

THE ARKANSAS COURT OF APPEALS HOLDS THERE IS NOT A
REASONABLE EXPECTATION OF PRIVACY IN THE AREA
SURROUNDING A HOME WHEN THE AREA COULD BE VIEWED
BY ANYONE RESPONDING TO A FOR SALE SIGN

In *Percefull v. State*,¹ the Arkansas Court of Appeals affirmed the conviction of Richard Percefull for manufacturing marijuana.² The Court of Appeals found that sufficient evidence supported Mr. Percefull's conviction for manufacturing marijuana; Mr. Percefull did not have a reasonable expectation of privacy in the area from which a police officer viewed the marijuana plants growing; the trial court did not abuse its discretion by allowing the prosecutor to ask questions exploring the link between marijuana and the use of hard drugs; there was no rational basis for giving jury instructions on a lesser-included offense; and Mr. Percefull did not suffer any prejudice as the result of a discovery violation.³

Marijuana was discovered at Mr. Percefull's residence after a confidential informant contacted Lieutenant Jim Bailey of the Malvern Police Department.⁴ The informant told Lt. Bailey that he owned pigs which were being raised on Mr. Percefull's property, and that he wanted someone to go with him to Mr. Percefull's property to check on his pigs because there was marijuana growing there, and he was concerned.⁵

Prior to going to Mr. Percefull's property, Lt. Bailey informed detectives that he suspected there was marijuana growing on the property.⁶ Lt. Bailey accompanied the informant to Mr. Percefull's property, where he observed signs advertising "pigs for sale" at Mr. Percefull's address.⁷ After arriving on the property, Lt. Bailey and the informant walked up steps off the driveway which led to the pig pens located behind the house, and, from that spot, Lt. Bailey was able to observe marijuana plants.⁸ The plants were behind a Styrofoam wall that was built along the driveway.⁹ At that point, Lt. Bailey contacted the Hot Springs County Sheriff's Department to obtain

1. 2011 Ark. App. 378, ___ S.W.3d ____.

2. *Id.* at 1, ___ S.W.3d at ____.

3. *Id.* at 4-7, 9-10, ___ S.W.3d at ____.

4. *Id.* at 1-2, ___ S.W.3d at ____.

5. *Id.* at 2, ___ S.W.3d at ____.

6. *Id.*, ___ S.W.3d at ____.

7. *Percefull*, 2011 Ark. App. 378, at 2, ___ S.W.3d at ____.

8. *Id.*, ___ S.W.3d at ____.

9. *Id.*, ___ S.W.3d at ____.

a search warrant, and the marijuana plants outside the house as well as marijuana in bags inside the house were seized pursuant to that warrant.¹⁰

Mr. Percefull claimed he was out of town when the marijuana was found growing on his property, and that he had not been growing marijuana prior to leaving town.¹¹ He denied having any “pigs for sale” signs and denied that the informant had livestock on his property.¹² Mr. Percefull accused the informant of planting the marijuana,¹³ claiming that the informant was suspected of several burglaries and that “this [was] how [the informant] keeps from going to jail.”¹⁴

The Arkansas Court of Appeals decided five issues on appeal.¹⁵ First, the court held that there was sufficient evidence to support Mr. Percefull’s conviction for manufacturing marijuana because the state did not have to prove actual, physical possession of the marijuana.¹⁶ Second, the court held that Mr. Percefull did not have a reasonable expectation of privacy in the area where Lt. Bailey was standing when he saw the marijuana plants; therefore, the trial court did not err in denying the motion to suppress.¹⁷ Third, there was no abuse of discretion when the trial court allowed the prosecutor to ask jurors whether they knew someone with a hard-drug problem.¹⁸ Fourth, there was no rational basis for giving the jury instructions on a lesser-included offense because Mr. Percefull presented a complete-denial defense.¹⁹ Finally, the court held that the State committed a discovery violation by failing to give to Mr. Percefull a crime lab sheet during discovery, but the violation did not necessitate reversal of Mr. Percefull’s conviction because he was not prejudiced by the error.²⁰

Mr. Percefull challenged the sufficiency of the evidence, asserting that the State did not present any direct evidence that he possessed the marijuana growing on his property.²¹ The court reviewed the evidence in the light most favorable to the State to determine if there was substantial evidence to support the conviction.²² The court stated that it was unnecessary for the State to prove actual physical possession of the marijuana—constructive

10. *Id.*, ___ S.W.3d at ____.

