same way here, although defendant's driveway was publicly exposed, and therefore he had no reasonable expectation of privacy in what he did on the driveway, he could reasonably expect that the public would not wander around his driveway, in the opposite direction from his house, position themselves close to his garage-door window, and peer in.

¶ 42. Based on the reasoning above, I would hold that the trial court erred in denying defendant's motion to suppress. I therefore respectfully dissent.

¶ 43. I am authorized to state that Justice Robinson joins this dissent.

/s/ Paul L. Reiber
Chief Justice

APPENDIX B

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CRIMINAL DIVISION
Docket No. 373-2-18 Cncr

STATE OF VERMONT,

v.

CLYDE S. BOVAT,

Defendant.

DECISION ON MOTION

Filed: August 17, 2018

This matter came before the Court for a hearing on June 11, 2018 on Defendant Clyde Bovat's motion to suppress certain evidence obtained as the result of the execution of a search warrant at his residence, filed May 14, 2018. Defendant was present and was represented by Samantha Lednicky, Esq. and Frank Twarog, Esq. The State was represented by Deputy State's Attorney Kelton Olney, Esq.

I: Findings of Fact

Based on the credible evidence adduced at the hearing, the Court makes the following findings of fact. During an investigation into an alleged deer jacking, two game wardens went to Defendant's residence and approached the residence via the driveway. At one point, both wardens looked into Defendant's two-bay detached garage that was located at the back of Defendant's driveway some distance from the road. Through a window in the garage door, the wardens observed Defendant's black pickup truck parked in the garage. The truck was parked facing away from the wardens so that they had a clear view of the rear tailgate. Looking through the window, the tailgate was approximately one arm's-length from the wardens' vantage point. The wardens could see deer hair and a small amount of blood on the top of the truck's rear tailgate. The tailgate was closed at the time the wardens observed it. The wardens were unable to see any blood in the bed of the truck or on the interior side of the tailgate from their vantage point.

Based in part on this observation made into the garage, the wardens obtained a search warrant to seize the truck; they included their observations of the blood and deer hair in the affidavit supporting the search warrant. Upon seizure of the truck, the wardens obtained samples of the blood they had observed, but they did not take any photographs of the tailgate at that time. The wardens photographed the truck approximately five days after the seizure. During this interval, the truck had been left out in the elements and subject to at least some inclement weather. The deer hair was not visible in the

photograph that was taken. Some amount of blood was visible, though the amount was smaller than was originally observed. During the wardens' initial visit to Defendant's property, the wardens sought Defendant's wife's consent to search the garage. However, Defendant's wife did not have the remote to the garage and was unable to open it.

The wardens also went to the Clark's barnyard and saw blood spots on the snow in the barnyard and found a rag with deer blood on it. This information was not included in the affidavit in support of the warrant. However, this information appears in the affidavit of probable cause filed with the charge.

Defendant called two witnesses: his wife, Mary Ann Bovat, and Gerald Bovat. Mary Ann Bovat testified that she observed the wardens arrive in three pickup trucks from her vantage point in the kitchen. She testified that the wardens were walking around and looking through the window of the garage. Mary Ann Bovat testified that it was approximately 15 minutes before she went outside to speak with the wardens and that she had called her daughter before she went out to speak with them. Mary Ann Bovat testified that she was very upset by the arrival of the wardens.

Gerald Bovat testified that he lives in Johnson Vermont but traveled down to St. George when he heard from his niece that there were wardens in Defendant's yard. It took Gerald Bovat over an hour to travel to Defendant's residence. Gerald Bovat then took up a position in the trailer park across the street and began to observe the wardens through his binoculars. Gerald Bovat observed the wardens looking around. Gerald Bovat then went to the

residence but was denied access to the garage because the wardens had seized the garage in order to obtain the warrant.

II: Conclusions of Law

First, Defendant argues that evidence obtained when state game wardens looked in the window of his garage should be suppressed and excluded as a basis for the search warrant. Second, Defendant seeks to suppress evidence obtained based on the game wardens' entry into the barnyard of a third party. Third, Defendant attempts to launch a *Frank*'s challenge as to certain information contained in the search warrant, specifically whether the wardens observed cab lights on Defendant's truck and observed deer hair and blood on the back of Defendant's truck tailgate as stated in the affidavit supporting the search warrant.

A: Observation into the Garage

Defendant argues that "law enforcement violated the Fourth Amendment to the U.S. Constitution by searching the curtilage of Defendant's home and his truck for evidence without a warrant." Specifically, Defendant argues that the wardens conducted an illegal search by looking in the windows of his two-car garage because it was within the curtilage of his residence. The Court disagrees because this particular garage falls outside the curtilage of the residence and, even if it were within the curtilage, the contents of the garage were within plain view from the driveway.

While both the Fourth Amendment of the Federal Constitution and Article 11 of the Vermont Constitution protect a person's home from

unreasonable searches, "neither the Fourth Amendment nor Article 11 confer absolute protection against government intrusion." *State v. Koenig*, 2016 VT 65, ¶ 14, 202 Vt. 243. "When government agents conduct a warrantless search, the law presumes such an intrusion into an individual's privacy is unreasonable and a constitutional violation." *State v. Ford*, 2010 VT 39, ¶ 10, 188 Vt. 17. However, there are "a few narrowly drawn and well-delineated exceptions" to this general rule. *Id.* The most relevant exception to the situation at issue in this motion is the plain-view exception.

