7-1-2013

State v. Howard Respondent's Brief Dckt. 40239

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO, Plaintiff-Respondent, vs. DERK WARNER HOWARD, Defendant-Appellant.	)	No. 40239 Gooding Co. Case No. CR-2011-2029

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

HONORABLE BUTLER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JOHN C. McKINNEY
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

Anthony M. Valdez
Valdez Law Office, PLLC
2217 Addison Avenue East
Twin Falls, ID 83301
(208) 736-7333

ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATEMENT OF THE CASE

Nature Of The Case

Derk Warner Howard appeals from the judgment entered upon his conditional guilty plea to manufacturing a controlled substance (marijuana), claiming the district court erred in denying his motion to suppress and his motion for reconsideration.

Statement Of Facts And Course Of Proceedings

The facts underlying Howard's arrest for manufacturing a controlled substance (marijuana), as found by the district court, are as follows (with bracketed references to the transcript):

> DETECTIVE JEROD SWEESY: Sweesy is a detective for the Idaho State Police (ISP) and has been employed with ISP for the last 20 years. [Tr., p.10, Ls.18-19; p.17, Ls.15-17.] He holds a Master Certificate from POST and has investigated approximately 75 to 100 marijuana grow operations. [Tr., p.17, Ls.9-14; p.19, Ls.10-21.] He is trained in the enforcement and eradication of marijuana grow operations, as well as other illegal narcotics investigations. [Tr., p.17, Ls.18-22.] Over the years of such investigations, he has had experience in detecting the odor of marijuana, both processed and growing. [Tr., p.18, Ls.6-22.] On August 30, 2011, ISP received an anonymous tip that Mr. Howard, the defendant, had a marijuana grow in a ravine south of his residence. [Tr., p.10, L.25 - .11, L.14.] After receiving this information, Sweesy went to Google Earth to locate the Howard residence and verify the existence of the ravine, which existed. [Tr., p.13, Ls.3-13.]
>
> On the morning of August 31, 2011, Sweesy, Ward, and Otto drove to the location of the anonymous tip. [Tr., p.13, Ls.19-23.] They turned onto a dirt/gravel road off of Old Highway 30 and proceeded generally east to a fork in the road. [Tr., p.14, L.6 – p.16, L.5.] They then proceeded to the right, to a white building where the road ended. [Tr., p.16, Ls.14-17.] They then walked the ravine to the vicinity of the Howard residence. [Tr., p.14, L.23 – p.16, L.17.] They did not locate or find any evidence of a marijuana grow. [Tr., p.16, L.22 – p.17, L.6.] They then decided to make contact with Mr. Howard at his residence. [Tr., p.19, L.25 – p.20, L.4.] The officers returned to their truck and proceeded back to the fork in the road, where they took the left fork further east, until they arrived

at the Howard residence. [Tr., p.20, L.18 – p.21, L.13.] They never observed any "no trespassing" signs. [Tr., p.39, L.18 – p.40, L.23; p.110, Ls.11-15.] When they arrived at the Howard residence, they parked at a location on the road just west of the Howard driveway. (Exhibit #4). [Tr., p.21, L.14 – p.22, L.13.]

The officers then exited their truck and walked up the Howard driveway to a path/walkway, which led to what they thought was the defendant's front door, which was on the east side of the residence. [Tr., p.22, Ls.14-19.] Ward knocked on the door and he and Sweesy waited for an answer for approximately 30 to 45 seconds. [Tr., p.23, Ls.2-8; p.109, Ls.8-9; p.82, Ls.11-16.] While at the door, Sweesy detected the odor of marijuana coming from the west. [Tr., p.23, L.16 – p. 24, L.3.] He testified that there was a light wind coming out of the west. [Id.] When there was no answer, they returned to their truck. [Tr., p.24, Ls.8-21.] Sweesy then walked west in an attempt to determine where the marijuana odor was coming from. [Id.] As he walked west on the road, he observed what he described as an open air shed/barn that was northwest of the residence. [Tr., p.25, Ls.3-9.] He testified that from the road, he observed white strings hanging from the trusses of the shed, and spaces of the siding of the shed allowed him to observe an "emerald green" color inside the shed. [Tr., p.24, L.22 – p.25, L.21; p.30, L.21 – p.31, L.15.[1]] Sweesy testified that the color he observed was consistent with marijuana plants and that it is common in grow operations to use the hanging strings to support the growing marijuana plants. [Tr., p.25, L.13 – p.26, L.3; p.31, Ls.13-21.]

Sweesy then retrieved a camera from his vehicle and began taking photos from the road. (Exhibit #5, Photos 9251-61). [Tr., p.26, Ls.9-18; p.54, L.18 – p.57, L.14.] Photos 9251 and 9252 depict the Howard residence. [Tr., p.55, Ls.8-23.] Photos 9253-55 depict west [sic] side of the Howard residence, from the road; the shed to the northwest of the Howard residence; and a brown truck and backhoe west of the Howard residence and a white Suburban southwest of the shed, between the shed and the residence. [Tr., p.56, L.8 – p.57, L.11.] Sweesy proceeded to take photos from an open field west of a fence line that separated the open filed from the Howard residence and the shed. [Tr., p.57, L.22 – p.58, L.3.] Photos 9256-61 depict various views of the shed with and without the use of a zoom lens. [Tr., p.57, L.22 – p.60, L.20.] Sweesy testified that the photos taken show the white strings hanging from the trusses of the shed and depict the green marijuana plants through the gaps in the cedar siding. [Tr., p.58, L.4 – p.60, L.20.]

---

[1] Det. Sweesy testified that he saw the strings hanging from the trusses of the shed when he was still on the roadway (Tr., p.24, L.22 – p.25, L.12); however, it was not until he walked north up the fence line that he was able to observe the "bright emerald green plants" between the slats of the outbuilding (Tr., p.30, L.17 – p.31, L.15).

After taking the photos, Sweesy was at the southwest corner of the fence line and road when the defendant arrived at the residence. [Tr., p.61, Ls.7-23.] After taking the photos, Sweesy called Sgt. Fullmer to start the paperwork for a search warrant. [Tr., p.64, Ls.5-16.] Sweesy testified that the defendant arrived in a brown truck with a passenger. [Tr., p.61, L.7 – p.62, L.1.] He identified the brown truck in Photo 9253, as the truck the defendant arrived in.[2] Sweesy identified himself to the defendant as an ISP officer. [Tr., p.63, Ls.15-18.] The defendant told the officer, multiple times, that they were trespassing and had to leave. [Tr., p.63, Ls.18-20; p.114, L.13 – p.115, L.16.] Sweesy asked the defendant if he was growing marijuana; the defendant denied such. Sweesy asked the defendant if he wanted to see the photos and the defendant responded, "I don't need to." [Tr., p.65, Ls.17-22.] Sweesy advised the defendant that he was in the process of obtaining a search warrant and advised the

---

[2] The district court was mistaken. The record does not show that Howard drove the brown truck seen in photo 9253 to his residence that day. (See Tr., p.56, L.8 – p.57, L.1.) To the contrary, the district court specifically found that "[t]he photographic evidence taken by Sweesy and the time sequence of those photos, clearly contradict the testimony of the defendant that those photos were taken *after* he arrived." (R., p.55 (emphasis added); see R., p.52 ("The Court must find that photos 9251-61 were taken before the defendant arrived at his residence."). Moreover, Howard testified that he drove a different brown truck to his residence and parked it next to an inoperative brown truck that the court and parties had seen (impliedly in the photo), as the following colloquy shows:

> Q. Where did you park your vehicle when you came to the residence on August 31st, 2011?
>
> A. Parked it right here right next to this other brown truck.
>
> Q. So this brown truck that's in the satellite photo, is that the same brown truck we've seen in the –
>
> A. Yes, it is.
>
> Q. How come that truck doesn't move?
>
> A. It's broke down now, I guess.
>
> Q. Okay. So you parked – You parked next to this brown truck?
>
> A. Yes.

