

SUPREME COURT LIVE

November 22, 2022

Fairbanks

ORAL ARGUMENT CASE SUMMARY

State of Alaska,

Petitioner,

v.

John William McKelvey III,

Respondent.

Supreme Court Case No. S-17910

Disclaimer: *This summary of the case highlights the major issues raised but is not intended to be comprehensive. It has been prepared for educational purposes only by the Supreme Court LIVE program staff and does not reflect the input or views of any member of the court.*

OVERVIEW OF THE CASE

Is aerial police surveillance of a person's home and its immediate surroundings using a telephoto lens a search that requires police to get prior court authorization when police are investigating someone for criminal activity? This case arises from a criminal investigation near Fairbanks. After an Alaska State Trooper received a tip about a marijuana grow operation at a person's residence and nearby greenhouse, the Trooper was flown in a small aircraft in the vicinity of the property so that the Trooper could take photographs using a telephoto lens. The Trooper relied on these photos and the tip to get a search warrant from a court official to search the home and greenhouse. The homeowner was later charged with drug-related offenses based on the evidence taken during the search. The homeowner argued that surveillance with an airplane and a telephoto lens was a search that violated his Constitutional rights to be free from unreasonable searches and seizures. The superior court decided the police photography in this case was not a search, but the Alaska Court of Appeals disagreed, deciding that the Trooper violated the Alaska Constitution by not getting a warrant first. The Alaska Supreme Court granted the State of Alaska's request for review of the Court of Appeals' decision.

ATTORNEYS

Attorney for Petitioner, State of Alaska:

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Robert John, Law Office of Robert John, Fairbanks.

Attorney for Amicus Curiae, Alaska Public Defender Agency (aligned with McKelvey):

Renee McFarland, Assistant Public Defender, Anchorage.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Troopers' use of aerial telephoto photography in this case violate the Fourth Amendment of the United States Constitution?
2. Did the Troopers' use of aerial telephoto photography in this case violate the Alaska Constitution's rights to privacy and to be free from unreasonable searches?

MAJOR AUTHORITIES TO CONSIDER

- **United States Constitution, Fourth Amendment**, Right to be free from unreasonable searches
- **Alaska Constitution, Article 1, § 14**, Searches and Seizures
- **Alaska Constitution, Article 1, § 22**, Right of Privacy.

United States Supreme Court Case Law

- ***California v. Ciraolo***, 476 U.S. 207, 106 S. Ct. 1809 (1986) ("naked-eye" surveillance of home and curtilage from airplane flying at 1000 feet).
- ***Dow Chemical Co. v. United States***, 476 U.S. 227, 106 S. Ct. 1819 (1986) (aerial photography of industrial facility taken directly above facility, using sophisticated equipment).
- ***Florida v. Riley***, 488 U.S. 445, 109 S. Ct. 693 (1989) ("naked-eye" helicopter surveillance of greenhouse at 400 feet).
- ***Kyllo v. United States***, 533 U.S. 27, 121 S. Ct. 2038 (2001) (surveillance using thermal imaging technology not then widely available).
- ***Florida v. Jardines***, 569 U.S. 1, 133 S. Ct. 1409 (2013) (scope of police

action within curtilage).

Federal Circuit Case Law

- ***United States v. Broadhurst***, 805 F.2d 849 (9th Cir. 1986) (naked-eye observation from different altitudes but no indication that greenhouse was in curtilage).
- ***United States v. Van Damme***, 48 F.3d 461 (9th Cir. 1995) (observations of structure not within curtilage from helicopter using a telephoto lens).

Alaska Supreme Court Case Law

- ***Cowles v. State***, 23 P.3d 1168 (Alaska 2001) (Identification of policy considerations for deciding whether government action is a search).
- ***Reeves v. State***, 599 P.2d 727 (Alaska 1979) (Alaska law preference for warrants for searches).
- ***Smith v. State***, 510 P.2d 793 (Alaska 1973) (adopting two-part test for reasonable expectation of privacy).
- ***Beltz v. State***, 221 P.3d 328 (Alaska 2009) (considering explicit right to privacy when holding that person has some objectively reasonable expectation of privacy in garbage set out for collection).

