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United States v. Vankesteren

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UNITED STATES V. VANKESTEREN

Last year, in *United States v. Vankesteren*,[1] the United States Court of Appeals for the Fourth Circuit was the first among the circuits to resolve an issue at the heart of two lines of Fourth Amendment jurisprudence: whether the police can use video surveillance on a person's property in a location distant from the person's home.[2]

In Fourth Amendment search cases, the Supreme Court has held that an individual can demand protection by the Fourth Amendment only if that individual has a reasonable expectation of privacy.[3] The Court has developed two particular lines of cases that are at issue in *Vankesteren*. In the first line of cases, the Court has held that one has a reasonable expectation of privacy in curtilage, which is the area immediately surrounding one's home, but not in open fields, which are areas more distant from one's home.[4] The second line of cases deals with the types of technology that the police can use to investigate an individual's conduct in his home. In general, the Court has held that the police can use technology that is generally available to the public because an individual cannot have a reasonable expectation of privacy in conduct that can be detected with the aid of technology that the public regularly uses.[5] These two lines of cases can be in tension with one another: whereas the open fields doctrine strips the owner of any right to privacy, the cases dealing with technologically assisted investigation limits the government's ability to observe conduct and gives the landowner some meaningful protection. Before 2008, no circuit had examined this issue.

In *Vankesteren*, the Fourth Circuit considered evidence from a video camera that government authorities had set up on the defendant's property without a warrant.[6] The court held that the camera was not set up in the defendant's curtilage but in his "open field," where he had no reasonable expectation of privacy.[7] Accordingly, the court allowed the State to use the evidence against the defendant.[8] But in its holding, the court did not rule out the possibility that the government may be limited in the types of technology it can use in open fields.[9] These statements are in tension with other Fourth Amendment jurisprudence that

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1. 553 F.3d 286 (4th Cir. 2009).
2. *See id.* at 286–87.
3. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
4. *See* United States v. Dunn, 480 U.S. 294, 300–01 (1987).
5. *See* California v. Ciraolo, 476 U.S. 207, 213–15 (1986); *cf.* Kyllo v. United States, 533 U.S. 27, 40 (2001) ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").
6. *Vankesteren*, 553 F.3d at 288.
7. *Id.* at 290.
8. *See id.* at 287.
9. *See id.* at 291 (concluding that "this camera was in a fixed location, was focused on a limited area of Vankesteren's fields, was activated only by motion, and recorded only during the daylight hours" and "[e]ssentially, the camera did little more than the agents themselves could have physically done, and its use was therefore not unconstitutional").

emphasizes that an owner has no reasonable expectation of privacy in an open field.[10] But ultimately, *Vankesteren* reflects an attempt by the Fourth Circuit to be faithful to both of these lines of Fourth Amendment jurisprudence.

In 2007, Steven Vankesteren, a farmer on the Eastern Shore of Virginia, was arrested for killing two red-tailed hawks, which are protected by federal law.[11] An agent with the Virginia Department of Game and Inland Fisheries had received a tip that a hawk had been trapped on Vankesteren's property.[12] The agent then went to Vankesteren's property, where, in an area about a mile from Vankesteren's house, he observed a trap that could be used to catch hawks.[13] Acting without a warrant, the agent set up a video camera, which "had a viewing area of twelve-by-twelve feet, ran only during daylight hours, and was motion activated," to observe the trap.[14] The tapes revealed Vankesteren trapping and killing two birds that were later identified as protected red-tailed hawks.[15]

Vankesteren was charged with two counts of taking (i.e., killing) a migratory bird without a permit under 16 U.S.C. § 703 and 50 C.F.R. § 21.11.[16] He argued pro se before a magistrate judge, who admitted the videotapes into evidence over Vankesteren's motion to suppress.[17] The magistrate judge found Vankesteren guilty on both counts and fined him $500 for each count.[18] A district judge entered final judgment in accordance with the magistrate's findings.[19] Vankesteren appealed his conviction to the Fourth Circuit, where he was represented by an attorney.[20]

A Fourth Circuit panel, comprised of Judges Roger L. Gregory, Diana Gribbon Motz, and Dennis W. Shedd, affirmed Vankesteren's conviction.[21] Writing for the panel, Judge Gregory agreed with the lower courts that the location of the camera was an "open field" and thus Vankesteren had no reasonable expectation of privacy.[22] Furthermore, the Fourth Circuit rejected Vankesteren's objection that it was impermissible for the police to use a video camera on his property.[23] In this argument, Vankesteren did not attack the open fields doctrine; instead, Vankesteren argued that when the government uses more