As explained by the Vermont Supreme Court,

> Fourth Amendment protections...extend only to items which are not in plain view and may not be seen by persons from a place they have a legitimate right to be.... Article 11 protections extend only to areas where individuals have 'conveyed an expectation of privacy in such a way that a reasonable person would conclude that he sought to exclude the public.... Where the government observes that which is willingly exposed to the public, there is no invasion of privacy—and therefore no search.

Koenig, 2016 VT 65, ¶ 15. "[T]he plain-view doctrine is predicated on two principles: first, 'that when a police officer has observed an object in plain view' from a legal vantage point the owner's privacy interests are forfeited; and second, that requiring a warrant once the police 'have obtained a first-hand perception of [the object] would be a needless inconvenience.'" *State v. Bauder*, 2007 VT 16, ¶ 30,

181 Vt. 392 (quoting *Texas v. Brown*, 460 U.S. 730, 739 (1983)).

The first principle underlying the plain-view doctrine is comprised of two prongs: first, that the police officer is observing the object from a legal vantage point; and second, that from that vantage point, the object is in plain view.

As to the first prong, "[i]t is well established that police officers are entitled to enter residential property, including portions that would be considered part of the curtilage, to carry out legitimate police business." *Koenig*, 2016 VT 65, ¶ 16. The portions of private property that an officer may enter include those that constitute the "normal route of access for anyone visiting the premises," as these are "only a semi-private area." *Id.* "A driveway, as that portion of the curtilage which is the normal route of access for anyone visiting the premises, is only a 'semiprivate area.'... Thus, when state officials come onto private property to conduct an investigation and restrict their movements to driveways which visitors could be expected to use, observations made from such vantage points are not covered by the Fourth Amendment." *State v. Pike*, 143 Vt. 283, 287-88 (1983).

A person can reassert their privacy interests in even these semiprivate zones. "Where indicia, such as fences, barriers or 'no trespassing' signs reasonably indicate that strangers are not welcome on the land, the owner or occupant may reasonably expect privacy.... The inquiry is objective—whether a reasonable person should know that the occupant has sought to exclude the public." *State v. Kirchoff*, 156 Vt. 1, 10 (1991).

In analyzing Defendant's motion, the Court first considers whether Defendant's garage falls within the curtilage. "The curtilage is an area outside the physical confines of a house into which the 'privacies of life' may extend, and which receives the same constitutional protection from unreasonable searches and seizures as the home itself." *State v. Rogers*, 161 Vt. 236, 241 (1993). In determining whether an area falls within the curtilage, Vermont has adopted the factors first announced in *United States v. Dunn*, 480 U.S. 294 (1987). *State v. Hall*, 168 Vt. 327, 330 (1998). The *Dunn* factors are: "First, how close is the area in question to the home? Second, is the area in question included in an enclosure? Third, what are the uses to which the area is put? Finally, what steps have been taken to protect the area from observation by people passing by?" *Id.*

The garage is located a significant distance from the home. No precise distance was provided at the hearing for the distance between the garage and the residence. However, the garage in question is detached from the residence and separated by a row of trees, what appears to be a small stone wall, what appears to be a freestanding pergola, and an area of driveway sufficient to accommodate at least two vehicles parked side-by-side as well as three large plastic garbage bins.

The garage is not included in an enclosure. From the aerial photograph admitted at the hearing, Defendant's Exhibit I, it appears that the residence and curtilage is surrounded by a rough barrier of trees that excludes the garage. The garage is located at the far end of a driveway that is not directly connected to the residence but is separated from the

residence by a walking path through the trees. The other end of the driveway, nearer to the garage, leads to a dirt path that continues into an open field. The garage is behind a single line of split rail fencing — the split rail fence does not enclose anything — that begins near one side of the garage and continues off toward the open field and away from the residence.

Other than testimony regarding a box that may have been used to deposit rent checks, there was no testimony regarding the uses of the garage. However, the photographs indicate that the garage is adjacent to an open field and has a worn dirt pathway heading in the direction of the field and away from the residence. Additionally, Defendant's truck was parked in the garage.

No steps have been taken to protect the area from observation by people passing by. The only thing between the garage and the roadway is a small white split rail fence that does not protect the area from observation in any way. By contrast, the view of the residence is partially obscured by trees in front of and surrounding the house — including the front and back yards — forming a rough outline that includes the residence but excludes the garage.

Based upon the Court's review of the evidence regarding the location at issue, Defendant's garage falls outside of the curtilage of the residence.

Even if Defendant's garage were within the curtilage, no violation occurred when the wardens looked in the window of the garage. The wardens looked through an uncovered clear window from the driveway and did not leave the driveway in order to see through the window. Additionally, the wardens

never entered the garage. "It is well-established that police officers are entitled to enter residential property, including portions that would be considered part of the curtilage, to carry out legitimate police business." *Koenig*, 2016 VT 65, ¶ 16. "Thus, when the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment." 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(f), at 782-87 (5th ed. 2012). Here, the wardens entered the driveway to conduct legitimate police business. "Criminal investigation is as legitimate a societal purpose as is census taking or mail delivery." *State v. Corbett*, 516 P.2d 487, 490 (Or. App. Ct. 1973) (cited in LaFave).

