ROP v. Rafael, 6 ROP Intrm. 305 (1996)
REPUBLIC OF PALAU,
Plaintiff,

v.

JOHN MARK RAFAEL,
Defendant.

CRIMINAL CASE NO. 190-95

Supreme Court, Trial Division
Republic of Palau

Decision and order
Decided: February 15, 1996

Counsel for Plaintiff: Kate Salii
Counsel for Defendant: Scott Ciment

LARRY W. MILLER, Associate Justice:

Before the Court is defendant's motion to suppress a number of marijuana plants seized from an area near his home in Angaur ⊥306 State.[1] It is undisputed that neither the seizure of the plants nor the search which led to them was authorized by a search warrant. The principal question to be addressed, therefore, is whether the search and seizure was nevertheless permissible.

The facts, mainly undisputed, are these: The Director of the Bureau of Public Safety received a tip, apparently anonymous, that there was a marijuana plantation in the jungle near defendant's residence. A team of police officers was dispatched to Angaur where, in the early morning hours of May 27, 1995, they entered the jungle. Between a half-hour and an hour later, after first coming upon marijuana plants behind another residence, the officers discovered the plants at issue here. They were surrounded by tall trees and brush, about 5-10 feet from the clearing behind defendant's house and about 10-20 feet from an outhouse in defendant's backyard. The back of defendant's house was less than 100 feet away, close enough so that a garden hose could reach from the house to the plants. The officers followed a path from the plantation to defendant's backyard, spoke to him and, after placing him under arrest and reading him his rights, allegedly obtained an incriminating statement from him.

Although defendant claimed in his motion to suppress that the plantation was located on land belonging to his clan, [2] he testified at the hearing that his house is on individual property

---

[1] The motion also seeks the suppression of statements obtained from defendant as a result of the seizure. There appears to be no dispute that both aspects of the motion will either succeed or fail together.

[2] The government had argued prior to the hearing that defendant would have a diminished

originally belonging to his father and now to him. The government presented no evidence on ownership. Given defendant's testimony and the lack of any contradictory evidence, the Court finds for purposes of this motion that the land in question is his individual property.

That the police proceeded here without any warrant raises, but does not determine, the question whether the search and seizure was permissible under the Palau Constitution. Although the Constitution, like the United States Constitution, has a clause ⊥307 governing the issuance of search warrants, Article IV, Section 6, the Appellate Division, like the U.S. Supreme Court, has found that there are "situations in which police may make a search or seizure without first obtaining a warrant." *ROP v. Gibbons*, 1 ROP Intrm. 547A, 547T (1988).

Were this case to be decided under the Fourth Amendment to the U.S. Constitution, the Court would be called upon to apply two interrelated principles. First is the principle that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government offices." *Oliver v. United States*, 104 S.Ct. 1735, 1742 (1984). Notwithstanding the literal meaning of the words, the U.S. Supreme Court has made clear that "[a]n open field need be neither 'open' nor a 'field' as those terms are used in common speech," and, specifically, that "a thickly wooded area" -- as was the case here -- "nonetheless may be an open field as that term is used in construing the Fourth amendment." *Id.* at 1742 n.11.

The second principle is an exception to the open fields doctrine which declares that the "curtilage" of one's home -- "the lands immediately surrounding and associated with the home", *id.* At 1742 -- shares the protection against warrantless searches that extends to the home itself. The Supreme Court has identified four factors to be considered in determining whether a particular location falls within the curtilage of a home: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 107 S.Ct. 1134, 1139 (1987). These factors are not to be "mechanically applied", but rather 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." *Id.* at 1139-40. Or, put another way, "the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home." *Id.* at 1139 n. 4.

The question, then, under the U.S. Constitution would be whether the area where the marijuana plans were found should be considered to be "open fields" or part of the curtilage of defendant's home. Emphasizing primarily the first factor -- the fact that the plantation was within 100 feet of the house and not more than 20 feet from the outhouse in its backyard -- defendant ⊥308 argues that the area should be considered curtilage. Arguably, the fourth factor supports defendant as well -- that the plants were located in the jungle and surrounded by taller trees and brush did serve to prevent their observation from passerby. [3] The other two factors,

---

expectation of privacy were it clan property. While the Court is uncertain of that proposition, it need not address it on the current record.