(Tr., p.151, Ls.9-22.)

defendant that he had two options: (1) consent to a search and he would not be arrested or (2) he would obtain a search warrant. [Tr., p.65, L.6 – p.66, L.9.] Sweesy further advised the defendant that he had the right to refuse to consent. [Tr., p.66, Ls.17-22.] The defendant responded by saying, "let's cut'em down." [Tr., p.66, Ls.9-11.] Sweesy then advised Fullmer that the defendant had consented to a search and a search warrant was not necessary. [Tr., p.67, Ls.1-8.] Sweesy requested "raid equipment" to take and package the evidence he obtained. [Id.] He also asked for additional assistance to carry out the search. [Id.] Other ISP officers arrived to assist, approximately 30 minutes after the request. [Tr., p.67, L.23 – p.68, L.2.] The scene was videotaped and photographed before any evidence was taken. [Tr., p.68, Ls.3-5.]

The interactions and conversations with the defendant were not recorded. [Tr., p.68, L.19 – p.69, L.15.] Sweesy assumed that the road from Old Highway 30 to the Howard residence was a public road. [Tr., p.70, L.9 – p.71, L.9.] Sweesy did not see the "no trespassing" sign on the Howard property until it was mentioned by the defendant. [Tr., p.39, L.18 – p.41, L.8; 98, L.13 – p.99, L.5.] It would not have been visible from the direction in which the officers approached the property. [Tr., p.35, Ls.1-17; p.39, L.17 – p.41, L.8.] According to Sweesy, the defendant was free to leave, but was not free to enter his property until the evidence had been collected. [Tr., p.65, Ls.6-9; p.95, L.21 – p.96, L.1.] The defendant was never placed in handcuffs. [Tr., p.170, Ls.5-7.]

TROOPER STEVE OTTO: Otto has been a patrol officer for ISP for 4 years. [Tr., p.107, Ls.6-14.] He has POST certification at the intermediate level and he has training in the area of detecting controlled substances. [Tr., p.107, L.17 – p.108, L.14.] He participated in the investigation of Mr. Howard on August 31, 2011. [Tr., p.108, Ls.19-24.] The officers exited off Old Highway 30 onto a dirt/gravel road. [Tr., p.110, Ls.6-10.] As they were travelling on this road, Otto was "actively looking" for "no trespassing" signs, but did not see any. [Tr., p.110, Ls.11-15.] All three officers travelled in the same vehicle. [Tr., p.109, L.23 – p.110, L.1.] While traveling on the road they never had to open any gates. [Tr., p.114, Ls.1-2.] When they arrived at the Howard residence, Otto remained on the roadway as Ward and Sweesy went to the door of the Howard residence. [Tr., p.109, Ls.4-13.] When there was no answer at the door, Sweesy and Ward came back and Sweesy walked "around the back of the house on the roadway and saw the suspected outhouse building." [Tr., p.109, Ls.14-17.] From the roadway, he was able to see the strings hanging in the shed/bam. [Tr., p.113, Ls.5-10.] When the defendant arrived and while they engaged with the defendant, the officers were spread out; with Ward ahead of Otto and then Sweesy. [Tr., p.115, Ls.2-8.] The defendant pulled into the driveway and parked; he was walking

> back and forth. [Tr., p.115, Ls.4-8.] Otto was present when Sweesy spoke to the defendant. [Tr., p.114, Ls.4-7.] The defendant was irate and upset; speaking fast and telling them they needed to get off his property and needed a warrant. [Tr., p.114, Ls.13-18.] Otto does not recall that the defendant mentioned a no trespassing sign. [Tr., p.114, Ls.19-22.] The only conversation Otto had with the defendant was when the defendant attempted to enter his residence. [Tr., p.115, L.19 – p.116, L.3.] From the time that the defendant told the officers to get of the property to the time the defendant said, "let's cut'em down," was approximately 10-15 minutes. [Tr., p.117, Ls.6-20.]
>
> The only restrictions on the movements of the defendant was in prohibiting him from entering to [sic] his residence, as officer safety was a concern. [Tr., p.195, Ls.16-21.] Sweesy's camera was on the tailgate, so they never told the defendant that he had to sit on the tailgate. [Tr., p.196, Ls.5-25.] His calls were also not restricted. [Tr., p.197, L.1 – p.198, L.5.] Otto's conversation with the defendant was limited. [Tr., p.197, Ls.14-18.] The defendant walked the officers to the marijuana plants when they began their search and extraction of the plants. [Tr., p.198, L.19 – p.199, L.5.]
>
> Otto observed the defendant execute the consent to search form. [Tr., p.199, Ls.21-23.] The search form was brought after the additional officers arrived on scene. [Tr., p.200, Ls.3-10.] Otto does not recall if that was the first time the officers discussed the consent to search with the defendant. [Tr., p.200, Ls.11-16.] Otto did recall that Sweesy, after taking the photos and before the other officers arrived, had a conversation with the defendant about consent to search or a search warrant. [Tr., p.200, L.17 – p.201, L.9.]

(R., pp.39-43.)

The state charged Howard with manufacturing a controlled substance (marijuana) and possession of drug paraphernalia. (R., pp.10-12.) Howard filed a motion "to suppress all evidence . . . which was the direct or indirect product or otherwise the fruit of the warrantless entry upon the illegal search of Defendant's property occurring on or about August 21, 2011." (R., pp.14-15.) After an evidentiary hearing, the district court denied Howard's suppression motion, concluding: (1) regardless of whether the officers' driving on a private road to get to Howard's residence

constituted a trespass, Howard did not have a "'reasonable expectation of privacy' from those who may happen to travel on the Road[,]" including the officers; (2) when Det. Sweesy detected the odor of growing marijuana while standing at the front door of Howard's residence, he "had the implied invitation to be within the curtilage" of Howard's residence; (3) apart from when officers were in the "invited public" area of the curtilage of Howard's residence, they remained outside the curtilage until and throughout the time they observed -- in plain view from vantage points west of the north-to-south "fence line" (see St. Ex. 4) -- marijuana growing in an outbuilding with gapped siding and roofing; and (4) after Howard arrived at his residence, he voluntarily consented to a search of his property for the suspected marijuana. (R., pp.37-65.) Howard filed a Motion to Reconsider and Brief in Support (R., pp.66-70), which was denied (R., p.84).[3]

Howard subsequently entered a conditional guilty plea to manufacturing a controlled substance (marijuana), and the possession of paraphernalia charge was

[3] Howard's motion to reconsider his suppression motion was based upon United States v. Jones, 565 U.S. ____, 132 S.Ct. 945, 951 (2012), which explained, in a case where officers placed a GPS tracking device on Jones' vehicle, "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." After reviewing Jones, the district court concluded:

> The *Jones* case does not concern factually the open fields doctrine. The *Jones* case does not concern the curtilage doctrine.
>
> . . . .
>
> I do not view the *Jones* case as having overruled either any of the prior U.S. Supreme Court precedent when addressing the open fields doctrine or the curtilage, specifically Oliver versus U.S.

(Tr., p.228, Ls.10-23 (italics added).)

dismissed. (R., pp.85-88.) The court sentenced Howard to a unified 5-year term with two years fixed, all suspended, and placed him on probation for three years. (R., pp.91-97.) Pfeiffer filed a Rule 35 motion, which the court denied. (R., pp.125-26.) Howard timely appealed. (R., pp.106-109.)

ISSUES

Howard states the issue on appeal as:

> Did the District Court err when it denied both Mr. Howard's Motion to Suppress and his Motion to Reconsider?

(Appellant's Brief, p.6.)

The state rephrases the issue on appeal as:

Has Howard failed to show error in the district court's denial of his motion to suppress and his motion for reconsideration?

ARGUMENT

Howard Has Failed To Show Error In The District Court's Denial Of His Motion To Suppress And His Motion For Reconsideration

A. Introduction

Howard asserts the district court erred in denying his motion to suppress, first contending "[t]the evidence presented at hearing clearly established that the ISP Officers traveled on a private road, through a gate in a fence that was posted 'NO TRESPASSING,' and then continued to trespass on private property in order to gain any 'view' of suspected marijuana plants growing in a shed behind Mr. Howard's residence." (Appellant's Brief, p.7.) Howard also contends that the district court "erred by making findings of fact that were not supported by the evidence presented at hearing in order to conclude that the ISP Officers did not invade the curtilage of Mr. Howard's property." (Id.) Howard's claims fail. Application of the law to the facts shows the district court correctly concluded that law enforcement's actions in this case were constitutionally reasonable for purposes of the Fourth Amendment.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006).

