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## COMMENT

### THE ILLUSORY CONSTITUTIONAL PROTECTION OF “NO TRESPASSING” SIGNS IN TENNESSEE

*STATE V. CHRISTENSEN*, 517 S.W.3D 60 (TENN. 2017).

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In *State v. Christensen*,<sup>1</sup> the Tennessee Supreme Court decided whether police officers violated the defendant’s constitutional right against unreasonable searches and seizures when the officers entered the defendant’s property despite the presence of “No Trespassing” signs. The court ruled that the officers’ entrance did not constitute a violation of the defendant’s constitutional rights.<sup>2</sup> Thus, the court upheld the ruling of the Tennessee Court of Criminal Appeals, stating that “No Trespassing” signs, alone, do not prohibit officers

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<sup>1</sup> 517 S.W.3d 60, 68–69 (Tenn. 2017).

<sup>2</sup> *Id.* at 63–64.

from coming onto the curtilage of a home to conduct a consensual knock-and-talk encounter. Therefore, the ruling by the trial court, finding the defendant guilty, was upheld.<sup>3</sup>

On August 3, 2013, two narcotics investigators responded to a tip regarding a pseudoephedrine purchase.<sup>4</sup> The tip eventually led them to the defendant's home, which had a gravel driveway.<sup>5</sup> Two "No Trespassing" signs were posted at the entrance to the driveway.<sup>6</sup> Further, there were no physical obstructions preventing entrance to the driveway.<sup>7</sup> The defendant came out to meet the investigators as they approached his porch.<sup>8</sup> When the defendant opened the door, the investigators smelled the distinct odor that comes with the production of methamphetamine.<sup>9</sup> The officers then spoke to the defendant and asked for consent to search his home.<sup>10</sup> The defendant told the investigators that he had done nothing illegal and would not consent to the search.<sup>11</sup> At this point, the investigators determined that, due to the present exigent circumstances (namely the volatile nature of the chemicals used in methamphetamine production), they had to enter the home to investigate further.<sup>12</sup> One investigator forced open the locked door to the home and began searching.<sup>13</sup> This initial entry led to the discovery of a methamphetamine lab and several firearms.<sup>14</sup>

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<sup>3</sup> *Id.* at 79.

<sup>4</sup> *Id.* at 64.

<sup>5</sup> *Id.* at 65.

<sup>6</sup> *Id.* at 67.

<sup>7</sup> *Id.* at 64.

<sup>8</sup> *Id.* at 65.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 66.

At trial, the defendant filed a motion to suppress the evidence gathered as a result of the warrantless search of his home, claiming that the presence of a “No Trespassing” sign meant that a warrant was required to enter his property.<sup>15</sup> The defendant’s motion was denied and he was convicted of five separate criminal charges.<sup>16</sup> Later, on direct appeal, the defendant contended that the trial court erred in denying his motion to suppress the evidence found within his home.<sup>17</sup> Conducting de novo review, the court of appeals determined that the growing legal consensus was that “the implied invitation of the front door can be revoked but that the revocation must be obvious to the casual visitor who wishes only to contact the residents of a property.”<sup>18</sup> Based on this determination, the court of appeals found the presence of a mere “No Trespassing” sign insufficient to revoke any aforementioned implied invitation.<sup>19</sup>

On appeal, the Tennessee Supreme Court began its review by affirming the rights enshrined in the federal and state constitutions forbidding warrantless searches of homes and specific Fourth Amendment protections against searches on the curtilage of one’s home.<sup>20</sup> The court pointed out, however, that not every police interaction on the curtilage of one’s home constitutes a search under the Fourth Amendment.<sup>21</sup> Citing the U.S.

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<sup>15</sup> State v. Christensen, No. W2014-00931-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 357, at \*2 (Tenn. Crim. App. May 14, 2015).

<sup>16</sup> *Christensen*, 517 S.W.3d at 63.

<sup>17</sup> *Christensen*, 2015 Tenn. Crim. App. LEXIS 357, at \*7.

<sup>18</sup> *Id.* at \*13 (citing State v. Grice, 767 S.E.2d 312, 319 (N.C. 2015)).

<sup>19</sup> *Id.*

<sup>20</sup> *Christensen*, 517 S.W.3d at 68–69 (citing U.S. CONST. amend. IV; TENN. CONST. art. I, § 7). The court here “assume[d] without deciding” that the driveway was part of the curtilage of the defendant’s home. *Id.* at 69.

<sup>21</sup> *Id.* at 69.

Supreme Court's ruling in *Florida v. Jardines*,<sup>22</sup> the court recognized the right of police officers to approach the curtilage of a home under "knock-and-talk" rules.<sup>23</sup> It was further established that "knock-and-talk" interactions are not considered searches under the Fourth Amendment; therefore, the question became whether the defendant had revoked this implied invitation to "knock-and-talk."<sup>24</sup>

The issue of whether "No Trespassing" signs are enough to revoke any implied license to "knock-and-talk" has been the subject of many state and federal cases.<sup>25</sup> However, the majority of states have found that such signs were not enough to revoke an implied license to "knock-and-talk."<sup>26</sup> The court specifically noted *State v. Rigoulot*,<sup>27</sup> which stated that "No Trespassing" signs "cannot reasonably be interpreted to exclude normal, legitimate inquiries."<sup>28</sup> In order to determine when a "No Trespassing" sign may be reasonably interpreted to forbid "knock-and-talk" situations, the court turned to the Tenth Circuit case of *United States v. Carloss*.<sup>29</sup> The court specifically pointed to a concurring opinion in *Carloss*, in which Chief Judge Tymkovich said that the

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<sup>22</sup> *Id.* at 69–70 (quoting *Florida v. Jardines*, 133 S. Ct. 1409, 1415–16 (2013) (holding that while police officers have a license to approach the home and knock, if they are engaging in conduct that is clearly a search, around the curtilage, any such evidence gathered as a result should be suppressed)).