[3] Indeed, even the police who had come looking for the plants walked past them initially

however, suggest that the area should be considered part of an open field: the plants were not within a single fence surrounding the house and indeed there as no fence at all; and the area was used solely for planting and not for any "intimate activities" of the home. Moreover, looking to the "primary focus" identified by the Supreme Court, the Court could well imagine a U.S. court drawing a line identifying defendant's cleared backyard as the proper locus of "intimate activities associated with domestic life" and declaring the beginning of the uncleared jungle to be the end of the curtilage. *See, e.g., United States v. Hatch* , 931 F.2d 1478, 1480-82 (11th Cir. 1991) (applying *Dunn* factors to uphold denial of motion to suppress).[4]

For several reasons, however, the Court believes that the same analysis is not appropriate under the Palau Constitution. First, the conceptions of privacy an geography which underlie the U.S. decisions do not translate well to Micronesia and to Palau in particular. With respect to privacy, the Court notes the following discussion from the State Court of Kosrae in the Federated States of Micronesia:

> "Kosraens do not typically use fences nor "No Trespassing' signs. Often, a large portion of the family's needs will be provided for by subsistence farming near the residence. These areas fall within a reasonable expectation of privacy, which society is willing to protect. They are not 'open' fields." *Kosrae* ⊥*309* *State v. Paulino*, Criminal Action No. 96-91 (March 2, 1992).[5]

Based on testimony given at the suppression hearing and on the Court's own observation, a similar conclusion appears justified in Palau. Moreover, as a matter of geography, it is worth noting that the majority opinion in *Oliver* attempted to rebut the dissent's broader notions of privacy by referring to the vastness of the United States: "These fields, by their very character as open and unoccupied, are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment. One need think only of the vast expanse of some western ranches or of the undeveloped woods of the Northwest to see the unreality of the dissent's conception." 104 S.Ct. at 1742 n.10. It is unclear to the Court why, even in the United States, assumptions perhaps appropriately applied to "vast expanses" should govern police access to residences and family farms. *See infra* . There is surely no reason why such

---

and discovered them only when they doubled back to look again.

[4] *Maine v. Thornton*, decided at the same as *United States v. Oliver*, also arose, as here, out of "an anonymous tip that marijuana was being grown in the woods behind [defendant's] residence." 104 S.Ct. at 1739. The Supreme Court, noting that Thornton had not even contended that the property searched was within the curtilage, *id.* at 1742 n.11, reversed the Maine Supreme Court's decision that the "open fields" doctrine did not apply and remanded for further proceedings. Unfortunately, the Maine court's opinion on remand is not available in the Court's library.

[5] *FSM v. Rosario*, 3 FSM Intrm. 387 (Tr. Div. 1988), reached a different conclusion as to the applicability of the open fields doctrine under the national constitution. That decision was based on the fact that "[t]he framers of the Federated States of Micronesia Constitution looked to United States court decisions to determine the meaning of the words they were selecting for the declaration of rights in this Constitution." As discussed below, the Court does not believe that the same can be said with respect to Palau.

assumptions should apply to the development of constitutional law in Palau, whose *total* area is less than some of the ranches and forests in the U.S.

Second, although the language of the Palau Constitution is quite similar to that of the Fourth Amendment,[6] the drafting history of the former suggests that the restrictive reading given to the latter is not appropriate here. The Supreme Court's decision in *Oliver*, relying on an earlier decision, concluded that open fields simply did not fit within any of the categories of "persons, houses, papers, and effects" protected by the Fourth Amendment. The Committee on Civil Liberties and Fundamental Rights which drafted the correlative provision in the Palau Constitution made clear that the words chosen were not meant to describe discrete categories. Instead, it took "the position that the words ⊥310 person, house, papers and effects' include all things protected by the Right of Privacy." Palau Constitutional Convention, Standing Committee Report No. 11 (February 20, 1979).[7] While the Committee did not elucidate further, and perhaps because it did not, the Court believes that this comment justifies a rejection, as a matter of Palau's constitutional law, of the pigeonholing interpretation offered by the *Oliver* majority in favor of the broader view put forward by Justice Thurgood Marshall in dissent:

> "The Fourth Amendment, like other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with 'precision' permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion. We do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete. Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes -- to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials." 104 S.Ct. 1745-46 (footnotes omitted).

Third, it should be borne in mind that while we typically look to the decisions of the U.S. Supreme Court for helpful U.S. authority, there are 50 states court systems, each interpreting their own state constitutions, to which we may also look for guidance. In this regard, it should be noted that at least two of the states whose decisions are contained in the Pacific Reporter (and therefore readily available in the Court's library) have explicitly rejected the "open fields" doctrine as applied by the U.S. Supreme Court and found broader protection in their state constitutions, *State v. Dixson/Digby* , 766 P.2d 1015, 1018-24 (Or. 1988); *State v. Myrick* , 688 P.2d 151, 154-55 (Wash. 1984), and a third has indicated that it may be prepared to do the same.

---

[6] Article IV, Section 4, provides: "Every person has the right to be secure in his person, house, papers and effects against entry, search and seizure." The Fourth Amendment provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

[7] As initially drafted, Section 4 bore the heading "Right to Privacy". That heading, and all other headings within the Fundamental Rights Article, were deleted in the final version of the Constitution.

State v. Sutton , 816 P.2d 518, 523-24 (N.M. App. 1991). The Oregon case is particularly significant because although the language of its ⊥311 constitution also mirrors the Fourth Amendment, it concluded that "[t]o hold that the provision applies only to those items specifically enumerated therein would undermine the rationale that we have identified as the touchstone of Article I, section 9 -- the right to be free from intrusive forms of government scrutiny . . ." 766 P.2d at 1022.