Given the layout of the residence, this driveway is a semiprivate area that appears to serve as the normal access route for anyone visiting the residence. *Koenig*, 2016 VT 65, ¶ 17; *Pike*, 143 Vt. at 287 ("A driveway, as that portion of the curtilage which is the normal route of access for anyone visiting the premises, is only a 'semiprivate area.'"). Anyone visiting the residence would be required to park in the driveway. Anyone visiting the residence would be required to use the small walking path connected to the driveway that leads to the residence. While it is not required to walk through the garage to access the residence, the garage is adjacent to the driveway and one can see into the window in question without leaving the driveway.

Since the wardens had a legitimate right to be in the driveway, Defendant's truck would have been in plain view through the window in the garage door connected to the driveway. "Fourth Amendment protections [] extend only to items which are not in plain view and may be not seen by persons from a place they have a legitimate right to be." *Koenig*, 2016 VT 65, ¶ 15.

Defendant's reliance on *Collins v. Virginia*, 584 U.S. ___, 138 S. Ct. 1663 (2018), is misplaced. In *Collins*, the U.S. Supreme Court found that a semi-enclosed portion of a driveway which was adjacent to the house and which was not a part of the normal route of access for anyone visiting the home was a part of the curtilage of the home. *Id.* at 1670-71. However, in deciding this issue, the Court relied on its precedents and did not expand or otherwise alter the traditional definition given to what constitutes the curtilage. See *id.* (citing *Florida v. Jardines*, 569 U.S. 1 (2013), which in turn cited *Oliver v. United States*, 466 U.S. 170 (1984), which was relied upon by the Court in *Dunn*). While the attached, semi-enclosed portion of the driveway was found to be a part of the curtilage in that case, the facts of this case, as described *supra,* do not warrant such a finding here.

Further, *Collins* did not concern the plain-view exception to the warrant requirement; rather, *Collins* involved the automobile exception. 138 S. Ct. at 1670 ("When these justifications for the automobile exception 'come into play,' officers may search an automobile without having obtained a warrant so long as they have probable cause to do so."). The officer in *Collins* stepped into the

curtilage—the enclosed portion of the driveway—and removed a tarp, which covered the vehicle in question, to examine it. *Id.* at 1668. The Court held that "[t]he automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." *Id.* at 1672. Here, the officers did not enter the curtilage to look into the garage; they remained in the driveway, which as noted above, is only a semi-private area. Further, the incriminating evidence—the blood and deer hair on the tailgate—were in plain view; the officers did not intrude on any separate Fourth Amendment interest in obtaining the incriminating evidence.

Finally, the portion of the opinion cited by Defendant supports upholding the validity of the search in this case. As noted by the Court, "[t]he ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible." *Id.* at 1675. Here, whether the garage qualifies as curtilage or not, the officers observed the truck inside of it from a lawful vantage point and saw incriminating evidence in plain view.

B: Clark's Barnyard

Defendant argues that law enforcement had no justifiable reason for entering Clark's barnyard and photographing evidence. However,

> [i]n a motion to suppress based on an illegal search or seizure, the defendant bears the burden of proving that a seizure occurred.

> *State v. Nault*, 2006 VT 42, ¶ 16, 180 Vt. 567 (mem.). Once the seizure is established, in cases where law enforcement acted without a warrant, the government bears the burden of justifying the intrusion.

State v. Harris, 2009 VT 73, ¶ 6, 186 Vt. 225.

Defendant failed to present any evidence at the hearing proving any search or seizure falling within the protections of the Fourth Amendment or Article 11 occurred at the barnyard. "[T]he government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." *Oliver*, 466 U.S. at 177. Further, "Article 11 does not afford protection against searches of lands where steps have not been taken to exclude the public." *Kirchoff*, 156 Vt. at 10. The only evidence presented at the hearing regarding the barnyard was that the wardens went to Clark's barnyard and saw blood spots on the snow in the barnyard and found a rag with deer blood on it. From what little evidence the Court has, it appears that no search or seizure otherwise requiring a warrant occurred. See *Dunn*, 480 U.S. at 301-03 (describing how the barn and surrounding area on defendant's ranch did not fall within the curtilage of home 60 yards away). The wardens went to a third party's barnyard. There is no evidence that the barnyard was a home or adjacent to a home, and thus within the curtilage. There is no evidence that the wardens entered any building or entered any place that they did not have a legitimate right to be. There is no evidence that there were any signs indicating an intention to exclude the public from the barnyard.

Defendant's motion to suppress evidence recovered from the barnyard is denied.

C: *Franks* Challenge

Finally, Defendant argues that "law enforcement used false and misleading statements to justify the issuance of the search warrant." Defendant's original filing points to two statements that Defendant argues were false: (1) the warden's statement that "[t]he truck is equipped with cab lights[]" and (2) the warden's statement that he observed hair and blood on Defendant's truck from the window of the garage. In his supplemental filing, Defendant adds a third challenge: that the warden's statement that Mr. Streeter "eventually admitted that he had obtained the deer from Clyde Bovat" should have included information regarding a first statement made by Mr. Streeter where Mr. Streeter stated that he had shot the deer himself. Defendant asserts that not including that information rendered the statement in the affidavit false and constitutes an omission of material information.

"Under principles announced by the United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 155-56...(1978), a finding of probable cause may be challenged on grounds that the supporting affidavit contains false or misleading information, or that material information has been omitted." *State v. Zele*, 168 Vt. 154, 157 (1998). "A defendant must establish by a preponderance of the evidence that the government agent 'intentionally, knowingly, or with reckless disregard for the truth' included in the affidavit false information, or omitted material information." *Id.* "Allegations of negligence or innocent mistake are insufficient." *Franks*, 438 U.S.

at 171. In order to mount a Franks challenge, Defendant must first make a

> substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155-56.

