NOT DESIGNATED FOR PUBLICATION

No. 125,385

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

MICHAEL G. HUNTER,
Appellee.

MEMORANDUM OPINION

Appeal from Ness District Court; BRUCE T. GATTERMAN, judge. Opinion filed June 30, 2023. Affirmed in part, reversed in part, and remanded with directions.

Jacob T. Gayer, county attorney, and *Derek Schmidt*, attorney general, for appellant.

No appearance by appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: The State appeals the district court's suppression of drug evidence found in Michael G. Hunter's mobile camper during the execution of a search warrant. The district court found that a K-9 search of the real estate on which the camper was parked was unlawful. Without the canine search, the district court found the search warrant affidavit lacked probable cause. Because the property owner, Hunter's grandfather, consented to the canine search of his property, we find the district court erred by declining to consider it in determining probable cause. We therefore reverse the district court's order suppressing the evidence and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The district court's memorandum decision sets forth the following summary of facts leading up to the issuance of a search warrant for Hunter's motor home:

> "The relevant facts in this case are that Byron Hunter [Hunter's grandfather] is the owner of property at . . . North Iowa [Street], Ness City, Kansas. The property is essentially a vacant lot, but contains several out buildings and on the date in question, a motor home belonging to Michael G. Hunter was also located on the property. The Defendant, according to testimony of Byron Hunter at the suppression hearing, had been staying on the property, rent free, but with the permission of Byron Hunter. On August 3, 2020, Byron Hunter signed a document shown as State's Exhibit 1, titled 'Permission to Search'. The document is a form document and authorized Undersheriff Tanksley to search 'my residence' (there was no residence of Byron Hunter on the property), or other real property located at . . . North Iowa Street, Ness City, Kansas, and for a 'K9 sniff' to include garage and 'my motor vehicle' (Byron Hunter had no motor vehicle on the property), namely 'any on property'.
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> "Tanksley had conducted a routine drive by of the property through public streets and alley way and observed a high volume of known drug users entering and leaving the property. In the affidavit in support of issuance of a search warrant prepared subsequent to the free air sniff, Tanksley identified two (2) people telling him of drug activity, but provided no corroboration of these statements within the affidavit.
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> "Tanksley described the motor home situated upon the premises as an older motor home, self-contained, and mobile. As he entered the property on August 3, 2020, Tanksley searched the separate garage and then moved across the lot with his K9 to the front of the motor home, and then straight back along the side of the motor home to a passenger rear door with a stair case leading to the door. Here, his K9 'hit' on the location. Tanksley did not enter the motor home, but left to prepare an affidavit and application for search warrant, which was presented to District Magistrate Judge R. Scott Barrows."

Police found methamphetamine in Hunter's motor home when the search warrant was executed. Hunter was charged with possession of methamphetamine, in violation of K.S.A. 2020 Supp. 21-5706(a), and possession of drug paraphernalia, in violation of

K.S.A. 2020 Supp. 21-5709(b)(2). Hunter moved to suppress the drug evidence found in his camper.

Before the district court, Hunter challenged the search warrant, contending the affidavit supporting the search warrant lacked probable cause. He specifically challenged the constitutionality of the K-9 search, noting that the Fourth Amendment to the United States Constitution protects the curtilage of a home. Relying on *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), Hunter contended that his camper was his residence and the "free-air" sniff by the dog around his camper invaded the curtilage of his home so it required a search warrant. The district court agreed and granted Hunter's motion to suppress. The court held that the canine search violated Hunter's Fourth Amendment rights and that, without the K-9 search, the remaining information in the application for search warrant did not establish probable cause for the search of Hunter's motor home. The district court also held that no exceptions applied to cure this defect in the application for a search warrant.

The State timely appeals.

ANALYSIS

The State argues that the district court erred when it held that Hunter had a reasonable expectation of privacy within the curtilage of his camper, and asserts that Hunter's grandfather, Byron Hunter (Grandfather), the owner of the real property, had authority to consent to a search of the property. Alternatively, the State argues that the district court should have applied the automobile exception to the search warrant requirement, that even without the K-9 search the affidavit established probable cause, and finally, that the good-faith exception applied even in the absence of a warrant. Hunter has filed no response to this appeal.

Standard of Review

"On a motion to suppress, an appellate court generally reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and reviews the ultimate legal conclusion de novo." *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). In reviewing the factual findings, an appellate court does not reweigh the evidence or assess the credibility of witnesses. *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015).