Alaska Court of Appeals Case Law

- ***McKelvey v. State***, 474 P.3d 16 (Alaska App. 2020) (decision under review: aerial surveillance at 600 feet of greenhouse in curtilage using telephoto lens is a search).

SUMMARY OF THE CASE

John McKelvey III lived in a rural area near Fairbanks. He had both a house and greenhouse on his property, and he had posted signs to keep people from entering or trespassing on his land. The greenhouse, which was close to the house, had trees around it shielding it from public view.

The Alaska State Troopers received a tip that McKelvey had a marijuana grow operation on his property, including information that the marijuana plants were growing in five-gallon buckets and were placed in the greenhouse at night. To verify this information a Trooper was flown in the vicinity of McKelvey's home and greenhouse; the Trooper took photos of the greenhouse using a camera with a telephoto lens. With the aid of the telephoto lens, the Trooper could see five-gallon buckets through the sides of the greenhouse, but even with the telephoto lens he was unable to determine what kind of plants were growing in the buckets.

The Trooper then got a **search warrant** from the court, authorizing him to search McKelvey's property, including his greenhouses. During the subsequent search the Troopers found evidence of a marijuana grow operation, as well as a firearm, methamphetamine, objects used in the sale of drugs, and a substantial amount of cash. McKelvey was charged with several **felonies** related to drug distribution and one felony related to his firearm.

McKelvey asked the **superior court** to **suppress** the evidence the Troopers had seized when they searched his home. He argued that the Troopers violated his rights under the **United States Constitution** and the **Alaska Constitution** to be free from unreasonable searches and seizures and that therefore the State should not be able to use the evidence against him in the criminal case. (If evidence is suppressed, the State cannot use it in a criminal case.) The superior court decided that the Troopers' actions were not a search and that the evidence was therefore lawfully obtained.

McKelvey and the State then agreed to present the superior court with **stipulated** (agreed-upon) facts related to two of the felonies against McKelvey, with the State **dismissing** the rest of the felonies. McKelvey was convicted of one drug-related charge and one charge related to his firearm; he was sentenced to four years.

COURT OF APPEALS' DECISION

McKelvey **appealed** to the **Alaska Court of Appeals**, an appellate court that hears only criminal cases. The Court of Appeals **reversed** the superior court's decision and held that the Troopers engaged in an illegal search when they flew near McKelvey's property and took the photos with a telephoto lens.

The Court of Appeals considered both federal and state law to decide whether the Troopers' actions were searches that could be conducted without a warrant. The court concluded that under federal law, the Troopers' activities were probably not a search because the Troopers used a telephoto lens that is available to the public and were flying in compliance with general aviation regulations. The court did not actually *decide* the federal law question, however, because it held that the actions were a search under state law.

In its decision, the Court of Appeals looked at whether McKelvey had an **objectively reasonable expectation** under the Alaska Constitution that his house and the nearby area, called the **curtilage**, would not be subject to aerial surveillance using the technology used here, a telephoto lens. The court first noted that under Alaska law, courts considering searches must balance societal values and come up with a legal rule that protects society's interest in a free and open society. The Court of Appeals did not think the Troopers' compliance with aviation safety regulations was a factor to consider

because the regulations were not written for the purpose of protecting privacy. The court relied on reasons from a dissent in a U.S. Supreme Court case to decide that an individual does not need to hide their curtilage from aerial observation to have an objectively reasonable expectation of privacy. The Court of Appeals rejected the general availability of technology as a factor to be used in deciding reasonableness. It based its conclusion in part on the right to privacy in the Alaska Constitution. The Court of Appeals also considered the steps McKelvey had taken at ground level to protect his privacy. Ultimately the court decided the Troopers' actions were a search for which they needed a warrant and reversed the superior court's decision.

ALASKA SUPREME COURT REVIEW

The Alaska Statutes do not give either the State or a criminal defendant the right to **appeal** a criminal case to the **Alaska Supreme Court**, but the Alaska Statutes allow the Supreme Court the **discretion** to review the Court of Appeals' decisions. In this case the State filed a **petition for hearing** asking the Supreme Court to review the case. Court rules set out reasons the Supreme Court may review a criminal case, including the existence of an important legal question with broad impact that the Alaska Supreme Court has never decided. The Supreme Court agreed to hear the case.