11. *Id.* at 3, ___ S.W.3d at ____.

12. *Id.*, ___ S.W.3d at ____.

13. *Percefull*, 2011 Ark. App. 378, at 10, ___ S.W.3d at ____.

14. *Id.* at 3, ___ S.W.3d at ____.

15. *Id.*, ___ S.W.3d at ____.

16. *Id.* at 4, ___ S.W.3d at ____.

17. *Id.* at 6, ___ S.W.3d at ____.

18. *Id.* at 6-7, ___ S.W.3d at ____.

19. *Percefull*, 2011 Ark. App. 378, at 9-10, ___ S.W.3d at ____.

20. *Id.* at 9, ___ S.W.3d at ____.

21. *Id.* at 4, ___ S.W.3d at ____.

22. *Id.* at 3-4, ___ S.W.3d at ____.

possession was sufficient.²³ To establish constructive possession, the State must prove that the Defendant had control over the contraband, and control can be inferred from ownership of the property where the contraband was found.²⁴ Therefore, there was sufficient evidence to support Mr. Percefull's conviction because the State introduced evidence that showed there was marijuana growing on property for which Mr. Percefull was the sole owner and that Mr. Percefull owned and occupied the residence on the property.²⁵

Next, the court held that Mr. Percefull did not have a reasonable expectation of privacy in the area where Lt. Bailey was standing when he saw the marijuana plants, therefore, the marijuana was not seized as the fruit of an illegal search.²⁶ The court noted that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," was protected by both the U.S. Constitution²⁷ and the Arkansas Constitution.²⁸ The court stated that the determinative factor for analysis under each was whether there was a reasonable expectation of privacy in the area searched.²⁹

Mr. Percefull argued that the area where the marijuana plants were growing was curtilage, and he had a legitimate expectation of privacy based on the factors articulated in *United States v. Dunn*.³⁰ He also insisted that the informant did not own any livestock on his property and did not have permission to be on the property.³¹ The court noted that although the Fourth Amendment generally protects the home and its curtilage, areas such as a driveway or walkway are not protected because there is not a reasonable expectation of privacy, as they are frequently used by visitors to approach a residence.³² In this case, the court said that the steps Lt. Bailey viewed the marijuana plants from would have been used by visitors responding to the "pigs for sale" sign, therefore, the court held that Mr. Percefull did not have

23. *Id.* at 4, ___ S.W.3d at ___ (citing *Morgan v. State*, 2009 Ark. 257, 308 S.W.3d 147).

24. *Percefull*, 2011 Ark. App. 378, at 4, ___ S.W.3d at ___ (citing *Ibarra v. State*, 2009 Ark. App. 707, at 5).

25. *Percefull*, 2011 Ark. App. 378, at 4-5, ___ S.W.3d at ___.

26. *Id.* at 6, ___ S.W.3d at ___.

27. U.S. CONST. amend. IV.

28. ARK. CONST. art II, § 15.

29. *Percefull*, 2011 Ark. App. 378, at 6, ___ S.W.3d at ___.

30. 480 U.S. 294 (1987) (explaining that the factors include the proximity of the claimed curtilage area to the home, the presence of an enclosure surrounding the home that the area is included within, the use of the area by the homeowner, and the measures taken by the resident to protect the area from being viewed by those who might pass by it).

31. *Percefull*, 2011 Ark. App. 378, at 5-6, ___ S.W.3d at ___.

32. *Id.* at 6, ___ S.W.3d at ___.

a reasonable expectation of privacy in that area.³³ Accordingly, there was no error when the trial court denied Mr. Percefull's motion to suppress.³⁴

The appellate court also held that there was no abuse of discretion when the trial court allowed the prosecutor to question jurors about whether they knew someone with a "hard-drug problem."³⁵ Voir dire examination is used to discover information that may be used as the basis for a peremptory challenge,³⁶ and decisions regarding the conduct of voir dire are not reversed absent an abuse of discretion.³⁷ The question was posed after the prosecutor made a successful challenge to one possible juror who declared, "well, I just don't think there's anything wrong with growing a little pot."³⁸ The State explained that the question was meant to explore the possible jurors' attitudes toward marijuana, while Mr. Percefull argued that the prosecutor asked the question to "link marijuana to other hard drugs in the jurors' minds."³⁹ The court found that there was no abuse of discretion given the circumstances.⁴⁰