The Fourth Amendment prohibits unreasonable searches and seizures. Warrantless searches are per se unreasonable unless they fall within an exception to the warrant requirement. *State v. Perkins*, 310 Kan. 764, 767, 449 P.3d 756 (2019). The judicially created exclusionary rule is designed "to deter unlawful searches and seizures by prohibiting the prosecution's use of unconstitutionally obtained evidence." 310 Kan. at 767. For the exclusionary rule to apply, there must first be a constitutional violation. *State v. Hubbard*, 309 Kan. 22, 33, 430 P.3d 956 (2018). The rule applies when it would act as a deterrent. *State v. Pettay*, 299 Kan. 763, 769, 326 P.3d 1039 (2014) (exclusionary rule is a deterrent measure and not a personal constitutional right).

A warrantless search violates the Fourth Amendment unless an exception applies—such as consent to the search. *Perkins*, 310 Kan. at 767-68. The State has the burden of establishing the scope and voluntariness of the consent to search. *State v. Ransom*, 289 Kan. 373, Syl. ¶ 2, 212 P.3d 203 (2009). To establish valid consent, the State must prove: (1) clear and positive testimony that consent was unequivocal, specific, and freely given; and (2) the absence of duress or coercion, express or implied. *State v. Daino*, 312 Kan. 390, 397, 475 P.3d 354 (2020). Whether consent is voluntary is an issue of fact which appellate courts review to determine if substantial competent evidence supports the district court's findings. *State v. James*, 301 Kan. 898, 909, 349

P.3d 457 (2015). If the parties do not dispute the material facts, the suppression issue is solely a question of law. *State v. Spagnola*, 295 Kan. 1098, 1104, 289 P.3d 68 (2012).

The district court found that the area around Hunter's camper was curtilage.

The State argues that the district court erred when it determined that the area where the free-air sniff took place was part of the curtilage of Hunter's home. The Fourth Amendment protects the curtilage of a home. See *United States v. Dunn*, 480 U.S. 294, 304, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). Curtilage is the "area immediately surrounding and associated with the home" itself for Fourth Amendment purposes. *Talkington*, 301 Kan 453, Syl. ¶ 6. "It harbors the intimate activity associated with the sanctity of a person's home and privacies of life. The extent of curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." 301 Kan. 453, Syl. ¶ 6. Four factors resolve whether a particular area is curtilage: (1) the proximity of the area to the home, (2) whether the area is enclosed, (3) how the area is used, and (4) the steps taken by the resident to protect the area from observation by people passing by. *Dunn*, 480 U.S. at 301. The district court found that the canine sniff invaded the curtilage of Hunter's home but did not explicitly consider the *Dunn* factors.

Only one of the four *Dunn* factors weighs in favor of finding curtilage here. Undersheriff Wesley Tanksley testified that he took the canine up to the door, stating that there was a step hanging out but that they "could stretch around it." This testimony indicates a close proximity to the home. As noted above, curtilage is the area immediately surrounding *and* associated with the home. Other than proximity, the record is bereft of evidence that any part of the surrounding lot was harboring "intimate activity associated with the sanctity of [Hunter's] home and privacies of life." *Talkington*, 301 Kan. 453, Syl. ¶ 6. On the contrary, the suppression hearing testimony affirmatively establishes otherwise.

The area was not enclosed or demarcated in any fashion by any sort of fence or other kind of marking. There was no landscaping, were no items of personal property in the area, and the area was open and visible to people passing by the property from the street. In short, there was no objective indication it was used for any of the "'intimate activities of the home.'" 301 Kan. at 468 (quoting *Dunn*, 480 U.S. at 302-03). We question whether mere proximity is sufficient to support the district court's conclusion that the area was curtilage. But even assuming it was, the uncontroverted testimony shows that Grandfather had an equal, unqualified, and uncontroverted right to access to all areas outside of Hunter's camper, including the area where the free-air sniff took place.

Grandfather had authority over the property and consented to the K-9 search.

