No. 2—10—0485
Order filed June 30, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellant,	)	
v.	)	No. 09—CF—5080
LEWIS C. FITZPATRICK,	)	Honorable George Bridges,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: The trial court erred in granting defendant's motion to quash and suppress: defendant was not arrested until the police had observed cannabis, which provided probable cause; the observation was not the product of an unlawful search, as defendant had no legitimate expectation of privacy in his driveway, where the observation was made; the observation was not the product of an unlawful seizure, as the officers' mere approach of defendant did not effect a seizure.

The State appeals from an order of the circuit court of Lake County granting the motion of defendant, Lewis C. Fitzpatrick, to quash his arrest and suppress evidence in a prosecution for various drug offenses. We reverse and remand.

Police officer Art Barden testified that he had received an anonymous tip that defendant was selling narcotics from a vehicle parked on his property. Barden traveled to defendant's home, apparently accompanied by another officer. They observed defendant in a vehicle that was parked in a driveway behind the house that led to an alleyway. The officers walked up to the vehicle. They did not have to open any gates or climb over any fences to reach the vehicle. Barden testified that he was in plain clothes but was displaying his badge. While standing beside defendant's vehicle, Barden observed defendant reach down to the floorboard. Barden looked down to the area where defendant was reaching, and he saw that defendant had a bag that appeared to contain cannabis. He testified that he had been trained in the visual identification of cannabis and had seen cannabis hundreds of times during his career as a police officer. Barden placed defendant under arrest and conducted a search incident to the arrest. Defendant testified that, when he was arrested, his vehicle was about 10 to 15 feet from his house.

The defendant bears the burden of proof at a hearing on a motion to quash his arrest and suppress evidence. *People v. Haywood*, 407 Ill. App. 3d 540, 542 (2011). "If the defendant makes a *prima facie* case that the evidence was obtained through an illegal search, the State can counter with its own evidence." *Id.* On appeal from a trial court's ruling on a motion to quash and suppress, the reviewing court "will accord great deference to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence." *People v. Close*, 238 Ill. 2d 497, 504 (2010). However, the trial court's ultimate decision to grant or deny the motion is subject to *de novo* review. *Id.*

Defendant contends that he made a *prima facie* case that Barden arrested him "without a warrant and without having observed any criminal activity." To the contrary, Barden did observe

criminal activity—he saw defendant handling what he had been trained to recognize, based on its packaging, to be cannabis. There is no dispute that defendant was not placed under arrest until *after* Barden observed this activity. At that point, probable cause to arrest defendant existed unless Barden's observation was itself a violation of defendant's fourth amendment rights. There are two reasons why that might be so. First, Barden had no warrant to search defendant's premises, so if Barden's observation of conduct occurring on defendant's property constituted a search, it would be unlawful unless it satisfied one of the "few specifically established exceptions" to the rule that warrantless searches are *per se* unreasonable. *People v. Spencer*, 408 Ill. App. 3d 1, 7 (2011). Second, the observation leading to defendant's arrest would have been unlawful if it was tainted by a prior unlawful detention of defendant (albeit one falling short of an arrest). The two questions before us then, are (1) whether an unlawful search occurred prior to defendant's arrest and (2) if not, whether the observation supplying probable cause for defendant's arrest occurred while defendant, though not yet under arrest, was otherwise being unlawfully detained. We consider these questions *seriatim.*

As our supreme court has quite recently observed:

> "The fourth amendment to the United States Constitution guards the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' [Citations.] A 'search' occurs when 'an expectation of privacy that society is prepared to consider reasonable is infringed.' [Citation.] Although the fourth amendment protects an individual's privacy in a variety of settings, '[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.' [Citation.] Because one's right to retreat into his or her home

> without unreasonable government interference is a core principle of the fourth amendment [citation], law enforcement officers generally may not enter, much less search, a person's home without a warrant absent exigent circumstances. [Citation.]" *People v. Absher*, No. 108441, slip op. at 5 (Ill. May 19, 2011).

