CAMPERS, CURTILAGE AND THE FOURTH AMENDMENT

January 2011


When law enforcement officers think of the concept of “curtilage” and its application to the Fourth Amendment, houses, yards, and the “open fields” exception to search warrant requirement often come to mind. However, the Fourth Amendment also applies to tents, just as it does other residences. In light of the fact that a person has Fourth Amendment protection in his or her tent, the next issue would be whether they have Fourth Amendment protection in the area immediately surrounding the tent (the area that would be considered “curtilage” if the tent were a house). On January 20, 2011, the Ninth Circuit Court of Appeals decided the United States v. Basher, which addressed this issue.

The facts of Basher, taken directly from the case, are as follows:

On the night of September 1, 2007, campers on National Forest Service land in Yakima County, Washington heard intermittent gunfire over the course of two hours coming from a "dispersed" or undeveloped campsite on the bank of the South Fork River. Campers also observed a campfire at the same location, although a burn ban was in effect. Among the campers who heard the gunfire were two off-duty law enforcement officers.

The topography surrounding the dispersed campsite, including a rock wall, caused an echo phenomenon that distorted the report of the firearm, so the officers could not tell what kind of weapon was being discharged. While the echo phenomenon distorted the report of the firearm, it did not seem to affect the campers' ability to locate the source of the firing. Campers and one of the officers identified the dis-persed campsite as the source of the firing.

The two off-duty officers—Yakima County Sheriff's Deputy Dan Cypher 1 and Forest Service Officer Blair Bickel—checked into duty the following morning and each traveled toward the dispersed campsite to investigate. Officer Bickel arrived first and contacted Deputy Cypher by radio, informing...
him that he wished to investigate the occurrences at the camp site. Deputy Cypher was en route, and arrived immediately after the radio communication.

Upon arriving, Deputy Cypher parked his vehicle nose to nose with Basher's truck. While Deputy Cypher later testified that this would block the vehicle's exit, Officer Bickel testified that there was sufficient room to drive around the police vehicle. Deputy Cypher emitted a few short bursts from his vehicle's siren.

Deputy Cypher noticed that the driver's side window of Basher's truck was rolled down, and that a box of shotgun shells was lying in plain view on the driver's seat. He also noted that the box was open and half-empty. Deputy Cypher pointed out the box of shotgun shells to Officer Bickel.

The officers also observed the fire ring as they approached the tent. Officer Cypher testified that in addition to the rocks typically placed around the edge of a fire ring, this fire ring had additional rocks stacked on top, creating a cone of rocks that could inhibit observation of the fire. Deputy Cypher testified that he saw smoke rising from the fire ring, and that the contents appeared to be smoldering. Officer Bickel remembered seeing ashes that were consistent with a recent fire, but could not recall seeing smoke.

From their position, the officers were facing the rear of the tent. Upon drawing closer to the tent, Deputy Cypher announced "Sheriff's Office" after noticing that the occupants were moving within the tent. The occupants were asked to exit the tent, and they came out of their own volition.

As the individuals exited the tent, Deputy Cypher told them to keep their hands in view. Deputy Cypher could not recall his exact words, and Officer Bickel could only recall that the word "hands" was used. The officers did not have their weapons drawn or yell at Basher or his son. There was no testimony that Basher and his son were ordered out of the tent. The officers guided Basher away from the tent, slightly separating him from his son. The officers engaged in small talk with them, and Basher lit a cigarette. No one was placed in handcuffs or frisked.

Deputy Cypher then asked Basher where the gun was. Basher responded "What gun?" Deputy Cypher told Basher that he had seen the shotgun shells and explained there were reports of gunfire coming from the campsite. Basher responded that the gun was in the tent.

Deputy Cypher asked if Basher's son could retrieve the weapon from the tent. Basher looked at his son and nodded affirmatively for him to retrieve the gun. Deputy Cypher gave the son instructions on how to safely retrieve the weapon. The officers did not enter the tent at any point.

The son went into the tent, and came out with a sawed-off shotgun. Deputy Cypher testified that he immediately recognized that the shotgun was of an illegal length, and arrested Basher. Deputy Cypher read Basher his Miranda rights, and Basher waived his rights. Basher subsequently made inculpatory statements. Upon running Basher's name through a database, Deputy Cypher discovered that Basher had an outstanding warrant from Lewis County. Basher was subsequently transported to jail. Ultimately, Basher was not formally charged with violating provisions in the Code of Federal Regulations ("C.F.R.") regarding the illegal campfire or the firing of the weapon, nor was he charged for analogous state crimes.
Basher was charged with federal firearms violations and indicted. He filed a motion to suppress and argued that the officers violated his *Fourth* and *Fifth Amendment* rights during the encounter. The district court denied the motion and he appealed to the Ninth Circuit Court of Appeals.

On appeal, Basher first argued that he and his son were illegally detained without reasonable suspicion when the officers went to their campsite to investigate alleged crimes (the campfire and the gunfire). The Ninth Circuit held that the Basher’s were detained pursuant to a valid *Terry* stop based upon reasonable suspicion. The court stated:

An investigatory stop or encounter does not violate the *Fourth Amendment* if the officers have reasonable suspicion supported by articulable facts that criminal activity may be afoot. [internal quotations omitted]

In this case, the officers heard the gunfire and witnesses told them origin. The facts here support the conclusion that the officers had sufficient reasonable suspicion to justify a *Terry* stop.