The validity of the consent by Grandfather was never at issue in this case. Though he did not recall the substance of his conversation with Undersheriff Tanksley, Grandfather acknowledged he signed the written consent to search the lot. Nothing in Grandfather's testimony suggests he did not freely consent to the search. And Hunter did not argue, and the district court did not find, that Grandfather's consent was not freely given. Grandfather testified that he was the sole owner of the vacant lot, that he did not need anyone's permission to go on the property, and no one had the authority to tell him that he could not be on the property. He maintained the property, though he testified Hunter had helped him mow the property "a day or two." Grandfather allowed his grandson to park his motor home on the property and live there without paying rent, but Hunter had no ownership interest in the real estate. Grandfather testified he had *unrestricted* access to the entire lot and he could go anywhere on the property at any time, without exception. Even when Hunter was staying there, Grandfather confirmed he was not restricted from going anywhere on the lot. Grandfather's testimony regarding his ownership, maintenance of, and unrestricted access to the property was uncontroverted.

In the motion to suppress, Hunter argued "the use of the K-9's free air sniff to provide probable cause is invalid as the use of the K-9 to conduct a 'free air sniff' on a person's abode constitutes a search" under the Fourth Amendment, and "without consent of the resident," probable cause and a search warrant are necessary for the K-9 to "sniff a private home." The only case cited by Hunter in support was *Jardines*. But *Jardines* did not discuss the issue of consent to a search at all. In *Jardines*, law enforcement took a drug-sniffing dog onto Joelis Jardines' front porch without a warrant and without anyone's consent. The United States Supreme Court affirmed suppression of the evidence, holding that police had searched a constitutionally protected area without a warrant. 569 U.S. at 5-6, 11. But the police in *Jardines* did not have the consent of an owner or occupant agreeing specifically and in writing to a canine search of the property.

Here, Undersheriff Tanksley had Grandfather's verbal and written consent to search the entire lot with a canine. The district court held the "free-air" dog sniff was a search that improperly included the curtilage to Hunter's camper. But to the extent that area was curtilage, it was also Grandfather's real property over which he had unrestricted access. Hunter and Grandfather mutually used the property and had joint access or control of the lot. In *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), the defendant shared a bedroom with Gayle Graff. Graff gave police permission to search the bedroom. The *Matlock* court held that a warrantless search by voluntary consent is not limited to consent given by the defendant. Police may obtain permission to search from a third party who possesses common authority or other sufficient relationship to the premises. 415 U.S. at 171. Grandfather testified he was the sole owner of the lot with common and unrestricted authority over the outdoor premises. Even assuming that the area around the camper accessed by the dog was curtilage, Hunter shared that area with Grandfather, who had equal access.

Actual authority to consent to a search exists when a third party shares with the defendant "'(1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it.'" *State v. Udell*, 34 Kan. App. 2d 163, 165, 115 P.3d 176 (2005) (quoting *United States v. Rith*, 164 F.3d 1323, 1329 [10th Cir. 1999]). The third party's consent to a search only extends to areas of joint access. See *Illinois v. Rodriguez*, 497 U.S. 177, 181-82, 188-89, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) (explaining the difference between actual and apparent authority); *United States v. Barrera-Martinez*, 274 F. Supp. 2d 950, 962 (N.D. Ill. 2003) (holding that roommates have actual authority to consent to a search of common areas, but "[w]here roommates have separate rooms, each roommate presumes that he has exclusive control over his own room"); *Lastine v. State*, 134 Nev. 538, 543, 429 P.3d 942 (2018) (holding that an uncle did not have actual authority to consent to a search of his nephew's bedroom in the house when "the door was always closed and he knocked before entering").

The evidence shows that Grandfather regularly accessed the lot to mow or maintain the property or access things—such as his motorcycle—that he stored in the garage. The lot was a common area where both Hunter and Grandfather had joint access and control. There is no evidence in the record disputing, challenging, or suggesting that Grandfather lacked common authority over the land where the K-9 search took place. Nonetheless, the dissent asserts "[t]o hold that Hunter's grandfather, as the landowner with common authority over the land surrounding Hunter's camper, could consent to the search of the curtilage of Hunter's camper would erode long-established Fourth Amendment protections for nonlandowner residences." Slip op. at 17. To reach this conclusion, the dissent disregards established United States Supreme Court caselaw, such as *Matlock*, that some areas of a home may be subject to control by more than one person, each of whom has actual authority to consent to a search of the jointly controlled area. Again, even if the district court was correct that the area searched was curtilage, and thus part of the home, because the uncontroverted evidence establishes Grandfather had

joint access and control over that area, he had actual authority to consent to the canine search.