Part of the instant hearing was devoted to Defendant's *Franks* challenge. At the hearing, Defendant adduced testimony regarding the cab lights on Defendant's vehicle and the blood and hair observed on the rear tailgate. Defendant introduced no testimony or evidence at the hearing regarding his third challenge, which he raised only in his supplemental filing submitted after the hearing.

1: Cab Lights

First, Defendant alleges that warden who authored the search warrant included a false statement in the warrant application by including the statement: "The

truck is equipped with cab lights." Defendant's initial argument was that the statement asserted that the warden could see the cab lights as he looked into the window of Defendant's garage, which Defendant argued was impossible. The statement contained in the search warrant affidavit does not specifically say that the warden was able to see cab lights on the truck in the garage at that time. At the hearing, the warden who authored the affidavit testified that the statement was not intended to express that he was able to see cab lights on the truck in the garage at that time, but rather that he was aware that this truck had cab lights from prior information he had learned about Defendant and his truck. The cab lights are significant because one of the witnesses told the warden that he had seen a "dark colored pick-up with cab lights" leaving the scene of the predawn gunshot. Defendant's second argument is that the statement is false because it does not clearly state that the warden was relying on information about Defendant's truck that he had learned in the past.

Considering either argument, Defendant has not established by a preponderance of the evidence that the statement constitutes perjury or was made with reckless disregard for the truth. At worst, the statement is unclear. Indeed, the fact that Defendant can attribute contrary "false" meanings to the statement only further supports the fact that the statement was ambiguous but not false. This ambiguity appears to be an innocent drafting mistake or, at worst, negligence on the part of the warden; Defendant has failed to establish that the warden acted with any intent to deceive or with

reckless disregard for the truth. See *State v. Demers*, 167 Vt. 349, 354 (1997) (holding where defendant only showed that the warden had been negligent in his preparation of the affidavit by omitting certain details, there was no *Franks* violation warranting suppression).

2: Evidence on Tailgate

Second, Defendant alleges that warden falsely stated in the search warrant application that he could see blood and deer hair on the rear tailgate of the truck in the garage. In support of his argument, Defendant asserts that the photographs taken by the wardens demonstrate that there was no deer hair or blood on the rear tailgate of the truck. The warden acknowledged that the photograph of the tailgate, admitted as Defendant's Exhibit C, does not show any deer hair on the tailgate. However, the photograph was taken five full days after the seizure of the truck during which time the truck had been left outside and exposed to the elements, including inclement weather. The Court finds that the blood and deer hair could easily have been washed away by the inclement weather.

The evidence presented at the hearing supports the facts stated in the search warrant application. The warden who authored the search warrant affidavit testified under oath that there was deer hair and blood on the tailgate when he observed it through the window, and that the deer hair and blood was still on the tailgate when he executed the search warrant. A second warden testified credibly at the hearing that he also saw deer hair and blood on the rear tailgate of Defendant's truck through the window of the garage while it was still parked in the garage.

Again, Defendant has not established by a preponderance of the evidence that the statement in the affidavit constitutes perjury or was made with reckless disregard for the truth.

3: Omissions Concerning Mr. Streeter

Defendant raises his third challenge for the first time in his supplemental filing submitted after the evidence was closed. Neither party introduced any evidence regarding this issue at the hearing. The Court had not granted Defendant a hearing on this issue because Defendant had yet to make a substantial preliminary showing. Thus, the Court considers this *Franks* challenge separately.

Defendant's allegations fail to meet his burden to produce a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Franks*, 438 U.S. at 155. "[S]ome care is required in applying the *Franks* intentional-or-reckless requirement to omissions, as 'an affidavit which omits potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information.'" 2 W. LaFave, Search & Seizure § 4.4(b) (5th ed. 2017). "*Franks* protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate." *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (cited in LaFave, *supra*). Additionally, "[f]or an omission to serve as the basis for a hearing under *Franks*, it must be such that its inclusion in the affidavit would defeat probable cause for arrest." *Id.* "Omitted information that is potentially relevant but

not dispositive is not enough to warrant a *Franks* hearing." *Id.*

Defendant's allegations, even if proven, would not be dispositive as they would not defeat the finding of probable cause for the warrant. While the warden's statement that Streeter "eventually admitted that he had obtained the deer from Clyde Bovat" does not specifically set out what Streeter said at first, the statement does inform the reader that Streeter had originally given a statement that was different from the statement contained in the affidavit. The omission of the details of the statement does not appear to be designed to mislead. Indeed, the fact that Streeter — who was found in the process of butchering the deer — only reluctantly identified Defendant as the source of the deer after he had first attempted to take the blame for the offense and after being confronted by the warden with evidence that he had not shot the deer would only have served as further indication of truthfulness. See *State v. Hall*, 168 Vt. 327, 332 (1998) (holding that officer's failure to include in the warrant affidavit that he had previously searched defendant's property and found no marijuana plants as claimed by informant did not constitute a *Franks* violation as "the omitted information did not negate or discredit the validity of the officer's sworn statements"); *State v. Platt*, 154 Vt. 179, 187 (1990) (denying *Franks* challenge to warrant in part because omitted information did not defeat finding of probable cause: "the fact that the informant denied involvement in the crime, but then confessed, particularly in light of the information previously gathered by the police, could be construed as a further indication of truthfulness.").