In addition to the State and McKelvey, who were parties in the superior court, the Supreme Court allowed the Public Defender Agency, which provides representation in criminal cases to indigent people, to file a brief as an **amicus curiae**, or friend of the court. The Public Defender Agency's brief addresses the impact the court's decision might have on poor people, who may not have the resources to take the same steps to protect their homes that wealthier people have.

LEGAL ISSUES GENERALLY

Both the United States Constitution and the Alaska Constitution recognize certain **individual rights**. The **Fourth Amendment** to the U.S. Constitution guarantees a person's right to be free from "**unreasonable searches and seizures**" of their houses. The Fourth Amendment has some requirements for search warrants as well.

Article I of the Alaska Constitution guarantees many individual rights, two of which are at issue in this case. **Article I, Section 14** is similar to the Fourth Amendment, guaranteeing individuals freedom from the government's unreasonable searches and seizures of their "homes and other property." **Article I, Section 22** recognizes an **individual right of privacy**, which "shall not be infringed."

The Constitutional guarantees about searches are not absolute: they do not completely forbid searches of the home, only unreasonable searches and seizures. The search and seizure amendments try to balance the government's interest in ensuring public

safety and individuals' interests in privacy and freedom from government intrusion into their lives. One way the amendments do this is by setting out basic requirements for search warrants.

Some police surveillance is not considered a search. Police can observe people and their activities in public settings or in open view. Courts can be asked whether a particular instance of police activity is a search, and if it is, whether the search was reasonable. McKelvey's case only looks at whether the Troopers' actions were a search.

Search and seizure law is related to people and their expectations related to their privacy. A person's expectation of privacy must be reasonable and may be related to where they are. People generally expect their homes will be more private than their offices, although people who have separate offices may expect some measure of privacy in their office as well. But a person's expectation of privacy has to be reasonable, which usually means it depends on many different facts and factors. People generally cannot have a reasonable expectation that activities they do in public, open to view, are private and therefore protected from police observation. To give an illustration, a person who engages in a criminal activity in a public park during daylight hours cannot have a reasonable expectation that the police will not see the activity. Similarly, a person who engages in activities in an unfenced front yard, open to public view, does not have a reasonable expectation of privacy because the police, like any member of the public, can see the yard and watch the person.

But there are a range of other situations that are harder to classify. Here are some situations that courts have had to consider:

- Does someone have a reasonable expectation of privacy in garbage that has been set out for collection? Can police take a person's garbage that has been set out for garbage collection and go through it without getting a warrant? ***Beltz v. State***, 221 P.3d 328 (Alaska 2009).
- Can the police attach a tracking device to a car to find out where a person has been? ***United States v. Jones***, 565 U.S. 400, 132 S. Ct. 945 (2012).
- Can the police install a video camera in the ceiling of an office to see whether an employee is stealing from an employer? ***Cowles v. State***, 23 P.3d 1168 (Alaska 2001).

To decide whether police activities constitute a search, the United States Supreme Court developed a two-part test that considers whether a person has a **reasonable expectation of privacy**. The first **prong** (part) of the test considers whether the person has a **subjective expectation of privacy**. This is rarely contested because it depends on the individual's intentions and actions. In McKelvey's case, the State agreed

McKelvey had a subjective expectation of privacy in his greenhouse because, among other things, he had posted “No trespassing” signs and the greenhouse was “surrounded by a natural sight-barrier of tall woods.”

The second prong of the test is called the **objective prong** and considers whether **society is prepared to recognize that expectation of privacy as reasonable**. Courts look at many factors when they evaluate the objective prong because it is based on the idea of reasonableness, which depends on the facts and circumstances of a given situation. In *Cowles v. State*, 23 P.3d 1168, 1171 (Alaska 2001), the Alaska Supreme Court said the question of reasonableness in cases about searches “entails a value judgment” that considers the benefits to society of the police conduct as well as how much people’s privacy and freedom would be diminished if the police conduct could continue without some sort of constitutional restraint. A court needs to keep in mind that our society is intended to be “a free and open society.”