We disagree with the dissent's assertion that "[t]he undersheriff searched the interior of the camper." Slip op. at 18. The search stopped at the door to Hunter's camper. Neither Undersheriff Tanksley nor the dog entered the mobile home, and the dog sniffed odors that were discernable from the exterior on the surrounding lot that was jointly controlled by Hunter and Grandfather. Grandfather's joint control and access of the area immediately around Hunter's camper gave Grandfather the actual authority to consent to the search. Thus, the dog sniff was a valid consent search and is an exception to the warrant requirement. The district court erred when it analyzed the search warrant affidavit without the free-air sniff of the camper's surroundings. Because Undersheriff Tanksley obtained valid consent to search the lot, the district court should have included the K-9 search information in its analysis of the search warrant.

Probable cause in the absence of the K-9 search

We agree with the district court that the affidavit, considered without the dog-sniff evidence, is insufficient to establish probable cause for the issuance of a warrant. To be sure, the balance of information in the warrant—the tipsters unspecified and conclusory statements about "drug activity" and Undersheriff Tanksley's observation of known drug users at the location are relevant—but the totality of those limited circumstances falls far short of supporting a "'practical common-sense decision'" that contraband or evidence of a crime would be found in Hunter's camper. *State v. Mullen*, 304 Kan. 347, 353, 371 P.3d 905 (2016).

The automobile exception does not apply.

The State argues that Hunter's camper is a vehicle and that the district court erred by not applying the automobile exception. Because substantial competent evidence supports the district court's finding that the camper was Hunter's home, we find the automobile exception did not apply.

Motor vehicles are constitutionally protected from unreasonable searches, but to a lesser degree than a home. *Carroll v. United States*, 267 U.S. 132, 153, 45 S. Ct. 280, 69 L. Ed. 543 (1925). A mobile home possesses some if not many attributes of a home but is readily mobile and, absent a prompt search, can be readily moved beyond the reach of the police. *California v. Carney*, 471 U.S. 386, 393, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985). Thus, a warrantless search of a mobile home may be valid depending on the ready mobility of the vehicle and the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation. 471 U.S. at 394.

Hunter's camper was not in a setting that objectively indicated that it was used for transportation. Its mobility was limited at the time of the K-9 search. When a vehicle is sufficiently mobile, it inherently creates the possibility that evidence which an officer has probable cause to believe is in the vehicle could be lost. *State v. Sanchez-Loredo*, 294 Kan. 50, 59, 272 P.3d 34 (2012). Testimony from the suppression hearing showed that Hunter drove his camper at times, but it primarily remained parked on Grandfather's lot. The district court's factual conclusion that the motor home was "situated on leveling blocks and was hooked to electricity running from the garage" is supported by the evidence. Though the camper was not permanently affixed to the land, it also could not be driven away at a moment's notice.

Hunter was not operating the camper as in *State v. Crudo*, 62 Kan. App. 2d 464, 517 P.3d 857, *rev. granted* 316 Kan. 759 (2022). Frank Raymond Crudo was driving his

pickup truck with a fifth-wheel camper attached when police pulled him over, leading to a search that revealed marijuana. This court held that the automobile exception applied to the camper, noting the difference as follows:

> "Had the camper been unhitched, parked at a campsite, and being used as a residence, that situation would be more analogous to *Collins*[*v. Virginia*, 584 U.S. ___, 138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018)]. But here, as in *Carney*, . . . the camper was readily mobile (since it was attached to the pickup), and it was being used for transportation rather than a residence (since it was traveling down a public roadway)." *Crudo*, 62 Kan. App. 2d at 470.

Hunter's camper was not on a public roadway but parked for long periods on a private lot. It was not "in a setting that objectively indicates that the vehicle is being used for transportation." *Carney*, 471 U.S. at 394. While it was readily mobile, that mobility was limited by the fact that it was plugged in and resting on leveling blocks. At the time police searched Hunter's mobile home, it was more home than mobile. Because substantial competent evidence supports the district court's conclusion, we find the automobile exception does not apply, and we affirm the district court ruling on this issue.

Good-Faith Exception

The State did not raise "good faith" until after the district court issued its written memorandum suppressing the evidence. Hunter did not file a written response to the State's post-ruling motion to reconsider, and the district court denied the State's motion without addressing the merits of the good-faith exception. The district court ruled that a motion to reconsider is not the appropriate procedural avenue "to advance arguments that could have been raised earlier." In light of our ruling that the K-9 search was permissible under the consent exception, we need not address the additional arguments made by the State concerning the good-faith exception to the warrant requirement. Any such ruling would be advisory in nature as that exception would come into play only if the consent

exception did not apply. See *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 892, 179 P.3d 366 (2008) ("To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract.").