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10. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 178 (1984) ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.").
11. *See Vankesteren*, 553 F.3d at 287–88.
12. *Id.*
13. *Id.* at 288, 290.
14. *Id.* at 288.
15. *Id.*
16. *Id.* (citing 16 U.S.C. § 703 (2006); 50 C.F.R. § 21.11 (2008)).
17. *See id.*
18. *Id.*
19. *Id.*
20. *See id.* at 287–88.
21. *Id.* at 287.
22. *Id.* at 290.
23. *Id.* at 290–91.

sophisticated technology, its use triggers higher scrutiny from the court.[24] The Fourth Circuit rejected this argument in application to this case, holding that the Fourth Amendment is not implicated in an open field even if the government uses hidden surveillance cameras.[25] The video footage was thus admissible in court.[26]

In general, the court in *Vankesteren* affirmed established Fourth Amendment jurisprudence of open fields. The court restated the basic principle that in an open field, a property owner cannot complain of the physical presence of officers who observe illegal conduct because the property owner does not have a reasonable expectation of privacy in an open field.[27] As the Supreme Court has previously stated, "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home" known as the curtilage.[28]

In *United States v. Dunn*,[29] the Supreme Court laid out four factors that a court should consider in determining whether a given area is curtilage:

> [1] the proximity of the area claimed to be curtilage to the home, [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.[30]

In application, this test has been quite restrictive in defining an area as "curtilage." The Supreme Court has held that the open field doctrine applies even if the officers are on the property without the owner's permission,[31] the officers have to walk around a locked gate and past a "No Trespassing" sign,[32] the officers must pass an owner's house in order to get to the field,[33] the field is surrounded by chicken wire,[34] the officers must cross a barbed-wire fence,[35] or the officers must look into a barn through locked wooden gates.[36] For example, in *Dunn*, the Supreme Court found that a barn was located on an open field when it was sixty yards from the house, it was outside a fence surrounding the house,

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24. *See id.* at 290.
25. *See id.* at 290–91.
26. *See id.* at 291.
27. *See id.*
28. Oliver v. United States, 466 U.S. 170, 178 (1984).
29. 480 U.S. 294 (1987).
30. *Id.* at 301.
31. *See* Hester v. United States, 265 U.S. 57, 58–59 (1924).
32. *See Oliver*, 466 U.S. at 173, 182–84.
33. *See id.* at 173.
34. *See id.* at 174.
35. *See* United States v. Dunn, 480 U.S. 294, 297–98 (1987).
36. *See id.* at 298.

the barn was not used for intimate activities, and there was no indication that the barbed-wire fences were for keeping people (rather than animals) out.[37]

Similarly, in *Vankesteren*, the court held that the area in question was an open field and that the defendant had "little on which to base his case" that it was curtilage.[38] The fields were located at least a mile from his home; the land was used for farming, not an "intimate activit[y]"; and there was "no indication . . . that Vankesteren had taken any steps to protect [the] field from observation."[39] Therefore, the area was an open field, "and Vankesteren ha[d] no reasonable expectation of privacy in those open fields."[40] Thus, the agent did not violate Vankesteren's Fourth Amendment rights when he entered Vankesteren's farm and set up video surveillance equipment.[41]

The Fourth Circuit also explained the objective nature of the constitutional inquiry into a landowner's expectation of privacy.[42] The court held that even if an individual subjectively believes that the area is private and even if the individual is involved in intimate activities in a location, like a "romantic tryst[]" or "relieving oneself," such does not automatically convert that area into curtilage.[43] In fact, Vankesteren argued that because he felt comfortable enough in that space to urinate, he had an expectation of privacy.[44] Yet the court summarized that "[a]nyone could have walked onto Vankesteren's property, including a VDGIF agent, and observed his traps."[45]

The thrust of Vankesteren's argument was not focused on the open fields doctrine itself but rather on the use of technology.[46] The Supreme Court has developed a jurisprudence that examines the permissibility of various types of

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37. *Id.* at 302–05.

38. United States v. Vankesteren, 553 F.3d 286, 290 (4th Cir. 2009).

39. *Id.*

40. *Id.*

41. *Id.* at 291.