Finally, the omission of Mr. Streeter's criminal background information — assuming there is such information — does not necessarily warrant a *Franks* hearing. In *United States v. Miller*, the Ninth Circuit upheld the district court's finding that failure to perform a background check on a confidential source amounted to mere negligence. 753 F.2d 1475, 1478 (9th Cir. 1985). "It might have been prudent for the federal agents to check on [the source's] background and criminal record, but their failure to do so is not reckless disregard." *Id.* The District Court for the District of Vermont has noted that "even though the police are not constitutionally required to reveal information about the confidential informant's criminal history or status, the affiant also may not intentionally or recklessly prepare the search warrant affidavit to create a materially false impression of enhanced reliability." *United States v. Wells*, No. CRIM. A. 88-87-01, slip op. at 4 (D. Vt. Jan. 30, 1989), available at 1989 WL 252841. However, Defendant's allegations fail to establish that the warden intentionally or recklessly prepared the affidavit to create a materially false impression of enhanced reliability by failing to include Mr. Streeter's criminal background information.

The Court finds that Defendant has not met his burden to require the Court to hold a hearing on the third challenge. The Court denies Defendant's third *Franks* challenge without a hearing. Defendant's Motion to Suppress based on his other two *Franks* challenges is also denied.

Electronically signed on August 17, 2018 at 04:50 PM pursuant to V.R.E.F. 7(d).

/s/ David R. Fenster
David R. Fenster
Superior Court Judge

APPENDIX C

VERMONT SUPREME COURT

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-362
DECEMBER TERM, 2019

STATE OF VERMONT,

v.

CLYDE S. BOVAT*

APPEALED FROM:
Superior Court, Chittenden Unit, Criminal Division
DOCKET NO. 373-2-18 Cncr

Filed: Dec. 19, 2019

In the above-entitled cause, the Clerk will enter:

Appellant's December 9, 2019 motion for reargument fails to identify points of law or fact overlooked or misapprehended by this Court in its November 8, 2019 opinion; accordingly, the motion is denied.

BY THE COURT

/s/ M. Skoglund
Marilyn S. Skoglund,
Associate Justice

Dissenting:

/s/ Paul L. Reiber
Paul L. Reiber,
Chief Justice

/s/ Beth Robinson
Beth Robinson,
Associate Justice

Concurring:

/s/ Harold E. Eaton, Jr.
Harold E. Eaton, Jr.,
Associate Justice

/s/ Karen R. Carroll
Karen R. Carroll,
Associate Justice

APPENDIX D

IN THE VERMONT SUPERIOR COURT
CHITTENDEN COUNTY CRIMINAL DIVISION

STATE OF VERMONT,

Plaintiff,

- against -

CLYDE S. BOVAT,

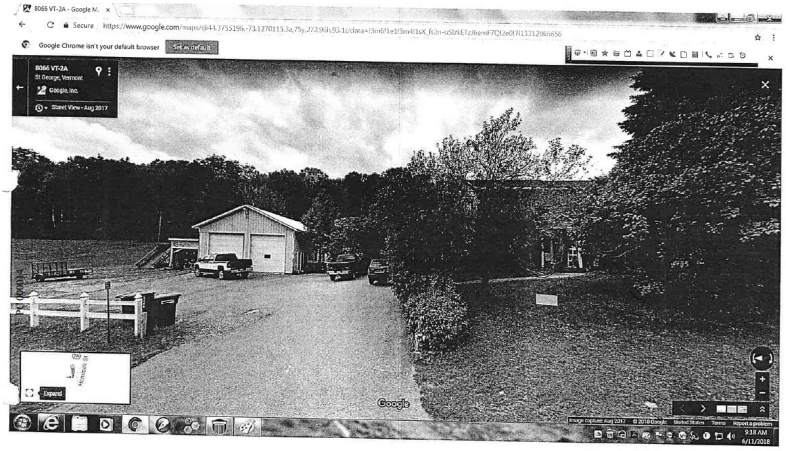
Defendant.

Case No. 373-2-18 Cncr

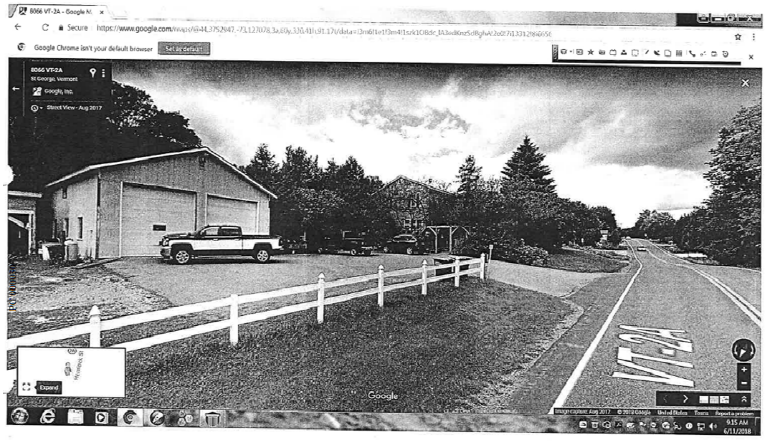
Burlington, Vermont

June 11, 2018
10:44 AM

Suppression Hearing Exhibits
Defendant's Exhibits A, H, and I



DEFENDANT'S EXHIBIT A
6/11/18 BWT



DEFENDANT'S EXHIBIT A
6/11/18 BWT

DEFENDANT'S EXHIBIT
I
6/11/18 9:14 AM

APPENDIX E

IN THE VERMONT SUPERIOR COURT
CHITTENDEN COUNTY CRIMINAL DIVISION

STATE OF VERMONT,

Plaintiff,

- against -

CLYDE S. BOVAT,

Defendant.