The expectation of privacy attaches not only to the interior of one's home, but also to the home's curtilage, meaning "the land immediately surrounding and associated with the home." *People v. Pitman*, 211 Ill. 2d 502, 516 (2004). Curtilage consists of those areas that "harbor[] the intimate activities commonly associated with the sanctity of a person's home and the privacies of life." *Id.* Relevant considerations include "(1) the proximity of the area claimed to be the home's 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 observation by people passing by." *Id.*

Two Illinois decisions cited by the State, *People v. Petersen*, 110 Ill. App. 3d 647 (1982), and *People v. Scott*, 249 Ill. App. 3d 597 (1993), suggest that ordinarily there is no legitimate expectation of privacy in one's driveway. As stated in *Peterson*, "a police officer may enter an unenclosed driveway to obtain a closer look at an automobile which is partially visible from the street without violating any reasonable expectation of privacy." *Petersen*, 110 Ill. App. 3d at 651. In *Scott*, two police officers received an anonymous tip that an intoxicated individual was driving a brown pickup truck. The officers observed a truck fitting the description pull into a private driveway. The defendant was driving the truck. He staggered out of it and the officers approached him. The officers detected various signs that the defendant was intoxicated, and they placed him under arrest. Noting that a police officer who has probable cause to believe a crime has been committed may

make a warrantless arrest in a public place (*Scott*, 249 Ill. App. 3d at 603), we observed that "[i]n the absence of otherwise limiting circumstances, a driveway on private property, like the entrance to a private home, can be considered a public place" (*id.*).

Where a criminal defendant claims that an unlawful search occurred, he or she bears the burden of proving a legitimate expectation of privacy. *People v. McCrimmon*, 225 Ill. App. 3d 456, 464 (1992). Defendant did not meet that burden. Defendant's testimony that he was parked relatively close to the dwelling—about 10 to 15 feet—provides some support for a finding that the location was part of the curtilage, as does the fact that defendant's driveway led to the rear of the home rather than the front. But we do not believe that these factors are sufficient to establish a legitimate expectation of privacy, and no other evidence favors defendant on this point. No testimony was offered that the driveway was included within an enclosure surrounding the home, that it was used for any purpose that would give rise to a legitimate expectation of privacy, or that any efforts had been made to restrict access to the driveway or to shelter it from the gaze of passersby.

Moreover, although the activity that Barden observed occurred within a motor vehicle, it was in plain view from Barden's vantage point on the driveway. Accordingly, defendant had no legitimate expectation of privacy with respect to that activity. See *Kentucky v. King*, ___ U.S. ___, 131 S. Ct. 1849, 1858 (2011); *People v. Ledwa*, 81 Ill. App. 3d 276, 279 (1980) ("We do not believe that defendants had a reasonable expectation of privacy concerning objects which were in plain view of the officers lawfully in a position to observe them.").

The remaining question is whether defendant was being unlawfully detained when Barden observed him handling what appeared to be cannabis. Not every encounter between a police officer

and a civilian constitutes a seizure. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006). Rather, "[c]ourts have divided police-citizen encounters into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions *** which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) encounters that involve no coercion or detention and thus do not implicate fourth amendment interests." *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006). Defendant insists that his initial encounter with Barden and, it would appear, a second officer, was an investigative detention and that the anonymous tip Barden received did not create a reasonable, articulable suspicion of criminal activity that would justify the detention. According to defendant:

> "[W]hen Barden pulled his squad car into the driveway, he boxed [defendant] in. [Defendant's] car was parked in the rear of the property, so he was prevented from driving away if he chose to do so. Where Barden and his partner blocked [defendant's] car without a reasonable, articulable suspicion of criminal activity, they violated [defendant's] Fourth Amendment rights[.]"

From our review of the record, however, we find no evidence that Barden pulled his vehicle into defendant's driveway (rather than parking in the alleyway). Thus, support for defendant's assertion that he was "boxed in" lacks support in the record. Defendant acknowledges that a seizure does not occur merely because a police officer approaches a parked vehicle in order to speak with an occupant. It appears that nothing more occurred here. Because the record does not establish a seizure, there is no need to consider whether Barden had a reasonable suspicion of criminal activity when he and another officer approached defendant's vehicle.

For the foregoing reasons, we reverse the order of the circuit court of Lake County granting defendant's motion to quash and suppress, and we remand the cause for further proceedings.

Reversed and remanded.