C. Howard Has Failed To Demonstrate Error In The Denial Of His Suppression Motion

The state fully adopts the district court's well-written opinion as its argument on appeal, a copy of which is attached hereto as Appendix A, and its oral decision on Howard's motion for reconsideration, which is attached as Appendix B. Additionally, the state relies upon facts set forth in its Statement Of Facts And Course Of Proceedings, supra, which are supported by references to the record, to show that, contrary to Howard's argument, the district court's findings of fact are supported by substantial evidence.

To the extent Howard challenges the district court's credibility determinations, the Idaho Supreme Court has made clear that appellate courts are to afford great deference to a trial court's credibility determination. See Rueth v. State, 103 Idaho 74, 77, 644 P.2d 133, 1336 (1982). In Rueth, the Idaho Supreme Court recognized that "[t]his standard of appellate review is salutary in effect, and reflects the view that deference must be afforded to the special opportunity to assess and weigh the credibility of the witnesses who appear before it personally." Id. In Jensen v. Bledsoe, 100 Idaho 84, 87, 593 P.2d 988, 991 (1979), the Idaho Supreme Court also recognized that "the trial judge is the arbiter of conflicting evidence; his determination of the weight, credibility, inference and implications thereof is not to be supplanted by this [appellate] court's impressions or conclusions from the written record."

Because of this great deference, if "findings of fact are supported by substantial and competent evidence, even if the evidence is conflicting, this Court will not disturb those findings." Griffith v. Clear Lakes Trout Co., Inc., 146 Idaho 613, 619, 200 P.3d

1162, 1168 (2009); see also Benninger v. Derifield, 145 Idaho 373, 374, 179 P.3d 336, 338 (2008). As explained in Benninger, "[i]t is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses." Id. at 374, 179 P.3d at 338. Based on the testimony and evidence presented at the suppression hearing, and the deference afforded the trial court's credibility determinations, Howard has failed to show that the district court factual findings were erroneous.

CONCLUSION

The state respectfully requests that this Court affirm the judgment and sentence entered upon Howard's guilty plea to manufacturing a controlled substance (marijuana).

DATED this 1st day of July, 2013.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of July, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

ANTHONY M. VALDEZ
Valdez Law Office, PLLP
2217 Addison Avenue East
Twin Falls, ID 83301

John C. McKinney
Deputy Attorney General

JCM/pm

APPENDIX A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

STATE OF IDAHO, Plaintiff,	)	
vs.	)	Case No. CR-2011-2029
DERK HOWARD, Defendant.	)	

MEMORANDUM DECISION RE: DEFENDANT'S MOTION TO SUPPRESS

On February 14 and 15, 2012, the defendant's motion to suppress came on regularly for hearing. Calvin Campbell, Gooding County Prosecutor, appeared on behalf of the State of Idaho and Counsel, Tony Valdez, appeared on behalf of the defendant, Derk Howard, also present. At the conclusion of the testimony the parties were given 14 days to submit their closing arguments with authorities in writing. The time to file their written arguments expired on March 1, 2012; the parties failed to timely file any written arguments and authorities with the Court.[1]

[1] The defendant filed his brief on March 12, 2012. The defendant argued that the open view doctrine does not apply, as the search occurred in the curtilage of his home. He also argued that the good faith exception does not apply and the consent was tainted by an illegal search.

Therefore, the Court, having considered the testimony; exhibits; and the motion to suppress filed by defendant, took the matter under advisement on March 2, 2012 for a written decision.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On August 30, 2011, the Idaho State Police (ISP) received an anonymous tip that there was a marijuana grow in a ravine in the vicinity of the defendant's residence, located at 373 Spring Cove Road, Bliss, Idaho.

On August 31, 2011, ISP Detective Sweesy (Sweesy), Agent Ward (Ward), and Trooper Otto (Otto) drove to the ravine to investigate the anonymous tip. They were dressed in plain clothes and were in an unmarked truck. They took Old Highway 30 to a dirt/gravel road (Road). This Road is surrounded by property owned by various owners, i.e. Faulkner Land & Livestock; the LDS Farms; Bosma Farms; and the Northside Canal Company. The Northside Canal Company also has a right-of-way to use the Road. The Road is a winding road that proceeds generally in an east/west direction. The properties adjacent to the Road are generally north or south of the Road.

The ISP officers drove to the ravine and walked the ravine. They could not find evidence of a marijuana grow. They then drove to the Howard residence and attempted to make contact with the defendant, who was not home. While knocking on the front door, Sweesy detected the odor of marijuana in the air, which was coming from the west. The officers then observed a structure to the northwest of the residence. Sweesy observed white strings hanging from the trusses and observed what appeared to be green plants, through the spaces in the slats of the outbuilding.

The defendant filed his motion to suppress challenging the constitutionality of the discovery/search of the marijuana and his subsequent consent to search. In the defendant's Motion to Suppress he argues that evidence in this case should be suppressed pursuant to Article I, Sections 13 and 17 of the Idaho Constitution; the 4th, 5th, and 6th Amendments of the U.S. Constitution; Rules 4 and 41 of the Idaho Rules of Criminal Procedure; I.C. §§ 19-601-19-603, 19-608-19-611, 19-615, and 19-4401-4420.

II.

TESTIMONY AND EXHIBITS

The following persons testified; the material aspects of their testimony may be summarized as follows:

DETECTIVE JEROD SWEESY: Sweesy is a detective for the Idaho State Police (ISP) and has been employed with ISP for the last 20 years. He holds a Master Certificate from POST and has investigated approximately 75 to 100 marijuana grow operations. He is trained in the enforcement and eradication of marijuana grow operations, as well as other illegal narcotics investigations. Over the years of such investigations, he has had experience in detecting the odor of marijuana, both processed and growing. On August 30, 2011, ISP received an anonymous tip that Mr. Howard, the defendant, had a marijuana grow in a ravine south of his residence. After receiving this information, Sweesy went to Google Earth to locate the Howard residence and verify the existence of the ravine, which existed.

On the morning of August 31, 2011, Sweesy, Ward, and Otto drove to the location of the anonymous tip. They turned onto a dirt/gravel road off of Old Highway 30 and proceeded generally east to a fork in the road. They then proceeded to the right, to a white building where the road ended. They then walked the ravine to the vicinity of the Howard residence. They did

not locate or find any evidence of a marijuana grow. They then decided to make contact with Mr. Howard at his residence. The officers returned to their truck and proceeded back to the fork in the road, where they took the left fork further east, until they arrived at the Howard residence. They never observed any "no trespassing" signs. When they arrived at the Howard residence, they parked at a location on the road just west of the Howard driveway. (Exhibit #4).

The officers then exited their truck and walked up the Howard driveway to a path/walkway, which led to what they thought was the defendant's front door, which was on the east side of the residence. Ward knocked on the door and he and Sweesy waited for an answer for approximately 30 to 45 seconds. While at the door, Sweesy detected the odor of marijuana coming from the west. He testified that there was a light wind coming out of the west. When there was no answer, they returned to their truck. Sweesy then walked west in an attempt to determine where the marijuana odor was coming from. As he walked west on the road, he observed what he described as an open air shed/barn that was northwest of the residence. He testified that from the road, he observed white strings hanging from the trusses of the shed and spaces of the siding of the shed allowed him to observe an "emerald green" color inside the shed. Sweesy testified that the color he observed was consistent with marijuana plants and that it is common in grow operations to use the hanging strings to support the growing marijuana plants.

Sweesy then retrieved a camera from his vehicle and began taking photos from the road. (Exhibit #5, Photos 9251-61). Photos 9251 and 9252 depict the Howard residence. Photos 9253-55 depict west side of the Howard residence, from the road; the shed to the northwest of the Howard residence; and a brown truck and backhoe west of the Howard residence and a white Suburban southwest of the shed, between the shed and the residence. Sweesy proceeded to take photos from an open field west of a fence line that separated the open filed from the Howard

residence and the shed. Photos 9256-61 depict various views of the shed with and without the use of a zoom lens. Sweesy testified that the photos taken show the white strings hanging from the trusses of the shed and depict the green marijuana plants through the gaps in the cedar siding.