Conclusion

Because the K-9 search should have been included in the district court's analysis of the search warrant, we reverse the district court's suppression of evidence and remand for further proceedings.

Affirmed in part, reversed in part, and remanded with directions.

* * *

HURST, J., dissenting: Although I agree with the majority's conclusion that Hunter's grandfather did not have authority to consent to law enforcement's search of Hunter's camper, I cannot join the majority's assertion that Hunter's grandfather nevertheless possessed authority to consent to a search in the curtilage of Hunter's camper to obtain information about the interior of the home. I would affirm the district court's determination that the State's search violated Hunter's Fourth Amendment rights, despite Hunter's grandfather's purported consent to the search, and therefore respectfully dissent.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Applying the "traditional property-based understanding of the Fourth Amendment," a search occurs when "the government obtains information by physically intruding on a constitutionally protected area, i.e., persons, houses, papers, or effects." *Florida v. Jardines*, 569 U.S. 1, 11, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013); *State v. Talkington*, 301 Kan. 453, Syl. ¶ 4, 345 P.3d 258 (2015).

However, a search also occurs "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 [1967] [Harlan, J., concurring]).

I. *Hunter's grandfather lacked actual authority to consent to the search of the curtilage of Hunter's home.*

The United States Supreme Court and the Kansas Supreme Court have consistently held that the curtilage of a home is treated *as part of the home itself* for Fourth Amendment purposes. See, e.g., *Jardines*, 569 U.S. at 6 ("[T]he curtilage of the house . . . enjoys protection *as part of the home itself*." [Emphasis added.]); *Talkington*, 301 Kan. 453, Syl. ¶ 6 ("The area immediately surrounding and associated with the home is the curtilage, *which is part of the home itself* for purposes of the Fourth Amendment." [Emphasis added.]). Under the Fourth Amendment jurisprudence, the curtilage of Hunter's camper is treated as part of the camper itself. Therefore, under the facts presented here, because Hunter's grandfather could not consent to the search of Hunter's camper, then he could not consent to the search of the curtilage of Hunter's camper.

The district court made factual findings that Undersheriff Tanksley took "his K9 to the front of the motor home, and then straight back along the side of the motor home to a passenger rear door with a stair case leading to the door. Here, his K9 'hit' on the location." Undersheriff Tanksley's testimony at the suppression hearing supports the district court's factual findings:

> "I let [the canine] lead in from the alley to the property, she walked around the garage and didn't show any interest. Walked over to the front of the motor home and started showing some alert signs and signals and then, walked straight back in a heavy breathing, sniffing pattern and instantly sat down and stuck her head towards me which is an alert indication to the smell of narcotics *within the vehicle* which is the only door to

> the vehicle. With the exception of the two front doors for the vehicle part that the, the motor home itself, there's one door on the south, I guess it would be the passenger rear." (Emphasis added.)

Upon direct examination, Undersheriff Tanksley was asked, "And specifically, when [the canine] alerted to you, you described that area as being outside the motor home. Was there anything preventing or restricting your free movement at that location?" Undersheriff Tanksley responded, "No. There was a medical step hanging out, but I mean, restricting maybe, but preventing anything, no. I mean, *we could stretch around it*." (Emphasis added.) Although Undersheriff Tanksley referred to Hunter's camper as a vehicle, I agree with the majority that the district court properly determined that Hunter's camper was his home—not a vehicle, as Undersheriff Tanksley may have treated it—at the time the search occurred.

The closer a person stands to a home, the more obvious it is that the person is standing within the curtilage of the home. See *Jardines*, 569 U.S. at 6 ("We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" [Emphasis added.]) (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 [1984]); *Talkington*, 301 Kan. 453, Syl. ¶ 6 ("The area *immediately surrounding* and associated with the home is the curtilage." [Emphasis added.]). The threshold, steps, and porch of a home are classic examples of curtilage. See *Jardines*, 569 U.S. at 7 (quoting *Oliver*, 466 U.S. at 182 n.12) ("The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'"); *Soza v. Demsich*, 13 F.4th 1094, 1105 (10th Cir. 2021) ("The front porch—the area at issue here—is undoubtedly curtilage.").