As part of this issue, Basher also tried to argue that the officers did not have sufficient reasonable suspicion because the alleged offenses had ceased (the fire was extinguished and the gunfire had ceased). However, the court stated it was reasonable or the officers to believe that these offense would reoccur.

Additionally, when Basher and his son exited the tent, it was reasonable for the officers to question Basher about the firearm because it was related to investigation and related to the officer’s safety. The court stated:

When police officers investigate gun crimes, it is routine to ask questions about guns. It is reasonable for officers investigating a gun crime to determine whether a firearm is present, and what kind of firearm it is. Therefore, the questions regarding the gun were within the scope of the *Terry* encounter.

Basher also argued that the officer’s violated is *Fifth Amendment* rights when they questioned him without advising him of his rights under *Miranda*. The court stated that officers are required to inform suspects of their *Fifth Amendment* rights before *custodial interrogations*. The standard for determining whether police questioning rises to the level of a custodial interrogation is summed up in the following rule:

*Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him “in custody.” The “ultimate inquiry” underlying the question of custody is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. To answer this question, the reviewing court looks to the totality of the circumstances that might affect how a reasonable person in that position would perceive his or her freedom to leave.

In this case, the court noted that the officers were “making small talk” with the Bashers and allowed Mr. Basher to smoke. The officers also did not use any physical force or display their weapons to Mr. Basher. While Basher complains that the officer’s sounded their sirens and announced “sheriff’s
department”, this was only done to alert the Basher’s of the officer’s presence. Further, the officer’s comment that Basher show his hands did not elevate the encounter to one of “custody.” As such, Miranda was not required during this encounter.

Further, the court reasoned that even if Basher were considered “in custody” for the purpose of Miranda, the “public safety exception” would apply. Under the public safety exception to Miranda

An officer’s questioning of a suspect without a Miranda warning is proper if the questioning is related to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon.xi [internal quotations omitted]

In this case, Basher was not secured and could have retrieved the weapon. Therefore, it was reasonable for the officers to ask him where it was located for their safety.

Basher also argued that he never consented to the retrieval of the weapon from the tent. Evidence in the record established that Basher nodded his head affirmatively when the officer asked Basher if his son could retrieve the shotgun from the tent. The court noted that “head nods have been found to express consent.”xii In this case, the court held that the consent was voluntary, specific and unambiguous; therefore, the consent was valid.

Basher, finally, argues that the warrantless entry and search of the camp violated his rights under the Fourth Amendment. In other words, Basher was attempting to argue that the campsite was analogous to the curtilage of a residence. As a review, curtilage is the area surrounding a residence that is afforded Fourth Amendment protection. The factors that the courts consider when determining whether an area is to be considered constitutionally protected curtilage are

[T]he proximity of the area to the home, the nature of the uses to which the area is put, whether the area is included in an enclosure around the home, and the steps taken by the resident to protect the area from observation.xiii

In this case, the court noted that the campsite was dispersed or undeveloped, rather than a developed campsite. The court then stated

Classifying the area outside of a tent in a National Park or National Forest lands campsite as curtilage would be very problematic … campsites, such as the dispersed, ill-defined site here, are open to the public and exposed.xiv

The court then held that since Basher was in an undeveloped campsite, visible to other campers there was no reasonable expectation of privacy in his campsite and the area outside of his tent is not considered constitutionally protected curtilage.

The Ninth Circuit then affirmed the decision of the district court denying Basher’s motion to suppress and stated

In summary, we hold that the officers’ interaction with Basher constituted a valid Terry encounter, and that Basher’s Fifth Amendment rights were not violated.
We further hold that Basher's *Fourth Amendment* rights were not violated, and that he consented to the retrieval of the shotgun from the tent.

Finally, we hold that the area of a campsite outside of a tent in these circumstances is not curtilage.\(^{xv}\)

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**NOTE:** Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

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**CITATIONS:**

\(^{1}\) See *United States v. Gooch*, 6 F.3d 673 (9th Cir. 1993)

\(^{ii}\) No. 09-30311, 2011 U.S. App. LEXIS 1064 (9th Cir. Decided January 20, 2011)

\(^{iii}\) *Id.* 2-6

\(^{iv}\) *Id.* at 7-8

\(^{v}\) *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968))

\(^{vi}\) *Id.* at 9

\(^{vii}\) *Id.* at 10


\(^{ix}\) *Basher at 10*

\(^{x}\) *Id.* (citing *Stanley v. Schriro*, 598 F.3d 612, 618 (9th Cir. 2010))

\(^{xi}\) *Id.* at 14 (citing *New York v. Quaries*, 467 U.S. 649 (1984))

\(^{xii}\) *Id.* at 16 (see *United States v. Yockey*, 654 F. Supp. 2d 945 (N.D. Iowa 2009))

\(^{xiii}\) *Id.* at 20 (citing *United States v. Dunn*, 480 U.S. 294 (1987))

\(^{xiv}\) *Id.* at 19

\(^{xv}\) *Id.* at 20-21