Unlike the United States Constitution, the Alaska Constitution has an explicit individual right to privacy. The Alaska Supreme Court has decided that the explicit right to privacy makes the Alaska Constitution’s guarantee against unreasonable searches and seizures stronger than the United States Constitution’s.

The Court of Appeals’ discussion of the police activity in McKelvey’s case focused on two main issues: the use of aerial instead of ground-level surveillance and the use of a camera with a telephoto lens. Both of these issues are related to technological advances and how those advances impact privacy and our expectations of privacy.

When the United States was founded, airplanes did not exist. Legal ideas about whether police intrusion onto a person’s property was acceptable were related to trespass and legal rules about physically entering the property. A person can stop others from looking into their yards by erecting fences; they can post “no trespassing” signs to show they do not want people to come on their property. But is it possible to stop aerial surveillance? Is there any way to post the equivalent of a “no trespassing” sign for air traffic? If there is not, can society regulate aerial police surveillance, or should it simply be allowed as long as the police comply with aviation safety rules?

Similarly, technology that lets police see and hear more than human senses allow may require courts to consider how to balance the benefits to society of police being able to more closely monitor possible criminal activity against people’s rights to be free of unnecessary government investigation of their actions. Courts have developed rules about wiretapping and recording people without their knowledge, but questions about what kinds of technology can be used without needing a warrant and when that technology can be used are issues that continues to challenge courts.

U.S. Constitution

Even though the Court of Appeals' legal holding that the actions were a search was based on the Alaska Constitution, the State and McKelvey both argue about whether the Troopers conducted a search under the U.S. Constitution.

The United States Supreme Court has considered several cases about aerial surveillance, and the parties discuss federal cases in detail in their briefs. The Court decided that aerial surveillance using an airplane flying at an altitude of 1000 feet that did not involve any visual enhancement is not a search, even if the police were looking at the home's curtilage. It also decided that helicopter surveillance of the curtilage from 400 feet was not a search. In a case that did not involve a home or its curtilage, the Court decided a direct flight over an industrial plant was not a search even though the government used technology that allowed it to see fine details not visible to the naked eye.

The U.S. Supreme Court's decisions in the aerial surveillance cases about the curtilage were close decisions, with the Court deciding 5-4 in both cases that the actions were not a search. The Court's main opinions considered factors such as the flights' intrusiveness and their compliance with Federal Aviation Administration rules. The Court seemed to be comparing flights to ground-level observations that police can make from a public place, like a road, without entering into someone's private property. The dissenting opinions considered other facts, such as the purpose of the police flights and the frequency of public travel similar to the police activity.

The U.S. Supreme Court has considered sense-improving technology as well. In *Kyllo v. United States*, a case from 2001, the Court discussed police use of a thermal imaging device aimed at residence from a public street. The police wanted to see whether the occupant was using high-intensity lamps, which can be used to grow marijuana. The imaging device was not intrusive. Additionally the imaging did not show any details of the suspect's life, only areas where more heat was escaping from the house. The Court decided that the police surveillance using "a device that is not in general public use" in order "to explore details of the home that would previously have been unknowable without physical intrusion" is a search.

The parties disagree about whether the police actions here would be a search under the U.S. Constitution.

The State's Position: The Troopers' aerial surveillance was not a search. The airplane was a fixed-wing aircraft commonly used in Alaska and was operating in compliance with FAA regulations. Air travel in Alaska is commonplace, and the Troopers were in a place that any member of the public could be. The surveillance did not interfere with McKelvey's activities and were otherwise reasonable. McKelvey did nothing to try to

obstruct aerial views of his greenhouse, and the Troopers never flew directly over the home. Using a telephoto lens that is commonly available is no different from using binoculars, and courts have clearly allowed police to use binoculars when observing suspects from a public place.

McKelvey's Position: The Troopers' actions were a search under federal law because they allowed the Troopers' to see things within the curtilage of McKelvey's home that the Troopers could not otherwise see. The federal cases allowing aerial surveillance in the curtilage were all naked-eye observations. Because the Troopers could not see the plants or the buckets without enhancement, the surveillance was not permissible under federal cases.