42. *See id.* This test was originally set forth in *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, Justice Harlan, in concurrence, laid out a two-part test for determining whether an area is constitutionally protected by the Fourth Amendment. *See id.* at 361 (Harlan, J., concurring). The first prong is subjective: the court must determine whether the person has "an actual . . . expectation of privacy" in the space. *Id.* The second prong is objective: the court determines whether that expectation is reasonable. *Id.* In later cases, the Court focused on the objective prong of the test. For example, in *California v. Greenwood*, 486 U.S. 35 (1988), an individual challenged the government's ability to search his trash once he put it on the curb. *Id.* at 37. The Court disregarded whether he had an actual expectation of privacy in the garbage. *See id.* at 39–40. Indeed, he certainly seemed to have this expectation because he threw away contraband and put his trash on the corner in sealed, black bags and closed containers, where the trash company would come along and commingle it with other trash. *See id.* at 56 (Brennan, J., dissenting). Instead, the Court's inquiry was focused on whether that expectation was reasonable. *See id.* at 39–40 (majority opinion).

43. *See Vankesteren*, 553 F.3d at 291.

44. *Id.* In an interesting footnote, the court noted, "Indeed, if Fourth Amendment protection were to be predicated upon where one felt comfortable enough to eliminate, our search and seizure jurisprudence would be turned on its head." *Id.* at 291 n.1.

45. *Id.* at 291.

46. *See id.* at 290.

technology that the police might use in a Fourth Amendment context.[47] Generally, the Court has held that when the public can see or hear an activity—even an activity on private property—from a lawful vantage point, then the owner loses his reasonable expectation of privacy, permitting the police to observe that activity.[48] In *California v. Ciraolo*,[49] the Court allowed an inspection of the defendant's property from an airplane flying at low altitude because it was "unreasonable for [the defendant] to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."[50] But in *Kyllo v. United States*,[51] the Supreme Court held that the police did implicate the Fourth Amendment when they used a thermal scanner to analyze the heat emanating from the defendant's home.[52] The Court reasoned that the public would not typically use the heat scanner and thus the owner of the house had a reasonable expectation of privacy in the level of interior heat in his home.[53]

In *Vankesteren*, the defendant argued that in an open field, he had a reasonable expectation of privacy from video surveillance.[54] In essence, he argued that while his fields might be open to passersby, he could at least expect that his fields were not the subject of government video surveillance. But the Fourth Circuit found his argument wanting, stating that although the defendant cited cases in support of the proposition that hidden cameras deserve heightened Fourth Amendment protection, "none of [those] cases involve[d] open fields where the defendant presumably ha[d] no reasonable expectation of privacy."[55] Unlike the defendants in those cases, Vankesteren had no reasonable expectation of privacy from video surveillance in his open field.[56]

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47. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

48. *See id.* at 32–33.

49. 476 U.S. 207 (1986).

50. *Id.* at 215; *see also* Florida v. Riley, 488 U.S. 445, 450–52 (1989) (plurality opinion) (allowing the police to inspect a greenhouse from a helicopter at 400 feet through a hole in the greenhouse's roof because the police conduct was not illegal per FAA guidelines and because the police did not observe any intimate details).

51. 533 U.S. 27 (2001).

52. *See id.* at 40.

53. *Id.* at 39–40.

54. *See* United States v. Vankesteren, 553 F.3d 286, 290–91 (4th Cir. 2009).

55. *Id.* at 290.

56. *Id.* at 290–91. The court in *Vankesteren* discussed *United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991), in which the Ninth Circuit found a defendant's expectation of privacy in his office was reasonable, and *United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000), in which the Ninth Circuit upheld the suppression of video surveillance, but only because the defendants had a legitimate expectation of privacy in their hotel room after the police informants left. *See Vankesteren*, 553 F.3d at 290.

The Fourth Circuit found that of central importance was the fact that the agents used the camera to surveil open fields.[57] The court distinguished the Fifth Circuit's opinion in *United States v. Cuevas-Sanchez*,[58] in which the police placed a camera on a power pole overlooking the defendant's ten-foot fence around his backyard.[59] The Fifth Circuit found that the defendant had a reasonable expectation of privacy in his backyard.[60] But the Fourth Circuit noted that this case was inapposite because the camera in *Vankesteren* was located far from the curtilage of Vankesteren's home.[61] In contrast, in *United States v. McIver*,[62] the Ninth Circuit found that law enforcement could use unmanned, motion-activated surveillance cameras to monitor a marijuana patch in a national forest.[63] Because officers placed the cameras on public land that was open to all, the defendants could not claim a violation of a reasonable expectation of privacy.[64] The court in *Vankesteren* followed the reasoning of the Ninth Circuit: just as the defendant in *McIver* had no reasonable expectation of privacy from being videotaped on public land, so Vankesteren had no reasonable expectation of privacy from being videotaped on his private land that was open to all.[65]

