IN THE

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY
Petitioner

versus

JAMES HOWELL LEACH and
KAREN ELAINE LEACH
Respondents

On Petition for Writ of Certiorari
to The Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it reasonable to initiate a "knock and talk" investigation at a back door used as the main public entrance of a residence?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the court whose judgment is under review are: (1) the Commonwealth of Kentucky; and (2) James Howell Leach and (3) Karen Elaine Leach.

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The Attorney General of the Commonwealth of Kentucky, as counsel for Petitioner, Commonwealth of Kentucky, petitions this Court to issue a writ of certiorari to the Kentucky Court of Appeals.

OPINION BELOW

The Commonwealth of Kentucky seeks certiorari review of the unpublished Kentucky Court of Appeals opinion in Leach v. Commonwealth, 2007 WL 2069818, rendered on July 20, 2007.

The Kentucky Supreme Court denied the Commonwealth of Kentucky's Motion for Discretionary Review on October 24, 2007. (See Appendix).

JURISDICTION

The Commonwealth of Kentucky invokes the jurisdiction of this Court pursuant to 28 U.S.C. Sec. 1257(a). The Commonwealth of Kentucky seeks review of a Kentucky Court of Appeals Opinion rendered July 20, 2007, reversing and remanding this case.

The Commonwealth of Kentucky filed a timely Motion for Discretionary Review, which was denied by the Kentucky Supreme Court on October 24, 2007.

CONSTITUTIONAL PROVISION INVOLVED

Constitutional Amendment IV — Search and Seizure: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On April 22, 2005, Detective Matt Carter, McCracken County Sheriff's Department (MCSD), went to the Leaches' home because of a Kentucky Crimestopper's tip regarding alleged illegal drug activity. Detective Carter went with Deputy Sheriff Riddle (MCSD). After receiving the tip, Detective Carter went to the residence and knocked on the back door. The back door was open, but it had a closed screen door on it. Detective Carter smelled the strong odor of marijuana immediately on approaching the back door. The reason that Detective Carter and Deputy Sheriff Jesse Riddle went to the back door first was because the tipster had called back a second time and specified that the officers needed to go to the back door as the Leaches

wouldn't answer the front door. The caller also stated that the Leaches were selling ice, methamphetamine and marijuana. Deputy Riddle informed Detective Carter that he had been to the Leach residence before, on a domestic call, and the whole time he was there everyone came and went through the back door.

Detective Carter knocked on the back door. Mr. Leach yelled, "Come in." Detective Carter didn't go in because Mr. Leach didn't really know who was at the door. Detective Carter attempted to get someone to the door by saying hello. Mr. Leach came to the door. Detective Carter told Mr. Leach who he was and that they had received information that there was illegal drug activity going on at Leach's residence. Mr. Leach told Detective Carter that

there was no such activity and, if there was, he was unaware of it. Detective Carter became aware that there was someone else in the residence. Mr. Leach told the detective that his friend was in the residence. Detective Carter yelled for that individual to come out. Mr. Leach yelled for his friend to come out also. Both men were Mirandized and Detective Carter told them that he smelled marijuana coming from the residence. Mr. Leach admitted that there was an ounce of marijuana in the residence and some weapons. Mr. Leach's friend admitted that he had some marijuana on him. Mr. Leach then informed Detective Carter that Mrs. Leach was also inside the residence. Because the weapons were a concern for officer safety reasons, the detective wanted to secure the residence. Detective Carter received verbal

consent to view the residence. Detective Carter, accompanied by Mr. Leach, entered the residence to get Mrs. Leach. Mrs. Leach was requested to get dressed and come out of the bedroom. This request was complied with and there were no problems.

Mr. Leach went through the residence with Detective Carter. In the den, Mr. Leach pointed out a gun and pointed out some rolling papers. The only room for which Mr. Leach did not give consent to search was the room belonging to his son. Mr. Leach's son had also been mentioned in the Crimestopper's tip, so Detective Carter testified that he obtained a warrant to search this room and several illegal items were found, including a quantity of marijuana, items of drug paraphernalia and

several firearms. Sixteen or seventeen marijuana plants were also found growing.

