

Police received an anonymous tip that a gardener was growing marijuana in her backyard, which was surrounded by a 15-foot high, solid wooden fence. A police officer was unable to view the yard from the street, so he used a police helicopter to fly over the gardener's house. The officer identified a large patch of marijuana plants growing right next to the house and used this observation to obtain a search warrant.

The gardener is prosecuted for possession of marijuana and moves to suppress use of the marijuana in evidence.

How should the court rule on the gardener's motion?

- A. Deny the motion, because a warrant is not required for a search of a residential yard.
- B. Deny the motion, because the gardener had no reasonable expectation of privacy from aerial observation.
- C. Grant the motion, because the gardener had a reasonable expectation of privacy in the curtilage around her house and the police did not have a warrant.
- D. Grant the motion, because the only purpose of the officer's flight was to observe the yard.

Explanation:

A court should suppress evidence obtained in violation of a criminal defendant's constitutional rights, including the **Fourth Amendment** right to be free from **unreasonable searches and seizures**. This right is violated when the government conducts a search without obtaining a warrant or establishing an **exception** to the warrant requirement. Under the Fourth Amendment, a **search** occurs when one of the following tests is met:

Physical trespass test – police physically intruded upon a **constitutionally protected area**—a person's body, house (dwelling or curtilage), papers, or effects—to obtain information *or*

Reasonable expectation of privacy test – police invaded (1) a person's **subjective** expectation of privacy (2) that society would find **objectively reasonable**.

Persons do not have an objectively reasonable expectation of privacy in items and areas exposed to public view. As a result, police can view those items and areas just like any member of the public (eg, police can walk on the sidewalk or fly in navigable public airspace).

Here, the officer flew over the gardener's backyard and observed marijuana plants. However, his flight was not a Fourth Amendment search because:

though the backyard was part of the gardener's curtilage (constitutionally protected area), the officer's flight did not physically intrude upon this area (eg, had he stepped onto her yard) *and*

though the gardener built a 15-foot-high fence around her backyard, her subjective expectation of privacy was objectively *unreasonable* since the yard was exposed to aerial view by the public.

Therefore, the officer did not need a warrant to fly over the gardener's backyard, and the court should deny her motion to suppress use of the marijuana in evidence **(Choice C)**.

(Choice A) A warrant was not required to fly over the gardener's residential yard because an aerial observation is not a Fourth Amendment search.

(Choice D) An *officer's* subjective purpose is irrelevant in determining whether a Fourth Amendment search occurred. Instead, courts will consider whether the *defendant's* subjective expectation of privacy was objectively reasonable.

Educational objective:

Police flyovers are not Fourth Amendment searches since (1) aerial observations are not physical intrusions and (2) a person has no reasonable expectation of privacy in items and areas exposed to public view.

References

U.S. Const. amend. IV (prohibition against unreasonable searches and seizures).

California v. Ciraolo, 476 U.S. 207, 213–14 (1986) (recognizing that a person has no reasonable expectation of privacy from aerial observation).

Florida v. Riley, 488 U.S. 445, 450–51 (1989) (explaining that police can use a helicopter to observe a person's property because there is no reasonable expectation of privacy from aerial observation).

Copyright © 1997 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

Fourth Amendment search

(no reasonable expectation of privacy in areas/activities exposed to public)