Alaska Constitution

An important issue in the parties' arguments about the Alaska Constitution is the explicit right to privacy. Another difference between state and federal search and seizure law is the type of analysis a court performs when it tries to determine whether an expectation of privacy is objectively reasonable. According to the Court of Appeals, under federal law the question of objective reasonableness is based on whether a member of the public could do what the police did "without doing anything illegal." But Alaska law requires a court to balance different societal values and treats objective reasonableness as a legal question.

The Alaska Supreme Court has never considered an aerial surveillance case, so the parties rely on other search cases that they think are similar enough to this one. They also cite cases from other states' courts that have considered similar questions.

The State's Position: The Troopers' surveillance in this case is similar to *Cowles v. State*, where police installed a video camera in the ceiling above a person's desk in an office she shared with others. The supreme court held that the office worker did not have a reasonable expectation of privacy in that case, so the court should decide McKelvey did not have a reasonable expectation of privacy here. The Troopers engaged in activity that any member of the public could engage in, so McKelvey could not have a reasonable expectation of privacy in his greenhouse. The Court of Appeals was wrong to rely on cases from other states about aerial surveillance because airplane use and flying is far more common in Alaska than in other states.

McKelvey's Position: *Cowles* is different from this case because the court's decision depended on the public nature of employee's office. She shared the office with others and regularly interacted with the public. McKelvey's case involves his home and its curtilage, where the public

cannot go and where his expectations of privacy are high. With respect to the commonness of flights, McKelvey testified that he rarely saw aircraft near his home. Members of the public cannot do what the Troopers did here because civil law protects individuals from unwanted intrusions into their privacy by other people. The Court of Appeals was right to rely on the dissenting opinions in U.S. Supreme Court cases and cases from other states. Because of the expanding use of drones and other forms of technology, the court should limit police use of technology-enhanced aerial surveillance because it unduly interferes with people's privacy.

QUESTIONS FOR STUDENTS TO CONSIDER

1. Under Alaska law, the court needs to consider two societal goals: public safety and "a free and open society." What makes a society "free and open"? List some activities or restrictions that might show that a society is or is not free and open.
2. The second prong of the reasonable expectation of privacy test looks at whether society is prepared to recognize a person's expectations as reasonable. How should a court evaluate this question? Should it depend on what most people do? Should the court consider history to see what people have in the past considered private? Should a court use abstract ideas about privacy and freedom? Explain your answer.
3. As technology and uses associated with it change, people and society as a whole may develop different ideas about what is public and what is private. For example, people now communicate by posting on social media in a way that makes their comments more public than was previously possible. How should courts evaluate this type of change when they consider reasonable expectations of privacy?
4. The State argues that McKelvey did nothing to conceal his marijuana from aerial observation. Although he used translucent rather than transparent material for the roof, the sides of greenhouse were transparent. Can a person use a greenhouse in a manner that completely conceals the interior? Applying the State's argument more broadly, what steps can a person take to protect the curtilage of his home from aerial observation and still enjoy being outdoors? Is there some way to opt out of aerial surveillance? If not, should there be and how might society regulate this? How did the Court of Appeals resolve this problem? Evaluate its solution.
5. How important do you think it is to the privacy question that Alaskans use aircraft more frequently than people in the continental United States do? Should the

location of your home influence your expectations of privacy?

6. The U.S. Supreme Court decided in 2001 police needed a warrant to use certain technology that was then not generally available to the public. Given how rapidly technology changes, do you think this is a workable rule? Why or why not? Can you think of ways to improve it?
7. Police generally are allowed to follow people when people go out in public, including following them in a car. Technology can allow the police to watch people and their homes without needing personnel to conduct the surveillance, as with using drones or video cameras on a streetlight. What limits, if any, should courts put on police use of this type of technology?
8. What do you think is the State's strongest argument? What do you think is its weakest argument? Explain.
9. What do you think is McKelvey's strongest argument? What do you think is his weakest argument? Explain.
10. If you were a justice on the Alaska Supreme Court, how would you decide this case? Explain.