After taking the photos, Sweesy was at the southwest corner of the fence line and road when the defendant arrived at the residence. After taking the photos, Sweesy called Sgt. Fullmer to start the paperwork for a search warrant. Sweesy testified that the defendant arrived in a brown truck with a passenger. He identified the brown truck in Photo 9253, as the truck the defendant arrived in. Sweesy identified himself to the defendant as an ISP officer. The defendant told the officer, multiple times, that they were trespassing and had to leave. Sweesy asked the defendant if he was growing marijuana; the defendant denied such. Sweesy asked the defendant if he wanted to see the photos and the defendant responded, "I don't need to." Sweesy advised the defendant that he was in the process of obtaining a search warrant and advised the defendant that he had two options: (1) consent to a search and he would not be arrested or (2) he would obtain a search warrant. Sweesy further advised the defendant that he had the right to refuse to consent. The defendant responded by saying, "let's cut'em down." Sweesy then advised Fullmer that the defendant had consented to a search and a search warrant was not necessary. Sweesy requested "raid equipment" to take and package the evidence he obtained. He also asked for additional assistance to carry out the search. Other ISP officers arrived to assist, approximately 30 minutes after the request. The scene was videotaped and photographed before any evidence was taken.

The interactions and conversations with the defendant were not recorded. Sweesy assumed that the road from Old Highway 30 to the Howard residence was a public road. Sweesy did not see the "no trespassing sign" on the Howard property until it was mentioned by the

defendant. It would not have been visible from the direction in which the officers approached the property. According to Sweesy, the defendant was free to leave, but was not free to enter his property until the evidence had been collected. The defendant was never placed in handcuffs.

TROOPER STEVE OTTO: Otto has been a patrol officer for ISP for 4 years. He has POST certification at the intermediate level and he has training in the area of detecting controlled substances. He participated in the investigation of Mr. Howard on August 31, 2011. The officers exited off Old Highway 30 onto a dirt/gravel road. As they were travelling on this road, Otto was "actively looking" for "no trespassing" signs, but did not see any. All three officers travelled in the same vehicle. While traveling on the road they never had to open any gates. When they arrived at the Howard residence, Otto remained on the roadway as Ward and Sweesy went to the door of the Howard residence. When there was no answer at the door, Sweesy and Ward came back and Sweesy walked "around the back of the house on the roadway and saw the suspected outhouse building." From the roadway, he was able to see the strings hanging in the shed/barn. When the defendant arrived and while they engaged with the defendant, the officers were spread out; with Ward ahead of Otto and then Sweesy. The defendant pulled into the driveway and parked; he was walking back and forth. Otto was present when Sweesy spoke to the defendant. The defendant was irate and upset; speaking fast and telling them they needed to get off his property and needed a warrant. Otto does not recall that the defendant mentioned a no trespassing sign. The only conversation Otto had with the defendant was when the defendant attempted to enter his residence. From the time that the defendant told the officers to get of the property to the time the defendant said, "let's cut'em down," was approximately 10 -15 minutes.

The only restrictions on the movements of the defendant was in prohibiting him from entering to his residence, as officer safety was a concern. Sweesy's camera was on the tailgate,

so they never told the defendant that he had to sit on the tailgate. His calls were also not restricted. Otto's conversation with the defendant was limited. The defendant walked the officers to the marijuana plants when they began their search and extraction of the plants.

Otto observed the defendant execute the consent to search form. The search form was brought after the additional officers arrived on scene. Otto does not recall if that was the first time the officers discussed the consent to search with the defendant. Otto did recall that Sweesy, after taking the photos and before the other officers arrived, had a conversation with the defendant about consent to search or a search warrant.

DERK HOWARD: Howard, the defendant, has resided at 373 Spring Cove Road, Bliss, Idaho for nine years. The property is owned by the Northside Canal Company, the defendant's employer. The defendant has been employed with the canal company for approximately 17 years. He is responsible for the maintenance of the canals adjacent to his residence, as well as other canals owned by the canal company. The property owned by the canal company, upon which the defendant lives, consists of approximately nine acres, including an open field west of the residential structure and outbuildings. The property boundary is marked in red on Exhibit #4. The open field to the west and the residential property to the east are separated by wooden posts and barb wire fence, which extends north to south. The improved portion of the property consists of a circular driveway, to the east; a detached garage, to the northeast; an open air shed/barn, to the northwest; and the house, to the south of the shed/barn and garage and to the west of the driveway. The defendant rents this property from the canal company at $5.00 per month, as part of his employment. The only access to his property is from Spring Cove Road, from the east, or from Old Highway 30 on the dirt/gravel road, from the west. The defendant maintains the dirt/gravel road from the west, upon which the canal company has a right-of-way. This road

passes to the south of his property. When one accesses this Road from Old Highway 30, s/he first crosses over a cattle guard. Some distance to the left of the cattle guard, is a "no trespassing" sign. As one proceeds east on the Road, where the road turns to the left, there is an irrigation canal with a head gate to control water flow. At the top of the head gate there is a "no trespassing" sign spray painted in orange, which is intended to keep people off of the canal structure. The defendant admitted that one cannot see the "no trespassing" sign on the video (Exhibit #1), but that one can see it while driving. To the west of the defendant's property, adjacent to the north side of the Road, there is a "no trespassing" sign, which would be visible to a vehicle travelling westbound on the Road. At the entry to his driveway, if one were approaching from the east, is a "no trespassing" sign. On the Road there are various points where there are sometimes gates. Gates are put up on the Road if he does not want people to come through or if there are cattle grazing.

There is a ravine south of the defendant's residence, which generally runs east to west. It is also owned or managed by the Northside Canal Company. In the open filed to the west of the defendant's residence, he occasionally keeps horses or cows in the field. There were no horses or cows in the field on August 31, 2011. There was a horse in the barn. To the northwest of the residence is the backyard and barn/shed. The defendant estimated that it is approximately "seven steps from his back porch to the barn/shed."

On the morning of August 31, 2011, the defendant was working for the canal company and was not at his residence. He was in the area "riding ditch." He was not in the area depicted in Exhibits #3 or #4. The defendant returned to his residence when he received a call stating that someone was at his house. He received that call from Ben Hepworth. Hepworth was on the canal bank southeast of his residence when he made the call. Hepworth said he thought the men

were looking at the Suburban and broken-down Ford, which were listed for sale. The two vehicles were located near the shed/barn; within five yards. The defendant testified that he returned home in his company truck and parked next to a brown truck, which was broken down. From the time of the call, it took the defendant approximately ten minutes to arrive at his residence. When he arrived, he testified that he saw three men on his property, behind his house. He testified that one of the men was just south of the shed/barn and the other two were standing north of the road, but south of his house. The defendant testified that it was Sweesy who was just south of the shed/barn. The defendant marked, with an "x", where the three men were located when he arrived. When the defendant got out of his truck, he spoke first to the officers. He spoke first to Otto and told him he was trespassing and needed to leave. Sweesy immediately started to walk towards him. The defendant did not observe the officers doing anything other than standing on the property. When he arrived, he did not see Sweesy with a camera. The defendant stated that when he arrived, Otto and Ward told him to go sit on the tailgate of their truck, which was parked in his driveway. Sweesy then came over to the truck, got his camera, and walked back down the road to the fence line and walked the fence line and took pictures. There were no police cars at the defendant's residence, other than a "navy blue four door dodge." The three officers did not identify themselves as police officers until after the defendant told them to leave. The defendant tried to enter his house to get a video camera, but the officers would not let him. The defendant tried to enter the house at least two times, but he was instructed by the officers not to enter. Sweesy offered to show the defendant the photos he had taken, but the defendant was aware of what they depicted. The defendant told this Court that he tried to make phone calls, but he was told he could not make any calls by Otto. After being at the residence for approximately 20 minutes, the defendant said, "let's go cut'em down," referring to the marijuana plants. During

this 20 minute period, before the defendant said, "cut'em down," he overheard Sweesy make a call. Sometime later after that call, Sweesy gave the defendant the option to wait for a search warrant or consent to the search. Sweesy told the defendant that if he gave permission, he would not go to jail. The defendant signed a consent to search form. He was not arrested at the scene, nor placed in handcuffs or in a police vehicle. When the officers began the search, he went with the officers and was present in the shed/barn during the search.

