



DPS TRAINING BULLETIN



LEGAL BULLETIN NO. 374

April 17, 2015

**AFTER MIDNIGHT WARRANTLESS PRESENCE OF "DRUG SNIFFING TROOPER" ON
HOMEOWNER'S PRIVATE DRIVEWAY IS A SEARCH UNDER THE 4th AMENDMENT
AND ART. 1 SEC. 14 OF THE ALASKA CONSTITUTION**

Reference:

Margaret A. Kelley

Alaska Court of Appeals

Opinion No. A-10882

April 10, 2015

v.

State of Alaska

FACTS:

Acting on an anonymous tip, two Alaska State Troopers drove to Kelley's residence. It was after midnight. Her driveway was a considerable distance from the public highway, and there are no neighbors nearby. The anonymous tipster reported Kelley was growing marijuana to sell.

The troopers drove up the driveway, parked in front of the house, rolled down the windows and "sniffed the air." No effort was made to contact the occupants of the residence. The troopers applied for a search warrant based on the fact that they were able to detect the odor of growing or recently harvested marijuana. Further investigation revealed Kelley owned the property, but electrical usage was "unremarkable."

Troopers obtained a search warrant for the property. When the warrant was executed, numerous marijuana plants and other evidence of a commercial grow operation was seized. Kelley was charged with four counts of fourth-degree misconduct involving a controlled substance.

Kelley moved to suppress the evidence, arguing the troopers' initial intrusion on her property was unlawful. The trial court ruled that the driveway to the house was "impliedly open to public use" and therefore the troopers had a right to be there, even after midnight.

ISSUE:

Did the troopers have a legal right to approach Kelley's home at that time, in the manner they did, to gather evidence of a marijuana grow?

HELD: No. Under the Fourth Amendment to the United States Constitution and Article 1, Section 14 of the Alaska Constitution, a warrantless search of a home (and curtilage) is illegal in the absence of exigent circumstances.

REASONING:

1. This case involves a "trooper sniff", not a "dog sniff", that the U.S. Supreme Court ruled illegal (see Florida v Jardines, bulletin no. 364.) But, in another respect, the search in this case was more intrusive than Jardines, because it took place after midnight.
2. The troopers entered the constitutionally protected curtilage of Kelley's home after midnight to gather evidence related to the anonymous tip that Kelley was growing marijuana to sell.
3. Even the legal principles that govern a "knock and talk" do not apply here, because the state never asserted, and the record does not show, that the troopers' approach to Kelley's residence was to engage in a knock and talk.
4. Law enforcement officers may enter an area within the curtilage of a home that is "expressly or impliedly open to public use." (see Pistro v State, bulletin no.20)
5. Here, the troopers' conduct violated the Fourth Amendment and Article 1, Section 14 of the Alaska Constitution based on all the circumstances in the case: the time of night, the troopers' conduct, the State's failure to advance any reason why the troopers could not gather their evidence during the day, or to believe that Kelley impliedly consented to such a late-night visit.
6. Nothing in this decision bars the police from approaching a residence late at night when they have a good cause to do so.

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