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State v. Ellis:

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Knock and Talk and Wander and Peek

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Since the time cavemen learned to cover their cave openings with animal hides, the police have been employing the knock and talk technique as a crime-fighting tool.[1] The courts have consistently held that officers may enter the curtilage of a home to approach the front door, knock, and attempt to speak with someone at the residence just like a visitor, vendor, or solicitor might do. In recent years, however, there have been several cases that have reiterated that this is a very narrow exception to the Fourth Amendment and officers should take care not to step outside the "beaten path," so to speak. A quick review of the highlights:

1. Florida v. Jardines:[2] U.S. Supreme Court says K-9 can't be taken up to the door to sniff around during a knock and talk since ordinary visitor would not be expected to bring special investigative tools to the door.

2. State v. Huddy:[3] Deputy exceeded scope of knock and talk when he didn't knock on cobweb covered front door, but instead went around to the back door where he smelled marijuana. He was investigating a potential burglary but there was not enough evidence that the house had been broken into.

3. State v. Stanley:[4] Officers had knowledge that visitors (also known as illegal drug purchasers) always went to the back door. When police conducted a knock and talk, they also went to the back door. Court said they exceeded the scope of a knock and talk because even with specific knowledge they were only allowed to go to the door "that a reasonably respectful citizen unfamiliar to the home would believe is the appropriate door at which to knock."

4. State v. Piland:[5] Officers lingering next to garage door smelled marijuana while another officer continued past to the front door. Since garage was on the way (arguably) to the front door, court held that the scope of knock and talk was not exceeded.

Last week, the North Carolina Court of Appeals decided another knock and talk case where the officers exceeded the scope by wandering around the house. In many ways, the outcome of this case is nothing new.[6] But

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[1] Ok, so maybe I'm exaggerating a little, but it's been a long time. They had policemen in the old Flintstones cartoons so it's possible they were doing knock and talks back then. By the way, I need a way to stream some of those old cartoons like the Flintstones or the Jetsons. The Super Friends was must-see TV on my Saturday mornings as a kid.

[2] 569 U.S. 1 (2013). In fact, maybe it's time to bring back some of the old cartoons like they are doing with the old game shows, which I also loved. My initial thoughts on the revived game shows: they did a good job with "Card Sharks" although I've always thought the actual game wasn't that fair; they've ruined "Press Your Luck" with a long drawn out and boring "bonus round," and the new "10,000 Pyramid's" winner's circle money round is so easy even a caveman could win it.

[3] 799 S.E. 2d 650 (April 18, 2017).

[4] COA 17-1000 (May 15, 2018).

[5] COA 17-1337 (December 18, 2018).

[6] Kind of like a summer rerun. For those of you who are too young to know what a rerun is, let me explain. Back in the days before streaming, shows would run their episodes again during the summer months so that you could catch the ones you missed during the season or watch them again. Now we are lucky enough to have lots of all new mediocre programming during the summer. One program I've enjoyed that I'm a little embarrassed to admit is "Songland." If you haven't seen it, this show features aspiring songwriters who pitch their songs to famous artists, who then take the idea and write a completely different song all while making the songwriter believe that they are doing them a favor.

the case also brought up another related issue – what constitutes "plain view" evidence when a knock and talk is conducted?

In State v. Ellis,[7] one Detective Helms and one Detective Klinglesmith[8] responded to a home where a stolen Bobcat earth moving machine was located. A witness at the scene told them that the person who had stolen the earth moving machine was at a house across the street. Upon crossing the street, the detectives walked up the driveway[9] on the right side of the house and Helms went to the front door. Klinglesmith went around to the back door because, according to his testimony, they were dealing with a felony suspect. As Helms knocked on the front door, he noticed a large spider web in the door frame. He received no answer to his knocking but noticed the curtain in the front window move. Helms then radioed Klinglesmith to tell him about the curtain and Klinglesmith began to knock at the rear door. He was also unsuccessful in getting someone to the door.

At that point, Klinglesmith walked around the other side of the house away from the driveway to get back in the front yard. As he stood near the front corner of the house farthest away from the driveway, he smelled the odor of marijuana. He called Helms over to confirm the smell and they noticed a loud fan and a light coming from a padlocked crawl space area where the odor of marijuana also seemed to be coming from. According to testimony, the detective then put his eye up to the crawlspace door and through some slats was able to see a marijuana plant in a bucket inside the crawlspace. With this information, the detectives radioed their vice unit which then obtained a search warrant for the residence. Based on the execution of the search warrant, the defendant was charged with various marijuana charges as well as a charge for trafficking in opiates.