The defendant does not have mail delivery at his residence; nor does he recall ever having any UPS or FedEx deliveries.

BEN HEPWORTH: Hepworth is a co-worker of the defendant's, employed by the Northside Canal Company for the last five years. He is a "ditch rider." He has been familiar with the defendant's residence for approximately nine years. On August 31, 2011, in the morning, Hepworth was working for the canal company and was on the canal bank located southeast of the Howard residence, when he saw a vehicle at the residence that he did not recognize. It was in the driveway of the defendant. He called the defendant. Hepworth then left his location and drove along the ditch bank of the canal to a location north of the Howard residence. From that location he saw three men on the defendant's property, who appeared to be north of the road as well as southwest of the residence. He marked their positions with an "O" on Exhibit #4.

EXHIBITS

The parties stipulated to the admission of the following Exhibits:

State Exhibits-

#1- Video

#2- CD Howard photos-taken 10/5/2011 from 2:41 pm to 3:06 pm

#3- Google Earth aerial map

#4- Google Earth aerial map - close-up

#5- CD ISP photos (this CD contains a log of the date and time of each photo)

-#9251-9261: taken 8/31/2011 from 11:01 am to 11:07 am

-#1853-1879: taken 8/31/2011 from 11:28 am to 12:01 pm

#6- ISP Consent to Search form

Defendant Exhibits-

#A- Northside Canal Company letter

Pursuant to I.R.E. 201, the Court hereby takes judicial notice of the contents of the Affidavit of Probable Cause in Support of Criminal Complaint/Citation, dated September 7, 2011.

The parties stipulated that the dirt/gravel road (Road), which the officers travelled upon to arrive at the Howard residence, is not a publicly maintained roadway.

III.

STANDARD

The 4th Amendment protects against unreasonable searches and seizures and was applied to the states in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.*

Katz v. US protects the privacy of those that exhibit an actual expectation of privacy and that expectation is one that society is willing to accept as reasonable. 389 U.S. 347 (1967). An unlawful search and seizure can only occur where the defendant has a reasonable expectation of privacy. *Id.* at 360.

> Courts have extended Fourth Amendment protection to the curtilage, which is the area or buildings immediately adjacent to a home which a reasonable person may expect to

> remain private even though it is accessible to the public. However, the presence of a police officer within the curtilage does not, by itself, result in an unconstitutional intrusion. Just as there is an implied invitation for citizens to access a house by using driveways or pathways to the entry, police with legitimate business are entitled to enter areas of the curtilage that are impliedly open to public use. A criminal investigation is as legitimate a societal purpose as any other undertaking that would normally take a person to another's front door. Therefore, when the police come onto private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places ordinary visitors could be expected to go, observations made from such vantage points are not covered by the Fourth Amendment.

State v. Linenberger, No. 36962, 263 P.3d 145, 148 (Ct. App. 2011) (internal citations omitted).

"At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. LeClercq*, 149 Idaho 905, 243 P.3d 1093, 1094 (Ct. App. 2010) (citing *State v. Veldez-Molina*, 127 Idaho 102, 106, 897 P.2d 993 (1995)). On appeal, "[t]he standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, [the court of appeals] accept[s] the trial court's findings of fact that are supported by substantial evidence, but... freely review[s] the application of constitutional principles to the facts as found." *Id.* (citing *State v. Atkinson*, 128 Idaho 559, 561, 926 P.2d 1284 (Ct. App. 1996)).

The defendant argues that the search of the property, which he rented from the Northside Canal Company, was a warrantless search to which no exception applies and that his subsequent consent to search was tainted.

IV.

ANALYSIS

A. FINDINGS OF FACT

1. On August 30, 2011, Sweesy received an anonymous tip that there was a marijuana grow in a ravine south of the Howard residence at 373 Spring Cove Road located in Bliss, Gooding County, Idaho.

2. Sweesy, through the use of Google Earth, verified that there was a ravine south of the Howard residence. The Howard residence, "373 Spring Cove Road, Bliss, Idaho" when entered into Google Earth, shows the location of the Howard residence to be adjacent to and north of the Road, which the officers travelled on to arrive at the residence.

3. On the morning of August 31, 2011, Sweesy, Ward, and Otto drove from Old Highway 30 to a non-publically maintained dirt/gravel road (Road) and then drove to the ravine. They walked the ravine and did not find any evidence of a marijuana grow. The ravine is owned or managed by the Northside Canal Company.

4. On August 31, 2011, there were no gates in place that would prevent travel on the Road and, while there is evidence that there were "no trespassing" signs at various locations off of the road, there were no signs that clearly prohibited or restricted travel on the Road.

5. After finding no evidence of a marijuana grow in the ravine, the three officers decided to make contact with the defendant, to further their investigation. They drove on the Road, eastbound to the Howard residence. From the ravine to the Howard residence, there were no closed gates to restrict or prohibit traffic. The officers parked their blue truck south of the Howard residence, on the Road west of the defendant's driveway. Sweesy and Ward walked up the Howard driveway to a concrete pathway the front door of the Howard residence. Where the officers entered the Howard driveway, where the walkway began, there was no gate or "no trespassing" sign. The "no trespassing" sign posted on the Howard property was at the eastern entrance and was not visible to the officers when they first arrived. Ward knocked on the door. After 30 to 45 seconds, they determined that no one was home. While at the door, Sweesy detected the odor of marijuana coming from the west of the house on a slight breeze.

6. The defendant rents approximately nine acres from the Northside Canal Company. The majority of the nine acres are an open field to the west of the Howard residence. There is a north/south wire and wood fence on the east end of the open field. The improved portion of the property, to the east of the fence line, consists of a residential house; a detached garage to the northeast of the house; and various other structures including, the open air shed/barn, which is located to the northwest of the house. The Road runs east and west to the south of the Howard property. From the Road, there is a driveway with two entrances east of the Howard residence. On August 31, 2011, there was a white Suburban and a white Ford truck just to the southwest of the shed/barn. There was a brown truck and a backhoe southwest of the house. The Howard residence is the only residence within miles. The property is bordered by a canal to the north and farm ground or pasture to the east, west, and south.

The south and east grass yard is bordered by vertical, wooden, fence posts at regular distances, without any horizontal barrier. (Exhibit #5, Photos 9251-52).

7. The officers walked back to their truck and attempted to determine where the marijuana odor was coming from. From the Road, the officers observed the shed/barn northwest of the residence. From the Road, Sweesy observed white strings hanging down from the trusses of the shed/barn. Through the gaps in the siding, he observed an emerald green color. Based on his observations and experience, Sweesy suspected that marijuana plants were growing within the shed/barn. Sweesy took two photos of the barn/shed from the Road. (Exhibit #5, Photos 9253 & 9254). The photos depict the open air roof and the south siding of the shed. There is no testimony as to the distance from the edge of the Road to the shed/barn. The defense has not challenged what Sweesy could or could not see from the Road.

8. Ben Hepworth, a coworker of the defendant, observed the officers and their vehicle (although he did not know they were law enforcement at that time) and notified the defendant that they were on his property. Hepworth testified that when he was southeast of the Howard residence, from an unknown distance, he observed a vehicle he did not recognize in the defendant's driveway. However, this testimony is not credible, because the photographic evidence does not show a blue truck on any portion of the Howard property. (Exhibit #5, Photos 9251-55). Hepworth testified that when he was north of the Howard property, on the canal bank, from an unknown distance, while driving, he observed the officers in the vicinity of the white Ford truck and the white Suburban, listed for sale. The Court finds that Hepworth's observation of the location of the officers' truck and the officers is not reliable, nor credible.

9. The defendant arrived at his residence approximately ten minutes after the call from Hepworth. The defendant testified that he arrived at his residence in a canal company truck, which he parked next to the brown truck that was southwest of his residence. When he testified, he was referring to Exhibit #4. (This brown truck is depicted in Exhibit # 5, Photos 9253-55). The testimony of the defendant, as to where he parked, is in conflict with the photos taken by Sweesy.