But interestingly, while the court in *Vankesteren* held that the defendant had no reasonable expectation of privacy from video surveillance, it suggested that the government's use of *some* technology may have violated the Fourth Amendment.[66] In rejecting Vankesteren's argument, the court quoted language from *Dow Chemical Company v. United States*,[67] in which the Supreme Court found to be constitutional aerial surveillance of a Dow chemical plant by the Environmental Protection Agency, which used cameras that were readily available to the public and were used by mapmakers.[68] But in that case, the Court cautioned that the government's use of technology must track the public's use:

> It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. . . . [But t]he mere fact

57. *See id.* at 291.
58. 821 F.2d 248 (5th Cir. 1987).
59. *Id.* at 250.
60. *Id.* at 251.
61. *Vankesteren*, 553 F.3d at 290.
62. 186 F.3d 1119 (9th Cir. 1999).
63. *Id.* at 1122–24.
64. *Id.* at 1125–26.
65. *See Vankesteren*, 553 F.3d at 290.
66. *See id.* at 291.
67. *Id.* (quoting Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986)).
68. *Dow Chem.*, 476 U.S. at 229, 238–39.

> that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.[69]

The court in *Vankesteren* thus distinguished the video camera used in this case from satellite surveillance and other "highly sophisticated surveillance equipment not generally available to the public."[70] The court went on to distinguish other technology that would be questionable such as "a camera that took . . . thermal images of Vankesteren's home or that was equipped with an automatic guidance system that allowed it to roam about Vankesteren's property, possibly into protected Fourth Amendment areas."[71] By contrast, the Fourth Circuit noted that "this camera was in a fixed location, was focused on a limited area of Vankesteren's fields, was activated only by motion, and recorded only during the daylight hours."[72] The court stated, "Essentially, the camera did little more than the agents themselves could have physically done, and its use was therefore not unconstitutional."[73]

In sum, the court seemed to suggest that one's reasonable expectation of privacy in an open field is not necessarily nonexistent. Rather, the reasonableness of one's expectation of privacy is contextual: it depends on what that expectation of privacy is *from*. And in this way, the Fourth Circuit brought into harmony the Fourth Amendment jurisprudence on open fields and on technological searches. An individual can have no reasonable expectation of privacy from human observation in an open field because that individual must expect that the field will be accessible to the public.[74] This was the principle at the heart of the open field cases of *Oliver v. United States*[75] and *United States v. Dunn*.[76] But an individual can have a reasonable expectation of privacy from certain intrusions that might be made possible by technologies of limited public availability, such as a thermal scanner or satellite imaging.[77] This issue distinguished *Ciraolo* from *Kyllo*: whereas in *Ciraolo* the Court found that the public regularly uses aircraft and thus allowed the police to use aircraft and human sight to look into the defendant's property,[78] in *Kyllo* the Court held that the police could not use a thermal scanner to examine the heat within the defendant's home because the scanner was not in "general public use."[79] The

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69. *Id.* at 238 (footnote omitted).
70. *Vankesteren*, 553 F.3d at 291 (quoting *Dow Chem.*, 476 U.S. at 238) (internal quotation marks omitted).
71. *Id.* (footnote omitted).
72. *Id.*
73. *Id.*
74. *See id.* at 289–91.
75. 466 U.S. 170, 179 (1984).
76. 480 U.S. 294, 304–05 (1987).
77. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001); Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986).
78. California v. Ciraolo, 476 U.S. 207, 215 (1986).
79. *Kyllo*, 533 U.S. at 40.

Fourth Circuit in *Vankesteren* provides a unified framework for considering both open fields cases and technological search cases: while individuals do not have a reasonable expectation of privacy in open fields because of the public's access to the land, they might have a reasonable expectation of privacy from searches on open fields made possible by technology unavailable to the public.[80]

In its most basic holding, *Vankesteren* allows police to use video surveillance without a warrant in open fields of private property if video surveillance approximates physical presence.[81] But more broadly, in *Vankesteren*, the Fourth Circuit considered a case at the intersection of open field jurisprudence and technological search jurisprudence. Earlier cases on the use of technology had mostly related to uses in the curtilage.[82] But in *Vankesteren*, the Fourth Circuit held that certain technology is permissible in an open field but other technology may not be permissible.[83] In so doing, it navigated between two lines of jurisprudence that seemed to be in tension, and it brought the two lines into harmony.

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80. *See* United States v. Vankesteren, 553 F.3d 286, 288–91 (4th Cir. 2009).

81. *See id.* at 291.

82. *See, e.g.*, United States v. Cuevas-Sanchez, 821 F.2d 248, 250–51 (5th Cir. 1987) (involving a camera overlooking a fence surrounding a backyard).

83. *See Vankesteren*, 553 F.3d at 291.