The search here occurred immediately outside the camper at its threshold. The undersheriff indicated that his drug-detecting canine alerted that there was a smell of

narcotics "within the vehicle" and that he and his canine were so close that they needed to "stretch around" the small stairs attached to the back door. The undersheriff was not searching an open field for the smell of narcotics but was searching what he characterized as the *inside* of the camper.

It is not necessary to conduct an exhaustive four-factor *Dunn* analysis to determine whether the area searched here was within the home's curtilage. See *United States v. Sweeney*, 821 F.3d 893, 901 (7th Cir. 2016) ("In most cases it is easy to say what the curtilage is. . . . When we encounter novel questions about the scope of curtilage, we take into account the four *Dunn* factors."). The *Dunn* factors are used to identify the *extent* of the curtilage, and the Court explained:

> "We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—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." *United States v. Dunn*, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987).

In *Dunn*, the Court analyzed whether a separate barn located 60 yards away from the home was within the home's curtilage. 480 U.S. at 302. This case is clearly distinguishable from *Dunn*. Here, the search occurred so near the home that it revealed details about the inside of the home, which demonstrates the reason curtilage is a protected area under the Fourth Amendment. Whatever the extent of the camper's curtilage was, based upon the *Dunn* factors, the area searched here was well within it. To find that the area searched here was not curtilage would be to hold that Hunter's camper lacked any curtilage at all.

Moreover, if Hunter's grandfather, as the landowner, had authority over the land upon which the camper sat and the surrounding area, that does not necessarily mean Hunter's camper lacked any curtilage. See *People v. Burns*, 50 N.E.3d 610, 622 (Ill. 2016) (holding that the landing outside of the defendant's apartment door was within the curtilage of the defendant's apartment despite the fact that the landing was a common area); *State v. Rendon*, 477 S.W.3d 805, 810 (Tex. Crim. App. 2015) (same). And unlike common areas immediately outside an apartment door that are shared with residents of other apartments, this was a stand-alone home, the curtilage of which was not shared with any other home. Hunter's grandfather's authority over the land surrounding the camper does not mean that the curtilage of Hunter's camper did not harbor "the intimate activity associated with the sanctity of [his] home and privacies of [his] life." *Talkington*, 301 Kan. 453, Syl. ¶ 6.

Similarly, I cannot join the majority in finding that Hunter's grandfather's authority over the land around the camper means that his grandfather had actual authority to consent to the search of the curtilage of the camper. To lack privacy in the curtilage of your home is to lack privacy in your home itself. As Justice Scalia explained:

> "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' This 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 impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window. [Citation omitted.]" *Jardines*, 569 U.S. at 6.

The majority contends that Hunter's grandfather could consent to search the curtilage because the grandfather owned the lot upon which the camper sat and had unrestricted access to the lot. In *Matlock*, the United States Supreme Court explained that a warrantless search can be justified "by voluntary consent . . . obtained from a third party

who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). However, Hunter's grandfather's access and relationship to the searched area here was not like the common authority deemed sufficient in *Matlock*. In *Matlock*, the third party who consented to the search resided within the area sought to be searched. Hunter's grandfather, on the other hand, did not reside in Hunter's camper—the camper was exclusively Hunter's home.

The United States Supreme Court has long held that a landlord cannot consent to the search of a tenant's home (just as Hunter's grandfather could not consent to the search of Hunter's home). *Chapman v. United States*, 365 U.S. 610, 616-18, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961). It is not unusual for a landlord, camper park owner, condominium landowner, or even a homeowner's association to have authority to enter and perform exterior maintenance on the land or even the building exterior, such as siding or roofing. To hold that Hunter's grandfather, as the landowner with common authority over the land surrounding Hunter's camper, could consent to the search of the curtilage of Hunter's camper would erode long-established Fourth Amendment protections for nonlandowner residences (and thereby potentially create separate classes of Fourth Amendment protection for residences of landowners and nonlandowners). I cannot say that a landowner who lacks authority to consent to an interior search, but who has ownership or maintenance authority over the exterior of a residence, can consent to search within the curtilage to discover details about the interior of the home. I cannot say that a landowner who has authority to perform exterior maintenance on a home or its curtilage has actual authority to consent to law enforcement standing within arm's reach of the doors and windows, peering inside, without violating the tenants' Fourth Amendment rights to be secure in their homes from unreasonable searches.