10. The testimony of Sweesy and Otto is in conflict as to the location of Sweesy when the defendant arrived and when Sweesy took photos 9251-61. According to Sweesy, he had just completed taking the photos and was at the southwest corner of the property, near the west fence line, when the defendant arrived. According to Otto, Sweesy began taking the photos after the defendant arrived. The Court finds, based on Sweesy's photos 9253 – 55, that the defendant and Otto are mistaken in their testimony, because there is no other vehicle parked next to the brown truck other than the backhoe. There is no evidence of a Northside Canal Company truck on the

property of the defendant, prior to the Sweesy photos being taken. At 11:05 a.m., the defendant had not yet arrived home when photo 9255 was taken. The Court must find that photos 9251-61 were taken before the defendant arrived at his residence. According to Exhibit #5, photos 9251-54 were taken at 11:01 am from the Road south of the Howard residence; photo # 9255 was taken at 11:05 am; photos 9256-58 were taken at 11:06 am; and photos 9259-61 were taken at 11:07 am. Photos 9255-61 were taken from various locations west of and along the fence that separated the open field from the improved portion of the defendant's property.

11. The testimony of Otto and Sweesy, as compared to the testimony of the defendant and Hepworth, conflict as to whether the officers were ever within the curtilage after there was no answer to the officer's knock at the door. The officers testified that they were either on the Road or west of the fence line. According to Hepworth, the three officers were in the vicinity of the two white vehicles, south of the shed/barn and north of the Road. According to the defendant, upon his arrival, Sweesy was on his property just south of the shed/barn and Ward and Otto were just north of the Road, just west of the brown truck, on his property.

Hepworth was clearly mistaken as to the location of the officers' truck. Hepworth was north of the Howard residence and on the north side of the canal, in his vehicle and made the observation while driving. The Court will find that it is probable that he was mistaken as to their location on the property. as opposed to their location on the road or west of the fence line.

12. The defendant also testified that when he arrived, Sweesy was up near the shed/barn and that Ward and Otto were left of the brown truck on his property. The Court, having found that the defendant's testimony is not credible as to when the photos were taken by Sweesy, must find that his testimony is not credible as to the location of the officers when he arrived. When the defendant arrived, he did not know that the three individuals were officers and

he told them to leave. After he discovered they were law enforcement, he told them they needed a warrant to search. This Court must find that the photos taken by Sweesy were taken prior to the defendant's arrival and are in direct conflict with his testimony that the photos were taken after he arrived. The Court finds that Howard's testimony of the location of the officers on his property, east of the fence line when he arrived, is not credible.

13. The last Sweesy photo was taken at 11:07 am and it was shortly thereafter that the defendant arrived at his residence.

14. Sweesy asked the defendant if he was growing marijuana on his property, which he denied. Sweesy asked the defendant if he wanted to see the photos that had been taken. The defendant responded that he did not need to see the photos. Sweesy, after taking the photos (Exhibit #5), contacted Fullmer to start working on a search warrant for the Howard residence.

15. Within 15 to 20 minutes after the defendant arrived, Sweesy discussed options with him. Sweesy said told the defendant that if he consented to a search he would not be arrested, but he would be arrested if the officers had to procure a warrant. Sweesy did not have any written consent to search forms. After considering his options, the defendant orally consented to the search. Sweesy notified Fullmer that a search warrant was not necessary, since the defendant had consented. Sweesy asked for additional officers and "raid equipment" to assist in the search and eradication of the marijuana.

15. Prior to the eradication of the marijuana grow, the officers videotaped the scene and photographed the marijuana grow inside the shed/barn. The marijuana grow on the Howard property was photographed between 11:28 am to 12:01 pm. (Exhibit #5, Photos 1853-79). The videotape of the scene was not offered into evidence in this proceeding.

16. Additional officers arrived within 30 minutes of Sweesy's call to Fullmer to assist with the search and eradication of the marijuana grow. The additional officers arrived after the defendant's oral consent to search. The defendant executed a written consent to search on August 31, 2011 at 12:15 pm; after other officers had arrived to assist in the collection of evidence and the removal of the marijuana plants.

B. CONCLUSIONS OF LAW

i. Open View Doctrine

A warrantless search consisting of observations made by law enforcement from a location where the public has a right to be either under the Fourth Amendment of the U.S. Constitution or Article I, § 17 of the Idaho Constitution, may be analyzed under the "open view doctrine." "Under the open view doctrine, a police officer's observations made from a location open to the public do not constitute a search. This is because one cannot have a reasonable expectation of privacy in what is knowingly exposed to public view." *State v. Christensen,* 131 Idaho 143, 146-47, 953 P.2d 583 (1998) (citing *Katz v. United States,* 389 U.S. 347, 351-52 (1967)).

The Court, in *State v. Prewitt,* 136 Idaho 547, 551, 38 P.3d 126 (Ct. App. 2001), stated:

> Although citizens have a reasonable expectation of privacy in the areas immediately surrounding their homes, not all areas of the curtilage are equal in terms of privacy:
>
> [T]he presence of a police officer within the curtilage does not, ipso facto, result in an unconstitutional intrusion. There is an implied invitation for the public to use access routes to the house, such as parking areas, driveways, sidewalks, or pathways to the entry, and there can be no reasonable expectation of privacy as to observations which can be made from such areas. Like other citizens, police with legitimate business are entitled to enter areas of the curtilage that are impliedly open to public use.
>
> The ability of police to move within the curtilage, however, is not unlimited. 'Police officers without a warrant are permitted the same intrusion and the same level of observation as one would expect from a 'reasonably respectful citizen.'' *Id.*

In this case, the testimony reveals that Sweesy observed the shed/barn from the Road and from an open field, west of the north/south fence line. His observations were made both with and without the aid of a camera with a zoom lens. The constitutionality of Sweesy's observations is dependent upon whether he was in a place that he had the right to be at the time he made the observations, i.e. was Sweesy within or outside of the Howard curtilage when he made his observations of the shed/barn?

According to the testimony offered at the suppression hearing, it was only Sweesy who first detected the odor of marijuana while at the door of the Howard residence. It was also Sweesy who observed the marijuana in the shed/barn. As for the observations of Sweesy of the shed/barn, he denies ever being on the Howard property east of the west fence line; west of the Howard residence; and north of the road. The defendant relies upon his testimony and the testimony of Hepworth, as to the location of the three officers and their vehicle. The photographic evidence taken by Sweesy and the time sequence of those photos, clearly contradict the testimony of the defendant that those photos were taken after he arrived. Further, the photographic evidence contradicts the testimony of Hepworth as to the location of the officers' blue truck, as the photos clearly depict that there is no blue truck on the Howard property. The Court, therefore, finds that the defendant and Hepworth are either not credible or are mistaken in their testimony, as to the location of the officers and/or their vehicle being. The Court would find that the only time the officers were within the curtilage was when they walked to the door of the Howard residence, prior to detecting the odor of marijuana.

ii. Curtilage & Trespass

The Fourth Amendment of the U.S. Constitution and Art. I, § 17 of the Idaho Constitution safeguard "the right of the people to be secure in their persons, houses, papers and

effects against unreasonable searches and seizures...." These constitutional provisions are designed to protect an individual's legitimate expectation of privacy that society is prepared to recognize as reasonable. *Oliver v. United States,* 466 U.S. 170, 177 (1984). "These constitutional safeguards of the privacy of 'houses' extend to the curtilage of a residence, which is in the areas or buildings immediately adjacent to a home that a reasonable person would expect to remain private, even though it is accessible to the public." *State v. Tietsort*, 145 Idaho 112, 115, 175 P.3d 801 (Ct. App. 2007). In *State v. Webb,* 130 Idaho 462, 467, 943 P.2d 52 (1997), our Court concluded the United States Supreme Court's definition of curtilage for Fourth Amendment analysis did not adequately reflect the privacy interests of Idaho citizens under Article I, § 17, of the Idaho Constitution. In *State v. Donato,* 135 Idaho 469, 472, 20 P.3d 5 (2001), the Court stated, in reliance upon *Webb*:

> ...we conclude the United States Supreme Court's definition of curtilage for Fourth Amendment analysis did not adequately reflect the privacy interests of Idaho citizens under Art. 1, § 17 of the Idaho Constitution. We did not reject the reasoning of the U.S. Supreme Court, but found the factors to determine curtilage as outlined by the U.S. Supreme Court in *United States v. Dunn,* 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) should be applied as "useful analytical tools." *Id.* at 467, 943 P.2d at 57. However, in formulating a definition of curtilage that would better ensure Idaho citizens' reasonable expectations of privacy were met, this Court found the Dunn factors should be applied in the context of the setting or locality of the residence itself, with consideration given to the differences in custom and terrain within different areas of the state. *Id.* Our analysis in *Webb* was based on the unique rural tradition and custom in Idaho that defines Idahoans' sense of protected space, and expectation of privacy, within their property. The recognition of the differences in a rural and suburban home for the purposes of defining curtilage is a special consideration in Idaho.