Finally, while the reasons so far enumerated perhaps only go as far as to show that it is appropriate to *consider* a different result, it needs to be said that, in the Court's view, the open fields doctrine as applied by the U.S. Supreme Court is deeply problematic. In the first place, the doctrine is quite troubling insofar as it deems acceptable police behavior that, if committed by a private person, would constitute civil and even criminal trespass.[8] While the Supreme Court may have been correct to say that the Fourth Amendment and the law of property serve different purposes, *see Oliver* , 104 S.Ct. at 1743-44, it is remarkable that the former - - designed especially to prevent official intrusions - - should be interpreted to give license to officials to violate the latter.

Second, the rationale behind the doctrine does not justify its reach. There is some sense in concluding that there is no legitimate expectation of privacy in a truly open filed that is visible from a public road or in property that is undeveloped and over which, despite its private ownership, members of the general public may travel. Thus, as the Oregon Supreme Court noted:

> "Areas such as 'the vast expanse of some western ranches or . . . the undeveloped woods of the Northwest' described by the *Oliver* majority . . . may involve little or no privacy interest. Some areas of this state contain large unmarked tracts of lands in which it is difficult to tell where one piece of property ends and another begins. The public may be in the habit of using these areas to hike, fish, hunt or camp. However, lonely a person usually may be in such places, he or she has true privacy in them." *Dixson/Digby*, 766 P.2d at 1023.

⊥312 It makes little sense, however, to generalize form a rationale applicable to places that "usually are accessible to the public and the police", *Oliver*, 104 S.Ct. at 1741, to permit intrusions on lands that are not. But that is what is accomplished by the dual application of the doctrine of open fields and the notion of curtilage. Everything that is not within the curtilage is, *ipso facto*, an open field, whether or not it is truly open in any sense of the word.

Third, unlike like many other situations where a warrant is not required, the open fields doctrine does not even require a showing of probable cause. *See Gibbons*, 1 ROP Intrm. at 547S ("the police may make warrantless public arrests on the basis of probable cause"); *id.* at 547T ("police are not required to obtain a search warrant to stop an automobile when they have

---

[8] Thus, in *Dunn*, the Court upheld a warrantless search in which "DEA agents traveled a half-mile off a public road over [*Dunn's*] property, crossed over three additional wooden and barbed wire fences, stepped under the eaves of the barn, and then used a flashlight to peer through otherwise opaque fishnetting." 107 S.Ct. at 1149 (dissenting opinion).

probable cause to believe it contains contraband or evidence of crime"). Rather, by its conclusion that open fields are not protected by the Fourth Amendment, the doctrine permits significant police intrusions on private lands without even a suspicion of criminal activity.

Without attempting to fashion a rule applicable to all circumstances, the Court believes that on a proper analysis of Article IV, Section 4, of the Palau Constitution, privately-owned land surrounding a residence, as long as it is not generally accessible or visible to the public, should be protected from unwarranted searches regardless of whether it would be considered curtilage under current U.S. law. [9] On the facts here, the Court finds that defendant had a legitimate expectation of and a right to privacy in the area where the marijuana plants were found. The area was on his property and not visible from the public road. There was no evidence that the jungle behind defendant's house was ⊥313 generally frequented by the public, and there was evidence that the only pathway leading to the area was form the back of defendant's house less than 100 feet away. It was a place that, except with his permission or a search warrant granted by a court, defendant should reasonably have expected would be left alone by other people, including the police.

Does a rejection of the open fields doctrine in these circumstances hinder the police in their pursuit of illegal activity, including the possession of illegal drugs? The answer is no and yes. If the information the police have is sufficiently reliable to obtain a search warrant, then police work is not hindered. They must simply take the necessary steps of demonstrating probable cause to the court and obtaining a warrant. If the information is not so reliable, then the police are hindered, but the hindrance is one that the Constitution commands for the protection of all. To say that the police were permitted to intrude on the property behind defendant's house in the middle of the night without a warrant or probable cause is to say that they can do the same at any time on anyone's property. The Court thinks that the Constitution says otherwise.

For all of the reasons set forth above, the motion to suppress is granted in its entirety.

---

[9] It is noteworthy that although the Supreme Court in *Dunn* believed that adoption of the open fields doctrine would obviate "the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances," 104 S.Ct. at 1743, application of the curtilage analysis set forth in *Dunn* has required just such an approach, with cases turning on such matters as the fact that a defendant "was a practicing nudist and often walked around in the nude in the driveway outside the garage." *See United States v. Depew*, 8 F. 3d 1424, 1427 (9th Cir. 1993). *Compare id.* (reversing denial of motion to suppress marijuana plants) *with United States v. Benish*, 5 F.3d 20, 23-24 (3d Cir. 1993) (affirming denial) *with United States v. Swepston*, 987 F.2d 1510, 1513-16 (10th Cir. 1993) (affirming grant of suppression motion as to one defendant, reversing as to another). If anything, the approach outlined above, although more restrictive, provides clearer guidance as to when a search warrant must be obtained.