In McCracken Circuit Court, Mr. and Mrs. Leach filed a motion to suppress the evidence in this case. Mrs. Leach initially filed the motion to suppress the evidence found in the house and Mr. Leach later joined this motion. The Leaches argued that the officers' search of their property violated the Fourth Amendment of the United States Constitution because the police were illegally on the property when they smelled the marijuana. More specifically, the Leaches argued that the officers were illegally on the property because the back door of the house was part of the curtilage and the curtilage was a protected private area not subject to a general search absent a properly issued warrant or

an appropriate exception to the warrant requirement of the Fourth Amendment.

On February 22, 2006, the trial court entered an order denying the Leaches' motion to suppress. In such order, the court made factual findings and legal conclusions. The court concluded that the officers were at the Leaches' residence for a legitimate reason and the officers were legitimately at the Leaches' back door to make contact with the residents. Finally, the court concluded that based upon the facts presented at the suppression hearing, the Leaches were subjected to a lawful search and seizure pursuant to the Fourth Amendment of the United States Constitution.

James Leach entered a conditional guilty plea to one count of firearm enhanced cultivation of marijuana, five or more plants, one count of firearm enhanced possession of drug paraphernalia, second offense, and one count of firearm enhanced possession of marijuana. Mr. Leach received a sentence of five (5) years in the penitentiary, probated for a period of two (2) years. Karen Leach entered a conditional guilty plea to one count of possession of marijuana and firearm enhanced use/possession of drug paraphernalia and received a sentence of two-and-a-half (2 ½) years in prison, probated for two (2) years.

On July 20, 2007, the Kentucky Court of Appeals rendered an opinion reversing and

remanding the trial court's order. The court held that the officers' presence at the back door amounted to a warrantless search and violated the Fourth Amendment of the United States Constitution. The court concluded that the Leaches' back door was within the curtilage of the Leaches' property and the officers were unlawfully on the curtilage when they initially smelled the marijuana. The court rejected the cases cited by the Commonwealth supporting the reasonableness of the officers' decision to approach the back door first to conduct the knock and talk. The court reasoned that in the cases cited by the Commonwealth, the front door was either inaccessible, or the police first knocked on the front door and got no response before proceeding to the back door.

The Commonwealth of Kentucky sought discretionary review in the Kentucky Supreme Court, which was subsequently denied on October 24, 2007.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED IN ORDER TO CLARIFY WHETHER, DURING AN INVESTIGATION, THE FOURTH AMENDMENT PERMITS THE POLICE TO APPROACH ANY ENTRANCE OF A RESIDENCE GENERALLY ACCESSIBLE TO VISITORS.

Summary of Argument

Numerous federal and state courts have held that the police may enter the curtilage to ask questions of the resident without violating the Fourth Amendment. However, there is no United States Supreme Court precedent acknowledging this right. Further, there is an ambiguity in the law as to whether a police officer may approach a residence for a legitimate purpose using any area generally made accessible to visitors, or whether the officer must approach the front door first before moving to

another entrance to locate the occupant. Police officers are constantly approaching residences for legitimate purposes such as serving warrants and conducting investigations. Therefore, a clarification in the law is required so that police officers may carry out their duties in conformity with the Fourth Amendment.

Argument

In Oliver v. United States, 466 U.S. 170 (1984) and United States v. Dunn, 480 U.S. 294 (1987), this Court extended the protections guaranteed by the Fourth Amendment to the curtilage of a house.

A. The police may lawfully enter the curtilage to interview a resident.

Most federal circuits have acknowledged that the police may lawfully enter the curtilage to interview the resident. United States v. Daoust, 916 F.2d 757 (1st Cir.1990); United States v. Reyes, 283 F.3d 446 (2nd Cir.2002) (The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and when police take that route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open); Estate of Smith v. Marasco, 318 F.3d 497 (3rd Cir.2003) ("Knock and talk" exception to the warrant requirement); Rogers v. Pendleton, 249 F.3d 279 (4th Cir.2001); United States v. James, 40 F.3d 850 (7th Cir.1994), modified on other grounds,