The facts in *Webb,* were that law enforcement officers had an anonymous tip regarding a marijuana grow on Webb's property that consisted of a 20 acre parcel of rural land, located outside the city limits of Hagerman. A fence line surrounded the entire 20 acre parcel. The fence was in poor condition and consisted of wooden posts and barb wire. When law enforcement officers first found evidence of a suspected marijuana grow, Webb was not living on the

property, although he did own the property. There was a well house, shop and trailer house on a portion of the property. Access to the shop, and trailer house was by a driveway. There was a gate and a "no trespassing" sign located at the road entrance to the trailer house. This was the only "no trespassing" sign on the property. The law enforcement officers gained access to the property in an area where there were wooden fence posts, but no wire between them. Over a period of two years, officers made access to the property from the same general area, to observe evidence of the marijuana grow. The Court, in affirming that the marijuana grow was not within the curtilage of Webb's property, stated:

> When determining whether an area comes within the curtilage of a defendant's residence, the trial court must first consider the four factors set forth in *Dunn.* By so holding we do not suggest that the factors are to be rigidly applied, but rather, are to be used as "useful analytical tools". *Dunn,* 480 U.S. at 301, 107 S.Ct. 1139-40.
>
> Secondly, we hold that when the trial court assesses the curtilage boundaries, in addition to considering the *Dunn* factors, the court should apply them in the context of the setting or locality of the residence itself. For instance, the curtilage of a home located within the city limits of Boise may not be the same as the curtilage of a ranch located in one of Idaho's rural counties. The trial court must therefore take into consideration the differences in custom and terrain within different areas of the state when contemplating particular expectations of privacy. *See, e.g., State v. Sutton,* 112 N.M. 449, 816 P.2d 518, 524 (Ct.App.1991) (overruled in part on other grounds) ("In New Mexico, lot sizes in rural areas are often large, and land is still plentiful. Our interpretation and application of the state constitution must take into account the possibility that such differences in custom and terrain gave rise to particular expectations of privacy when the state constitution was adopted.") We believe that this formulation of curtilage will better ensure that Idaho citizens' reasonable expectations of privacy will be met.

Webb, 130 Idaho at 467.

In *State v. Cada,* 129 Idaho 224, 230-31, 923 P.2d 469 (Ct. App. 1996), the Court of Appeals also recognized that the Idaho Constitution provided a broader protection of curtilage than did the 4th Amendment. The *Cada* Court stated:

> The Idaho appellate courts' past discussions of curtilage have recognized that curtilage encompasses domestic outbuildings that are close to and associated with a dwelling. *State v. Sindak,* 116 Idaho 185, 188, 774 P.2d 895, 898, (1989), *cert. denied,* 493 U.S. 1076,

> 110 S.Ct. 1125, 107 L.Ed.2d 1032 (1990) ("Curtilage is commonly defined as the enclosed space of ground and buildings immediately surrounding a dwelling house."); *State v. Clark*, 124 Idaho 308, 313, 859 P.2d 344, 349 (Ct.App.1993) (referring to curtilage as the "area or buildings immediately adjacent to a home which a reasonable person may expect to remain private even though it is accessible to the public."); *State v. Rigoulot*, 123 Idaho 267, 272, 846 P.2d 918, 923 (Ct.App.1992) (same); *Ferrel v. Allstate Insurance Co.*, 106 Idaho 696, 698, 682 P.2d 649, 651 (Ct.App.1984) ("curtilage" refers to a small piece of land, not necessarily enclosed, around a dwelling house, generally including buildings used for domestic purposes in the conduct of family affairs.).

Id.

This Court, therefore, is to consider the *Dunn* factors and then consider those factors "in the context of the setting or locality of the residence itself." The four factors for this Court to consider in *Dunn*, consist of: (1) the proximity to the home of the area claimed to be curtilage; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from the observation of people passing by. *Dunn*, 480 U.S. at 301. In this case, unlike Mr. Webb, the defendant was living on the subject property, which he rented from his employer. As to the first factor, from the testimony of the defendant and the officers, as well as the photographic evidence, the shed/barn in which the marijuana was being grown was in close proximity to the house. From the testimony of Sweesy, he recognized that the shed/barn was within what he viewed to be the curtilage. As to the second factor, the house and the shed/barn are enclosed by a wood and metal, to the west. The fence, from the southwest corner of the west fence line, extends east partway along the road, south of the shed/barn, where there is a gap in the fencing. Vehicles can park in that gap, on the defendant's property, west of his residence. There are wooden fence posts with no wire between them, south of the Howard residence, along the roadway which extend to the driveway, east of his residence. The north/northeast side of the Howard property is bordered by a large canal; owned by the Northside Canal Company. This

area forms somewhat of a triangle. To the west of the north/south fence line, which is the west boundary of the improved portion of the Howard property, is a large open field, which is part of the property owned by the Northside Canal Company and is part of the property rented by the defendant. As for the third factor, it is clear that the area of the property occupied by the defendant and his family, east of the west fence line, was used as is typical of a family, although it does not appear that the shed/barn was well maintained. The open field, west of the fence line separating it from the shed/barn and house, was used on occasion to graze cows and horses. The fence was maintained to keep the grazing livestock confined to the open field. As for the fourth factor, the marijuana grow was located in the poorly maintained shed/barn and was visible from the Road, south of the Howard property, and from the west side of the fence line.

The defendant's residence is somewhat isolated, although it is surrounded by various canals that he and Hepworth are required to maintain in their employment. Therefore, it would not be uncommon for the defendant's employer or other employees to be in the area. The Howard residence is bordered by the property of other landowners, who use it for either growing crops or grazing livestock. Hepworth is aware that it is not uncommon for the public to hunt in the area, provided they had the landowner's permission. Hepworth admitted that he had initially hunted in the open field rented to the defendant without the permission of the canal company. The curtilage would clearly only encompass the property to the east of the fence line; south of the Northside Canal and north of the Road.

A trespass is not a constitutional violation unless it "represents an invasion of a person's reasonable expectation of privacy." *State v. Rigoulot,* 123 Idaho 267, 272, 846 P.2d 918 (Ct. App. 1992). The use of the non-public road by the ISP officers did not violate the defendant's right of privacy, nor was there any clear indication that access on the Road was in anyway

restricted. In *Prewitt*, 136 Idaho at 549, officers used a "private road" to arrive at the defendant's residence. Further, certain entries into the curtilage are not constitutionally protected, i.e. those persons who are impliedly invited. The Court in *Tietsort*, 145 Idaho at 115, stated:

> Even under Idaho constitutional jurisprudence, however, not all entries by law enforcement officers onto the curtilage of a home infringe upon constitutionally protected expectations of privacy. Under the open view doctrine, when the police come onto private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places where ordinary visitors could be expected to go, observations from such vantage points are lawful. *Id.; State v. Clark*, 124 Idaho 308, 312–13, 859 P.2d 344, 348–49 (Ct.App.1993); *State v. Rigoulot*, 123 Idaho 267, 272, 846 P.2d 918, 923 (Ct.App.1992). Direct access routes to the house, including driveways, parking areas, and pathways to the entry, are areas to which the public is impliedly invited. Police officers restricting their activity to such areas are permitted the same intrusion and the same level of observation as would be expected from a reasonably respectful citizen. *Cada*, 129 Idaho at 232, 923 P.2d at 477; *Clark*, 124 Idaho at 313, 859 P.2d at 349. The scope of the open view doctrine is limited, however, by the implied invitation to enter. Consequently, "a substantial and unreasonable departure from the normal access route will exceed the scope of the implied invitation and intrude upon a constitutionally protected privacy interest." *Clark*, 124 Idaho at 314, 859 P.2d at 350.