Case No. 373-2-18 Cncr

Burlington, Vermont

June 11, 2018
10:44 AM

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE DAVID FENSTER,
SUPERIOR COURT JUDGE

APPEARANCES:

Kelton D. Olney, Esq.
Attorney for the State

Samantha V. Lednicky, Esq.
Frank J. Twarog, Esq.
Attorney for the Defendant

PROCEEDINGS

* * *

[Testimony of Warden Joyal, pp. 7:2-22:14]

* * *

Q. Did you receive a call -- do you recall receiving a phone call from a member of the public on November 23rd of last year?

A. Yes. That was Thanksgiving morning. I was notified and was called out by dispatch to respond to a potential jacking incident on Hinesburg Hollow Road close to the address of 720.

Q. Okay. Did you investigate that call?

A. I did.

Q. As a result of that investigation, did you ultimately interview an individual named Eugene Streeter (ph.)?

A. I did. Warden Currier and I both interviewed Mr. Streeter. He goes by Dewey (ph.).

Q. Okay. What did Mr. Streeter have to say?

A. So Mr. Streeter, based on my investigation, a deer that was subsequently jacked on Hinesburg Hollow Road ended up in the possession of Mr.

Streeter who does have fish and wildlife prior violations. And when we interviewed Mr. Streeter, he originally was loyal to admit where he had -- who he had gotten the deer from. Originally he had said he had shot the deer himself. And then in a different location from where the deer had been jacked on Hinesburg Hollow Road so we told him that he was lying. He eventually admitted that he had obtained the deer from Mr. Bovat.

Q. Okay. In backing up just a moment, in terms of the original call of the poached deer on Hinesburg Road, did you receive any information from dispatch or from that caller about what they had observed?

A. Yes. Yes. He -- Mr. Lewis, the original complainant, had observed a dark colored truck with cab lights -- he actually knew exactly how many cab lights it had on it which tells me that he had definitely got a good look at the vehicle. He wasn't able to obtain the registration number off the vehicle because it was approximately 3:50 or 4:00 in the morning on Thanksgiving. He had taken a spotlight out and was attempting to try to see what was going on close to his residence. And he said that the vehicle had its headlights out but the cab lights were showing. And then when he came around the corner, it sped towards the main road in Huntington.

Q. Okay. So now moving forward to you've talked to Mr. Streeter. What did you do next?

A. Warden Currier and I met Warden Whitlock who was a little bit late to the scene at Hillside and then we traveled to Mr. Bovat's residence on St. George Road.

Q. Okay. And just so we're clear, the reason you went to Mr. Bovat's residence because of what you'd been told by Mr. Streeter?

A. Absolutely. So I know from prior experience that Mr. Bovat operates a dark colored pickup truck with cab lights with a registration PEPEB, Paul-Edward-Paul-Edward-space-Boy. And he -- Eugene Streeter eventually admitted that he had obtained the deer from Mr. Bovat which bells and whistles went off in my head at that time because I already had prior knowledge of the vehicle that Mr. Bovat was operating and that it matched the description that Mr. Lewis had described on Thanksgiving morning. So I was essentially one hundred percent sure that we had the right vehicle.

Q. Okay. So when you went to Mr. Bovat's property, can you describe -- can you just describe that property as you recall it?

A. Yeah. I'll recall to the best of my ability. So he has a pretty broad driveway that's in close proximity to the road. We didn't see any signage that prohibited any type of trespassing. At that point we were pretty much on the lines of seizing a scene to apply for a warrant at that point anyway. There's a detached two bay garage, each of the garage doors has one small window in it. Has a door to the side that I don't believe has a window in it. And there to the right of the garage, there's kind of like an entryway that would go north and then you enter the front door to Mr. Bovat's residence.

Q. Okay. So in terms of your observations, did you see any no trespassing signs?

A. I didn't see any no trespassing signs to the best of my ability. Warden Whitlock and Warden Currier didn't as well.

Q. Is that property next to a trailer park?

A. It's across the road, a little bit south to a trailer park. Yes.

Q. Okay. Did you observe anything on Mr. Bovat's property that would suggest he invites people there -- that he invites people onto the property?

A. Mr. Bovat's, to the best of my recollection, from what I've heard from the general public, is the part manager.

MS. LEDNICKY: Objection.

THE COURT: Well, there's an objection.

MS. LEDNICKY: If he's stating --

THE COURT: What was your objection?

MS. LEDNICKY: Oh, I thought you said -- if he's stating what the general public says about statements, it's hearsay unless if he wants us to accept that for the truth of the matter.

MR. OLNEY: Let me rephrase.

THE COURT: Okay.

BY MR. OLNEY:

Q. Warden Joyal, did you -- when you were on the property in November, did you observe anything that indicated to you on that day that others were invited onto the property?