<sup>23</sup> *Id.* at 70 (citing *State v. Cothran*, 115 S.W.3d 513, 522 (Tenn. Crim. App. 2003)).

<sup>24</sup> *Id.* (citing *Jardines*, 133 S. Ct. at 1417–18).

<sup>25</sup> *Id.* at 72 (citing cases).

<sup>26</sup> *Id.* at 73 (citing cases).

<sup>27</sup> 846 P.2d 918, 923 (Idaho Ct. App. 1992) (stating that "No Trespassing" signs are not enough to forbid normal legitimate requests, and that police officers do not violate the Fourth Amendment if they enter the curtilage under these circumstances).

<sup>28</sup> *Id.* at 923.

<sup>29</sup> 818 F.3d 988, 990 (10th Cir. 2016).

legal standard to be applied in these cases should be whether a reasonable person, under a totality of the circumstances, would view a “No Trespassing” sign as something that would place any bearing on one’s ability to go up to the curtilage of the home and knock.<sup>30</sup> The Tennessee Supreme Court adopted this totality of the circumstances standard.<sup>31</sup> In examining the totality of the circumstances in the defendant’s case, the court determined that the simple presence of “No Trespassing” signs did not suffice to deter officers from approaching the curtilage of his home.<sup>32</sup> The court suggested, however, that if the defendant’s driveway had been blocked by a locked gate or a fence, then it would have been more clear to the officers that any license to approach the home had been revoked.<sup>33</sup> No such barrier existed in the defendant’s case.<sup>34</sup> Based on this determination, the court found that the defendant had no expectation of privacy in regards to individuals approaching his home.<sup>35</sup> Thus, the ruling of the trial court was upheld.<sup>36</sup>

The dissent rebuffed the court’s assertion that it might take a locked fence or gate for a citizen to invoke his Fourth Amendment rights.<sup>37</sup> In writing the dissent, Justice Sharon Lee pointed out that the court’s physical barriers standard would leave poorer citizens without the means to invoke their rights.<sup>38</sup> Justice Lee further stated that “No Trespassing” signs clearly state the property owner’s desire to not have visitors.<sup>39</sup> Many other

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<sup>30</sup> *Christensen*, 517 S.W.3d at 74–75 (citing *Carloss*, 818 F.3d at 999–1000).

<sup>31</sup> *Id.* at 75.

<sup>32</sup> *Id.* at 75–76.

<sup>33</sup> *Id.* at 78–79.

<sup>34</sup> *Id.* at 76–77.

<sup>35</sup> *Id.* at 78.

<sup>36</sup> *Id.* at 79.

<sup>37</sup> *Id.* (Lee, J., dissenting).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 80.

jurisdictions have taken such a stance.<sup>40</sup> One such example is *People v. Scott*,<sup>41</sup> where the New York Court of Appeals declared that physical barriers and/or appropriate signage was enough to make clear that entry was not permitted by the property owner.<sup>42</sup> However, the dissent also considered the totality of the circumstances standard set forth by the court.<sup>43</sup> Justice Lee contended that, even under the totality of the circumstances standard, the defendant made it clear that he wanted no visitors.<sup>44</sup> Justice Lee argued that while the majority claimed it was applying a totality of the circumstances standard, it failed to actually weigh the significance of the signs.<sup>45</sup> Citing a case from the Maryland Court of Appeals, Justice Lee contended that the presence of two clearly visible “No Trespassing” signs was enough to make it clear to the investigators that no one was welcome to approach the home.<sup>46</sup> Justice Lee also argued that because the defendant had made clear that no one was welcome on his property, he had a reasonable expectation of privacy on his curtilage, and those expectations were violated by the warrantless intrusion by the investigators.<sup>47</sup>

*Christensen* will have an effect on homeowners across the state of Tennessee by raising the bar for what revokes the implied invitation for individuals to approach the curtilage of their home and knock. Now, Tennesseans must utilize a physical barrier, such as a locked fence or gate, to put the public on notice that unsolicited visitors are not welcome to approach their home. While this

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<sup>40</sup> *See, e.g., id.* at 80–81 (citing cases).

<sup>41</sup> 593 N.E.2d 1328, 1338 (N.Y. 1992).

<sup>42</sup> *Id.*

<sup>43</sup> *Christensen*, 517 S.W.3d at 82 (Lee, J., dissenting).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (citing *Jones v. State*, 943 A.2d 1, 12 (Md. Ct. Spec. App. 2008)).

<sup>47</sup> *Id.* at 83.

ruling follows most other jurisdictions in making physical barriers the standard for revocation of the implied invitation to “knock-and-talk,” it still leaves some questions. One such question is whether such a rule will create a burden on lower income households that wish to invoke their Fourth Amendment rights.<sup>48</sup> It will be important to follow future cases to see if there are any disparities based on income. Another question is how other courts will treat the varying rulings taken by jurisdictions on this issue. While most jurisdictions have adopted the same rule as Tennessee, others have chosen the alternative.<sup>49</sup> Until there is a significant divergence on this issue in the federal courts, however, this area of Fourth Amendment jurisprudence will likely remain one governed by jurisdiction-specific rules.

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<sup>48</sup> *See id.* at 79.

<sup>49</sup> *Id.* at 80.