"As set forth in *Cada*, there are several factors to be considered in determining whether an officer exceeded the scope of open view, including whether the officer acted secretly or openly, the time of the day or night when the officers approached, and whether the officers attempted to talk with the resident. *Id.* at 233, 923 P.2d at 478." *Prewitt*, 136 Idaho at 550. In *Rigoulot*, 123 Idaho at 272, the Court held that when police come onto the curtilage of a home for a legitimate purpose and restrict their movements to places where ordinary visitors would be expected to go, their observations from such vantage points are not unlawful. In *State v. Clark*, 124 Idaho 308, 313, 859 P.2d 344 (Ct. App. 1993), the Court held that the direct access routes to a house, including parking areas, driveways and pathways to the entry, are areas to which the public is impliedly invited, and that police officers restricting their activity to such areas are permitted the same intrusion and the same level of observation as would be expected from a "reasonably respectful citizen." In this case, the officers arrived at the residence in the day time

and were merely attempting to make contact with the defendant to further their investigation. While walking to the front door, Sweesy detected the odor of marijuana. Since Sweesy had the implied invitation to be within the curtilage in order to make contact with the defendant to further his investigation, his detection of the odor of marijuana was not a constitutional violation. *State v. Rigoulot,* 123 Idaho 267, 272-273, 846 P.2d 918, 923-924 (Ct.App.1992). The officers then returned to the Road, where Sweesy made his observation of the suspected marijuana grow. He made further observations west of the fence line. Lastly, Sweesy's use of a camera to aide or enhance his observations from a place where he had a right to be is not an unconstitutional intrusion. *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 2043 (2001)(the use of technology to intrude into a constitutionally protected area is a violation where the technology is not in general public use); *State v. Schumacher,* 136 Idaho 509, 37 P.3d 6 (Ct. App. 2001); *State v. Christensen,* 131 Idaho 143, 147, 953 P.2d 583, 587 (1997) (search was based on speculation as to what the officers could have seen since there was no evidence that officers used binoculars that were available).

Under the facts and circumstances of this case, it is reasonable to believe that the curtilage consisted of the improved portion of the property, occupied by the defendant and his family, east of the fence line. The observations made by Sweesy were outside of the curtilage. The officers viewed the Howard property during the day time, in the open, and they arrived at the residence intending to speak with the defendant. Their actions were not covert and, therefore, did not constitute an "intrusive method of viewing." The officers had a legitimate reason to make contact with the defendant, to further their investigation, and did not unlawfully enter the curtilage to do so. The use of the path to the Howard residence, where they detected the odor of

marijuana, was not a constitutional violation, in as much as the officers had an implied invitation. The "no trespassing" sign was at a location not visible to the officers.

The officers drove to the Howard residence on the Road, and the Road passes through properties owned by Faulkner Land and Livestock, Northside Canal Company, and others. It is not openly restricted as to who can or cannot travel on it. The Road connects with Spring Cove Road. Irrespective of whether their travel on the Road was a trespass, the defendant did not have a "reasonable expectation of privacy" from those who may happen to travel on the Road. Therefore, any observations made by Sweesy, from the Road or west of the fence line, that were in plain view, do not form the basis of an unconstitutional, warrantless search.

iii. Consent

The defendant claims that his consent to search was not voluntary or was otherwise tainted by an unlawful search. Since the Court has found that the search was lawful, the issue of taint is moot.

As to the issue of whether the consent was voluntary, the defendant was aware that the detectives had reason to believe that he was growing marijuana. At the time he consented to the search there were three law enforcement officers present. The defendant talked with Sweesy. Sweesy offered to show him the photos. Sweesy informed him they were in the process of obtaining a warrant to search. There is no evidence that there were any weapons drawn by the officers. The defendant was not handcuffed and was free to leave, according to Sweesy. Sweesy told the defendant that he had two options: (1) he could consent and not be arrested or (2) the officers would obtain a warrant and he would be arrested. Sweesy did advise the defendant that he did have the right to refuse to consent. "Where an officer informs a suspect that the officer intends to do something that the officer is legally authorized to do under the circumstances, such

conduct does not amount to coercion. *See State v. Garcia,* 143 Idaho 774, 779–80, 152 P.3d 645, 650–51 (Ct.App.2006)." *State v. LeClercq,* 149 Idaho 905, 911, 243 P.3d 1093 (Ct. App. 2010). A defendant's consent is not rendered invalid merely because an officer has said that a warrant will be sought if consent is refused. *State v. Smith,* 144 Idaho 482, 489, 163 P.3d 1194 (2007). However, under certain circumstances, false representations of law enforcement may render a consent involuntary where the officer represents that he has a warrant to search when such a warrant does not exist or where the officer erroneously or falsely represents the ability to obtain a warrant. *Tietsort,* 145 Idaho at 119. This Court has determined that the information obtained by Sweesy, i.e. the detection of the odor of marijuana and the observation of the marijuana plants, were constitutional, Sweesy did not misrepresent or falsely state that he could get a search warrant.

At the time that the defendant orally consented to the search, there were three plain clothed officers present and they had one unmarked truck. The defendant was not detained and was free to leave. The officers never drew their guns. Sweesy told the defendant what his options were: (1) consent or (2) wait for a search warrant. Sweesy advised the defendant that he had the right to refuse consent and that they could do it the easy way or the hard way. Clearly, the defendant was not in custody at the time he orally consented. The fact that Sweesy may have stated that the defendant would be arrested if he elected to wait for the warrant is not coercive. *State v. James,* 148 Idaho 574, 577-78, 225 P.3d 1169 (2010); *State v. Garcia,* 143 Idaho 774, 779-80, 152 P.3d 645 (Ct. App. 2006) ("an officer's implied or explicit offer not to arrest a suspect if he 'turns over what he has' is not coercive if it merely informs the suspect of the officer's intention to do something that is within the officer's authority based on the circumstances").

V.

CONCLUSION AND ORDER

For the reasons set forth above, the defendant's Motion to Suppress is DENIED.

IT SO ORDERED.

DATED this 21 day of March, 2012

John K. Butler, District Judge

APPENDIX B

RULING ON HOWARD'S MOTION FOR RECONSIDERATION OF SUPPRESSION DECISION:

All right. Thank you. All right. The court has reviewed the authority, the court has reviewed the *Jones* case. The *Jones* case does deal with the placement of a GPS device upon a vehicle. The *Jones* case does not concern factually the open fields doctrine. The Jones case does not concern the curtilage doctrine.

I do not view the *Jones* case as having overruled either any of the prior U.S. Supreme Court precedent when addressing the open fields doctrine or the curtilage, specifically *Oliver versus U.S.* The federal courts and the state courts have recognized that a trespass in the context of a Fourth Amendment violation is only relevant to the extent that it represents an invasion of a person's reasonable expectation of privacy.

In my view, when the officers entered onto the gravel road from U.S. Highway 30 at the cattle guard, certainly, at that particular location that's being discussed here, Mr. Howard, at that location had no reasonable expectation of privacy.

However, as the court indicated in – and it was in State versus *Rigoulot*, 123 Idaho 267, a 1982 Court of Appeals decision, the court did indicate there that posting no trespassing signs may indicate a desire to restrict unwanted visitors and announce one's expectation of privacy. However, the court would note that there is no evidence that Mr. Howard was the one that posted the no trespassing sign at the location of the cattle guard.

In fact, I will indicate further that the evidence did not, at the evidentiary hearing, did not support the fact necessarily that there was such a no trespassing sign posted at the time of the entry by the officers.

As the court recalls the testimony of Mr. Howard when he was viewing the sign, he was merely indicating that that is a no trespassing sign in the video taken by the officers, and I do not recall that there was any direct testimony that the trespassing sign was present in August at the time that the officers made the entry.

But I think the court, in *Rigoulot*, does support the court's memorandum decision. The court does not believe that the discussion in Jones alters the court's decision, so the court will deny the motion for reconsideration.

(Tr., p.228, L.8 – p.230, L.11.)