A. I believe I saw a box close to his entryway where it appeared that tenants might drop off some type of rent which made me think that in his position that people might routinely go to his property

uninvited to drop off rent or issues with the park potentially.

Q. Is it your understanding that Mr. Bovat is the manager of that trailer park?

A. That is what I understand. I've -- that's unconfirmed so I haven't confirmed that with him.

Q. So, Warden Joyal, at some point then did you look into this garage?

A. Yes. So when we got to the residence, Mr. Streeter already advised that Mr. Bovat had departed on -- may have already departed on a hunting trip. So Mr. Bovat also has -- he has a newer model pickup truck and we didn't see that vehicle in the drive when we got there. We did see his wife's vehicle parked in the driveway. That was the only thing we saw outside the driveway. So Warden Currier and I went to -- up to the window of one of the garage bays so we could look in and we could see the tailgate of his truck parked facing away right there.

Q. Okay. And did you notice anything about the garage doors?

A. So the one that was where Mr. Bovat's truck was parked was closed. The one to the left of that was open a little bit.

Q. How much is a little bit?

A. It's -- approximately a foot and a half.

Q. Okay.

A. Foot, foot and a half.

Q. Okay.

A. And that's generalizing.

Q. So just -- to make sure that this is clear, is the garage attached to the house?

A. No, I don't believe so. No, I believe it's attached by quite a distance.

MS. LEDNICKY: Can you repeat that? I didn't hear what the witness said.

THE COURT: Yeah. It'd be helpful if that was clarified.

Q. Sure. To the best of your recollection, Warden Joyal, is the garage attached to the residence?

A. No. It is detached.

Q. Okay.

A. To the best of my recollection.

Q. So when you look through the window of the garage bay door, can you describe what you observed?

A. So it's a relatively long pickup truck so it was parked facing away. And obviously was all the way in the garage because the garage door was shut. We looked through the window and we were looking directly at the tailgate. I'm guessing approximately three feet away from our face. And so we were looking at the tailgate and we could look down and I could see that there was the PEPE B registration plate and that we could see deer hair, small amount of blood, and then what appeared to be scuff marks potentially from a deer or a person that were consistent with what we were expecting for a deer having been loaded into the truck pretty soon before that time.

Q. Okay. Where were the deer hair and blood located on the truck?

A. They were on the tailgate, on the top of the tailgate. A lot of times the plastic lip that extends over the tailgate will get burrs from being used as a work vehicle and deer hair will get lodged into those crevices. And then deer blood, whenever there's a freshly killed deer that's loaded into a truck, a lot of times there's a fair amount of blood that gets sprayed and will sometimes deposit the droplets and then sometimes run down the back of the tailgate as well.

Q. And was this tailgate open or close?

A. It was closed.

Q. Okay. So what you're describing observing would be at the top of the tailgate ---

A. Yes.

Q. -- flush with the sides of the bed?

A. Yes.

Q. Okay. Did you seek permission to enter this garage?

A. Yes. We spoke with Mr. Bovat's wife. We were looking for consent to get into the garage. And what our objective was is the hair and blood that we saw, we wanted to obtain DNA samples to collect that in the event that we had to, we could submit them to the lab to confirm that they matched the DNA samples that I collected on the scene on Hinesburg Hollow Road. That's what we were trying to get into the garage for.

Q. Okay. Were you given permission to go in?

A. Mr. Bovat's wife originally said that she couldn't find the key. And then afterwards, Mr. Bovat's brother denied us access into the garage I

believe through Mr. Bovat unless we had a search warrant, which is what we did.

Q. At about this time, did you speak with Mr. Bovat on the phone?

A. I did. I did speak with him over the phone. Yes.

Q. What did he tell you?

A. He originally -- was explained the origins of some deer parts that he had outside of his residence which I didn't know the origins of those so I wasn't interested in the origins of those. So he explained those for a little bit. Then I said, well, what about the deer that was jacked on Thanksgiving morning on Hinesburg Hollow Road? And he eventually admitted that he was present at that time. And then he started to get a little bit leery of potential consequences that might come forth of that so he then said he would consult his attorney and terminated the phone call.

Q. Okay. And was it at this point that you applied for a warrant for the garage?

A. Yes. Electronically. Yes.

Q. Okay. And the following day, or maybe it was two days later, did you go to the Clark farm?

A. I believe I went to Clark's barnyard on Sunday. I don't have my affidavit in front of me. If I had my affidavit, I could tell you exactly what day and time it was.

Q. But within two or three days of --

A. Within a short time afterwards. Yes.

Q. Okay.

A. Because we -- the deer was jacked on Thanksgiving morning. The next day is when we interviewed Dewey Streeter, went to obtain the search warrant and then I believe it was two days after that that I went to Clark's Barnyard.

Q. Okay. What do you recall observing in Clark's barnyard?

A. I observed blood spots on the snow which I photographed which was where Mr. Streeter explained that they would be.

Q. And where did -- where in the barnyard did you observe those things?

A. So there's a larger barn and then a space and then a different barn. There's kind of like a small bar way as part of the barnyard. And when I went in there, I figure that they had gone to the right where it's a little bit more sheltered. And I pulled in there and just conducted foot patrol in the barnyard and found the blood spot. I also found a rag with some presumably deer blood on it that was on like a boat trailer that I assumed was -- they had used after potentially eviscerating deer.

Q. And -- or maybe I should have asked you this earlier, but as part of your training, are you trained to know what deer hair looks like versus some other animals hair?