79 F.3d 553 (7th Cir.1996) (Police officer seeking to knock on publicly accessible back door to a dwelling was lawfully within the curtilage of dwelling); United States v. Thomas, 120 F.3d 564 (5th Cir.1997) (No Fourth Amendment violation when police entered through the gate of a privacy fence to approach the front door); United States v. Reed, 733 F.2d 492 (8th Cir.1984) (No Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors); United States v. Hammett, 236 F.3d 1054 (9th Cir.2001) (Law enforcement officer may encroach upon the curtilage of a home for the purpose of asking questions of the occupants); United States v. Taylor, 458 F.3d 1201 (11th Cir.2006) (Officers are allowed to knock on a

resident's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may, without probable cause, a warrant, or exigent circumstances).

One scholar put it appropriately when he stated that, "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), any observations made from such vantage points are not covered by the Fourth Amendment." Wayne R. LaFave, 1 Search and Seizure: A Treatise on the Fourth Amendment, Sec. 2.3(f) (3d ed.2003).

B. Some circuits have concluded that the police may move away from the front door if it is inaccessible, or if they receive no response.

Some federal circuits have held that the police may move away from the front door to another entrance if the front door is somehow inaccessible, or the officer receives no answer upon knocking. In United States v. Daoust, 916 F.2d 757 (1st Cir.1990), the First Circuit held that when the police found the front door inaccessible, there was no Fourth Amendment violation when they went to the back of the house and looked through a window and observed a gun. In United States v. Raines, 243 F.3d 419 (8th Cir.2001), the Eighth Circuit concluded that there was no Fourth Amendment violation when, after receiving no answer at the front door, the

deputy proceeded to the back of the residence in an attempt to make contact with the resident. In United States v. Hammett, 236 F.3d 1054 (9th Cir.2001), the Ninth Circuit concluded that law enforcement officers who legitimately approached the front door of the defendant's residence for the purpose of asking questions of the occupants, did not violate the Fourth Amendment when, after receiving no response to their knocks at the front door, they circled around the home in a good faith attempt to find another entrance and to notify the occupants of their presence. Finally, in Estate of Smith v. Marasco, 318 F.3d 497 (3rd Cir.2003), the Third Circuit held that when officers are pursuing a lawful objective, their entry into the curtilage after not receiving an answer at the front door did not violate

the Fourth Amendment. The implication from these cases is clearly that the police must approach the front door first before attempting to contact the resident somewhere else on the premises.

C. Some circuits have concluded that the police may approach any entrance accessible to the public.

Nevertheless, several federal circuits have recognized that the police may approach **any** entrance which is made accessible to the public.[1] In United States v. James, 40 F.3d 850 (7th Cir.1994),

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[1]There even seems to be a split within the Eighth and Ninth Circuits. See United States v. Freeman, 426 F.2d 1351, 1352-53 (9th Cir. 1970) (No search when officers spotted marijuana in plain view at the rear of an apartment after climbing a stairway which provided access to both the rear and front of eight second floor apartments); United States v. Reed, 733 F.2d 492, 501 (8th Cir. 1984) (No Fourth Amendment search occurs when the police officers who enter private property restrict their movements to those areas generally made accessible to visitors — such as driveways, walkways, or similar passageways).

modified on other grounds, 79 F.3d 553 (7th Cir.1996), the Seventh Circuit held that where the back door of a residence is readily accessible to the general public, the Fourth Amendment is not implicated when the police officers approach that door in the reasonable belief that it is a principle means of access to the dwelling.

In Alvarez v. Montgomery County, 147 F.3d 354 (4th Cir.1998), the Fourth Circuit declined to adopt the inflexible approach of requiring the police under all circumstances to knock at the front door before attempting to contact the occupant elsewhere on the premises. The court in that case reasoned that the textual "touchstone of the Fourth Amendment is reasonableness," Id. at 358, quoting, Florida v. Jimeno, 500 U.S. 248 (1991), and Katz v.

United States, 389 U.S. 347 (1967). When applying this basic principle, the United States Supreme Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."Alvarez v. Montgomery County, 147 F.3d at 358, quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996).

D. Some state courts have concluded that the police may move away from the front door if it is inaccessible, or if they receive no response.