The court of appeals also rejected Mr. Percefull's argument that the trial court erred when it refused to instruct the jury on the lesser-included offense of possession of marijuana.⁴¹ The court reviewed the decision for abuse of discretion⁴² and stated that the decision of the trial court is affirmed where there is no rational basis for giving the instruction for the lesser offense.⁴³ There is no rational basis for giving instructions on lesser-included offenses when the defendant asserts a defense of complete denial.⁴⁴ The court, therefore, concluded that there was no rational basis for giving the jury instructions and no abuse of discretion because Mr. Percefull had completely denied manufacturing the marijuana—even asserting that the informant had planted it.⁴⁵

Lastly, the court of appeals held the introduction of a crime-lab submission sheet that the State failed to give to Mr. Percefull during discovery

33. *Id.*, ___ S.W.3d at ____.

34. *Id.*, ___ S.W.3d at ____.

35. *Id.* at 7, ___ S.W.3d at ____.

36. *Id.*, ___ S.W.3d at ____ (citing *Hutcheson v. State*, 92 Ark. App. 307, 318, 213 S.W.3d 25, 32 (2005)).

37. *Percefull*, 2011 Ark. App. 378, at 7, ___ S.W.3d at ____.

38. *Id.*, ___ S.W.3d at ____.

39. *Id.*, ___ S.W.3d at ____.

40. *Id.*, ___ S.W.3d at ____.

41. *Id.* at 10, ___ S.W.3d at ____.

42. *Id.* at 9, ___ S.W.3d at ____ (citing *Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002)).

43. *Percefull*, 2011 Ark. App. 378, at 9, ___ S.W.3d at ____ (citing *Cook*, 77 Ark. App. 20 (2002)).

44. *Id.*, ___ S.W.3d at ____.

45. *Id.* at 10, ___ S.W.3d at ____.

constituted error, but it did not necessitate reversal because the error was harmless.⁴⁶ A reversible discovery violation exists when the Defendant is prejudiced by a failure to disclose; the Defendant has the burden of proving the discovery violation was sufficient to undermine confidence in the outcome of the trial.⁴⁷ The appellate court will not reverse if the error was harmless.⁴⁸

The evidence at issue was a crime lab submission sheet that listed items submitted for testing to the State Crime Lab.⁴⁹ Mr. Percefull argued that allowing the sheet into evidence violated Arkansas Rule of Criminal Procedure 17.1.⁵⁰ The Court of Appeals stated that the sheet was indeed covered by Rule 17.1(a)(v),⁵¹ and that its submission into evidence was an error pursuant to that rule.⁵² Mr. Percefull, however, did not demonstrate that he was prejudiced by the submission because of the following: the sheet listed items submitted to the crime lab for testing, the test results from these items were included in the crime laboratory's analysis which was admitted into evidence, and Mr. Percefull did not dispute the report's conclusions.⁵³ Thus, even though there was error, the court did not reverse because the error was harmless.⁵⁴

Percefull v. State expands the areas in which homeowners do not have a reasonable expectation of privacy. The court expanded prior case law that held there was no reasonable expectation of privacy in areas used by visitors to approach a home by holding there was not a reasonable expectation of privacy in other areas visitors responding to publicly posted signs and notices may use. In this case, the "pigs for sale" sign expanded the unprotected area beyond the driveway to include stairs that led behind the house to where the pig pens were located. Generally, a home's curtilage is still protected, but there may be exceptions for areas in which the homeowner has implicitly invited members of the public.

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46. *Id.* at 9, ___ S.W.3d at ____.

47. *Id.* at 8, ___ S.W.3d at ____ (citing *Lacy v. State*, 2010 Ark. 388, ___ S.W.3d ____).

48. *Id.*

49. *Percefull*, 2011 Ark. App. 378, at 9, ___ S.W.3d at ____.

50. ARK. R. CRIM. P. 17.1

51. *Percefull*, 2011 Ark. App. 378 at 9, ___ S.W.3d at ____ (citing ARK. R. CRIM. P. 17.1(a)(v) ("which includes any document that the prosecuting attorney intends to present at trial")).

52. *Percefull*, 2011 Ark. App. 37, at 9, ___ S.W.3d at ____.

53. *Id.*, ___ S.W.3d at ____.

54. *Id.*, ___ S.W.3d at ____.