Although the trial court denied the defendant's motion to suppress, on appeal the Court of Appeals ruled that by going to the back door, the detective exceeded the scope of a knock and talk. He had entered a part of the curtilage that was outside the normal path a visitor might take to the front door and he did so without a warrant or any exception to the warrant requirement, such as exigent circumstances. In addition to the back door, the officer was also not permitted to walk around the other side of the house to front corner where he smelled the marijuana. The court pointed out that officers are not "permitted to roam the property searching for something or someone after attempting a failed 'knock and talk,'" and by doing so, they "overstayed their 'knock and talk' welcome."

The court rejected the officers' argument that the lack of any no trespassing signs meant that they could walk around the property. In addition, they noted that the movement of the front curtain did not give the officers the right to knock at another door, since if anything, this supported the conclusion that the occupant saw the police outside and did not wish to speak with them. They pointed out that "whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak."[10]

However, the more interesting part of the court's opinion was their ruling that even if the detective was lawfully present at the front corner of the house where he smelled marijuana, his action in putting his eye up to the crawlspace door and peeking through was an unlawful search. The reasoning was that the gaps in the slats were small ones (demonstrated by the fact that the detective had to put his eye close to them to see through) and the homeowner's right to privacy is not defeated simply because there might be small gaps or holes. This was based on an earlier case, State v. Tarantino.[11]

In Tarantino, a detective received a tip that marijuana was being grown in an old abandoned commercial building. The detective went out to the property to investigate and observed that the windows were boarded up

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[7] COA 19-59 (June 18, 2019).

[8] Yes, that's Klinglesmith. Why do you ask? Perhaps you expected some witty line about this being an alias for Kris Kringle aka Santa Claus or along the lines of him being a relative of John Jacob Jingleheimer Schmidt (after all, his name is my name, too.) But I try not to make fun of officers that I don't know – especially when I don't know how big they are.

[9] Actually the court's opinion said the officers were walking down the "wood line" on the driveway side but apparently this had no effect on the decision in the case.

[10] This was a quote from the U.S. Supreme Court case Kentucky v. King, 563 U.S. 452 (2011).

[11] 322 N.C. 386 (1988).

and the doors were nailed shut. At the bottom of the wall between the doors were several cracks no more than ¼ inch wide where the boards did not join completely. The detective was able to shine his flashlight through the cracks and saw marijuana plants. He later returned with a search warrant based on that discovery. The N.C. Supreme Court held that because the owner had taken steps to preserve the privacy of the interior of the building, he maintained a reasonable expectation of privacy even though the building was not 100% secure. As a result, the marijuana plants could not be considered to be in plain view.

Tarantino and Ellis have an impact on how the plain view doctrine and the knock and talk play together. As an officer legally approaches the front door to do a knock and talk, he or she might see evidence or contraband in at least three situations. The officer might observe contraband such as marijuana plants growing outside the house in another part of the property. In such a case, even if the marijuana plants are growing in an area inside the curtilage, the N.C. Supreme Court ruling in State v. Grice[12] seems to say that the officer could seize those plants unless maybe they were behind a fence or other barrier. In either case, the officer could certainly use the marijuana plants as the basis for a search warrant.

A second situation that might arise is if the officer's path to the front door leads them by a window or opening through which they see contraband or evidence. In this situation, the plain view doctrine would apply and the officer could obtain a search warrant based upon the evidence seen through the window or opening or enter without a warrant if exigent circumstances are present. The courts have said that an officer is not required to "shield their gaze when passing by." This situation would also cover the officer going up to do a knock and talk and seeing contraband through a screen or storm door inside the house.

However, if the officer must go to great lengths to bring the evidence into view, such as putting his or her face up to the window or looking through a gap between the door and the frame, the contraband or evidence would not be considered to be in plain view according to the courts. This type of affirmative "peeking" would be considered a search because the person in charge of that location would still have a reasonable expectation of privacy. As a result, officers would not be able to use this "seen" evidence as the basis for a search warrant or exigent entry without running afoul of the Fourth Amendment.

For those interested in the bottom line, just remember: knock and talk is constitutional police procedure but wander and peek is not.

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ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith Rodgers, PLLC but he thinks they're pretty cool guys.

[12] 367 N.C. 753 (2015). One last comment about game shows: I watched a new one the other night called "Spin the Wheel" which was pretty good although the spin of the wheel is not based on how hard the player spins it but is controlled by a computer and "its speed and timing are randomly generated" which reminds me of all the N.C. gambling arguments about whether something is a game of skill or a game of chance.