A. Yeah. This is day in and day out every fall. We know what we're looking for.

MR. OLNEY: Okay. Nothing further. Thank you, Warden.

THE COURT: Thank you.

Attorney Lednicky?

CROSS-EXAMINATION

BY MS. LEDNICKY:

Q. You testified earlier that you believed that Mr. Bovat was not home at the time you decided to do search of h his home; is that correct?

A. Correct.

Q. How did you know that information?

A. Mr. Streeter, after we had interviewed him, had said that he was departing on an out of state hunting trip. So that's why we though he was gone.

Q. So knowing that he was gone, you still showed up at the residence --

A. Yeah, because we were interested in the --

Q. -- intending to do a search?

A. -- black truck. Yes.

Q. And when you arrived at Mr. Bovat's home, how many vehicles were present?

A. I saw one outside and then when we looked in the garage window, there was a second truck.

Q. I'm sorry. How many vehicles did you arrive with? Were you alone? Was there one warden vehicle? Were there other law enforcement vehicles present?

A. I believe there were two, potentially three. I don't remember if Warden Currier and I were in one vehicle. I believe that two of us were in one vehicle and one was in his own vehicle.

Q. So there would be two vehicles arriving?

A. I believe so.

Q. Were they marked as law enforcement vehicles?

A. Yes. They all would have been marked game warden trucks. Yes.

Q. And you've mentioned three wardens. Was there anyone else present during that initial --

A. No.

Q. Okay. When you first arrived at Mr. Bovat's property, did you go to the front door?

A. I don't remember if we looked to see if the black truck was there or go to the front door. They happened very quickly. One after the other. I don't remember which one was first.

Q. So at some point you went to the front door?

A. Yes.

Q. Do you have any recollection of how long after when you arrived there you went to the front door?

A. It would have been very quick. I mean, we would want to touch base to see who was present at the house. And also one of the things that a game warden or any law enforcement officer is going to do upon arriving at a residence is notify the homeowner what's going on and also to see what other people are there for officer safety reasons. So it happens relatively quick.

Q. So did you identify that there was people present at the residence?

A. I probably -- I don't remember.

Q. To this day, do you remember having -- remember anyone present at the residence?

A. Yes. I remember Mr. Bovat's wife at the residence.

Q. Do you know Ms. Bovat's name?

A. Maryanne (ph.), I believe.

Q. Was it you or one of the other wardens that approached the residence first?

A. I tried to maintain being the contact person to Mrs. Bovat just because it was my case, my district. I'm familiar with the Bovat's just through the general public interaction. So I tried to maintain just being the contact person for Mrs. Bovat for the duration of the case.

Q. And you said earlier that you sought her consent to search the garage; is that correct?

A. Yes. Yes.

Q. And you never received that consent; is that correct?

A. No. It was a little bit wishy washy because it was -- she said she didn't have the key to access the garage which personally I find a little bit hard to believe that someone whose garage they own they don't have access to it. But if she wasn't giving us consent, then we weren't -- we were going to back off until we either got consent or were going to apply for a warrant.

Q. And so after confirming that you did not have consent to search the garage, was it at that point that you peered through the window and noticed the truck?

A. I believe that we had looked through the window pretty soon after arriving.

Q. Can you describe for the Court the dimensions of this window?

A. It's a -- it's hard to describe. It's not really like a porthole but it's kind of -- I remember it being oval shaped. If I had to guess dimensions, I'm going to say ten inches by twelve inches potentially.

Q. Okay.

A. Just a single window in each of one of the garage doors.

Q. I'm going to show you a photograph and I'd like you to tell me what you see there.

A. Yeah. This is about the dimensions. It's rectangular instead of oval, but it's about the --

Q. Can you identify for the Court what's in this photograph?

A. This appears to be google earth image from a street view of Mr. Bovat's house garage. His truck that we seized, the truck that he presumably had on the hunting truck, and his wife's SUV.

Q. In that photo?

A. Yeah.

Q. And is the red and white truck the vehicle that you believe he had on the hunting trip?

A. That's the -- by deduction, that's the vehicle that I believe he had on -- left with out of state on his hunting trip.

Q. Is this photograph a fair and accurate depiction of the layout of the residence when you arrived there --

A. Yes.

Q. -- in November of last year?

A. Yes.

Q. And can you -- you can easily see the two-bay garage; is that correct?

A. Absolutely. Yes.

Q. And so you were just describing for us how large that window is.

A. This window is. Yes.

Q. Can you state again how large that window is?

A. About same dimensions, eight inches vertically and twelve inches horizontally. Based on this picture, it might be a little bit bigger then I was originally thinking. But it's about the dimensions I had said.

Q. When you arrived at this residence, can you draw for us or circle where the front door of the residence was?

A. Right here.

THE COURT: Before you go any further, can we just -- what is that marked as?

MS. LEDNICKY: I will mark it as Defendant's Exhibit A.

THE COURT: All right. Thank you.

A. This is what I'm denoting as the front entrance.

Q. Sorry.

A. No problem.

Q. All right. So the witness has circled the front entrance to Mr. Bovat's residence. And I'm going to mark this as Defendant's Exhibit A. And I move to admit.

THE COURT: Any objection?

MR. OLNEY: No objection.

THE COURT: All right. Defendant's A is admitted.

(Google photograph of Defendant's residence was hereby marked and received into evidence as Defendant's Exhibit A, as of this date.)

* * *