The state courts have inconsistent opinions with regard to this issue as well. Some states have implicitly or expressly recognized that the police must approach the front door first before attempting to locate the occupant somewhere else on the premises. State v. Lyons, 307 S.E.2d 285

(Ga.App.1983) (Where police officers responding to a complaint were unable to elicit a response at the front door of a residence reasonably believed to be occupied, a subsequent entry into the backyard to reach the back door is a valid intrusion); Miller v. State, 27 S.W.3d 427 (Ark.2000) (Police did not violate the Fourth Amendment by going to the back door of the defendant's home after getting no response at the front door); Gonzalez v. State, 588 S.W.2d 355 (Tex.Crim.App.1979) (Acknowledging that no Fourth Amendment violation occurs when the police go to the back door to contact the resident, but only after first approaching and knocking on the front door); City of Eugene v. Silva, 108 P.3d 23 (Or.App.2005) (For purposes of officers' entry onto residential premises, a homeowner is presumed to

have implicitly consented to entry into the front yard to approach the front door; conversely, such a presumption of implied consent to enter is not ascribed to other areas of the curtilage, and entry onto those areas is presumptively a trespass); State v. Fisher, 154 P.3d 455 (Kan.2007) (Acknowledging that if no one answers the knock at the front door, officers can be justified in knocking on more doors).

E. Some states have recognized that police may approach any entrance accessible to the public.

Other states have held that an officer who approaches the house from any common access route does not violate the resident's reasonable expectation of privacy under the Fourth Amendment. State v. Seagull, 632 P.2d 44 (Wash.1981) (Police with

legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house, and in doing so they are free to keep their eyes open); State v. Domicz, 907 A.2d 395 (N.J.2006) (Law enforcement officer's actions of approaching the back door of the defendant's residence through a gate that separated the driveway from the rear of the residence did not implicate the Fourth Amendment, where the officer did so for purposes of knocking on the back door to speak with the defendant and the position of the parked cars in the driveway led the officers to believe that the back door was used by the residents and visitors); Trimble v. Indiana, 842 N.E.2d 798 (Ind.2006) (The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and thus, if the police take that

route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open); People v. Thompson, 221 Cal.App.3d 923 (1990) (Police with legitimate business may enter areas of the curtilage which are impliedly open to the public, such as access routes to the house); Waldrop v. State, 544 S.2d 834 (Miss.1989) (recognizing that police officers have the right of ingress and egress onto private property).

F. It is reasonable for officers to approach any entrance generally accessible to the public.

The textual touchstone of the Fourth Amendment is reasonableness. Florida v. Jimeno, 500 U.S. 248 (1991) citing Katz v. United States, 389 U.S. 347 (1967). Moreover, this Honorable Court has

consistently eschewed bright line rules such as requiring the police to first approach the front door before attempting to locate the occupants elsewhere on the premises. Finally, the Fourth Amendment does not require an officer to determine which door most closely approximates the main entrance and approach only that door. The Fourth Amendment requires only that officers act reasonably. Therefore, when officers are approaching a residence for a legitimate purpose, it is reasonable for the officers to enter those areas of the curtilage which are impliedly open to use by the public.

G. Detective Carter was reasonable in going to the back door to conduct a "knock and talk."

In this case, the Kentucky Court of Appeals relied heavily on the fact that Detective Carter did not go to the front door first before proceeding to the back door. However, the officers had specific information that the back door was the principle entrance used by visitors. Detective Carter limited his movements to the walkway along the side of the house, which led directly to the back patio where the back door was located. There were no shrubs or fence obscuring the back door and a welcome mat was set out for visitors. Finally, the back door was open with only a screen in place, and when the officers knocked, Mr. Leach yelled for them to come in. The Fourth Amendment requires only that the officers

utilize those access routes generally made accessible to visitors. The facts of this case show that the officers restricted their movements to places open to visitors and the officers' presence at the back door of the Leaches' residence did not violate the Fourth Amendment of the United States Constitution.

CONCLUSION

Wherefore, based upon the foregoing reasons, the Attorney General of Kentucky requests that this Court grant a writ of certiorari to the Kentucky Court of Appeals in this case.

Respectfully submitted,

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