Additionally, even if Hunter's grandfather had authority to consent to law enforcement accessing or searching the curtilage because of his authority over the area,

he lacked authority to consent to search the interior of Hunter's camper by virtue of its proximity to the area over which he could consent to search.

II. *The undersheriff searched the interior of the camper.*

Hunter argued that the State's search violated his Fourth Amendment rights, and the district court relied on *Jardines* to find the search unconstitutional, but the court's Fourth Amendment reasoning was less clear. It appears that the district court relied on the reasoning in section I of this dissent to suppress the evidence. I include this second reasoning, explained more eloquently in the concurrence in *Jardines*, for why the district court's conclusion was correct even if based on a different Fourth Amendment reasoning than the one presumptively relied upon by the district court. See *State v. Smith*, 309 Kan. 977, 986, 441 P.3d 1041 (2019) ("appellate courts may affirm a district court as right for the wrong reason if an alternative basis exists for the district court's ruling").

The majority argues that even if the area in which Undersheriff Tanksley took his canine was the curtilage of Hunter's home "because the uncontroverted evidence establishes Grandfather had joint access and control over that area, he had actual authority to consent to the canine search." Slip op. 8-9. But Undersheriff Tanksley did not use his drug-detecting canine to search for drugs within the curtilage. Rather, Undersheriff Tanksley accessed the curtilage with his drug-detecting canine to search the *inside* of Hunter's home, which the majority concedes was beyond the scope of the grandfather's common authority. As explained above, a search occurs when the government "invades a subjective expectation of privacy that society recognizes as reasonable." *Talkington*, 301 Kan. 453, Syl. ¶ 4; see *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In *Kyllo*, the United States Supreme Court held that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. at 40.

Even if Hunter's grandfather could consent to the search of the curtilage of Hunter's camper, Undersheriff Tanksley's search nevertheless violated Hunter's reasonable expectation of privacy because he used a trained drug-detection dog as an investigative device not in general public use to explore details about the interior of Hunter's home that would previously have been unknowable without entering the camper. See, e.g., *Kyllo*, 533 U.S. at 33; *United States v. Whitaker*, 820 F.3d 849, 850-51 (7th Cir. 2016); *United States v. Thomas*, 757 F.2d 1359, 1366-67 (2d Cir. 1985). Nearly 40 years ago, the Second Circuit found that use of a drug-detecting canine outside the door of a home violated the resident's reasonable expectation of privacy because "[w]ith a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses." *Thomas*, 757 F.2d at 1367. More recently, the Seventh Circuit applied the reasoning in *Katz* and *Kyllo* to exclude evidence obtained when police, with consent from the property manager, brought a drug-detecting canine to the shared hallway of an apartment building and the canine alerted to the presence of drugs at Whitaker's apartment door. After the alert, like here, the police obtained a search warrant for Whitaker's apartment where contraband was found. The Seventh Circuit explained that although Whitaker did not have a reasonable expectation of complete privacy in the shared hallway, that did not mean Whittaker "had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Whitaker*, 820 F.3d at 853.

As Justice Scalia explained in *Kyllo*, the very core of the Fourth Amendment is the right to be free from "'unreasonable governmental intrusion'" in one's home. 533 U.S. at 31. While there are numerous distinguishable cases, such as searches of vehicles or their contents on public roadways, searches incident to arrest, searches in public places, or searches consented to by roommates or cohabitants sharing the space searched, finding that drug-detecting canine searches do not run afoul of *Kyllo*, there appears to be no precedent addressing the specific facts presented here. Here, the government used a

"sense-enhancing technology" not in general public use to gain information about the "interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area.'" See *Kyllo*, 533 U.S. at 34. Therefore, even if Hunter's grandfather had actual authority to consent to Undersheriff Tanksley entering the curtilage of Hunter's camper to perform a search, Undersheriff Tanksley nevertheless violated Hunter's reasonable expectation of privacy as defined in *Kyllo*.

I cannot say that Hunter's grandfather, by virtue of being the landowner and land maintainer of the property upon which Hunter's residence sat, had actual authority to consent to police taking a drug-detecting canine within inches of Hunter's camper to obtain information about the inside of the home. I would affirm the district court's determination that the consent exception to the warrant requirement did not apply. I therefore respectfully dissent.