



TENTH CIRCUIT HOLDS USE OF CAMERA ON UTILITY POLE DID NOT VIOLATE THE FOURTH AMENDMENT

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Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

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On April 5, 2017, the Tenth Circuit Court of Appeals decided *the United States v. Cantu*, in which the court discussed whether the use of a utility pole camera that viewed the front of Cantu's residence violated his rights under the Fourth Amendment. The relevant facts of *Cantu*, taken directly from the case, are as follows:

The arrest in this case arose from an investigation by the Lea County Drug Task Force and the FBI of a drug-trafficking organization operating in Hobbs, New Mexico. One of the subjects of their investigation was Rolando Cantu, the defendant's brother and also his next-door neighbor. At the request of the Task Force, the local utility company installed a video camera on a utility pole approximately 70 yards from the brothers' adjacent residences. This was the closest utility pole to the properties. The pole was on the side of a paved alley providing access to a parking lot and commercial buildings. The camera allowed agents to observe the front of the brothers' properties, as well as a common, unpaved area between Rolando Cantu's house and the defendant's trailer. The camera did not record sound, and it did not allow the agents to see inside either property. It provided a continuous live feed to a television screen at the Task Force office. Agents at the Task Force office could adjust the camera, zoom it in and out, and take still photographs. Although they are uncertain precisely when it was removed, the Task Force was using the camera at another address a few months after the surveillance of the Cantu's properties.

During the course of this surveillance, the Task Force's commander saw someone on the video feed walking in the common area between the two residences, carrying what looked like an assault rifle. The commander captured several still photographs from the feed. It is apparent from these photographs that a car or pedestrian coming down the street would have seen the man carrying the weapon. See Attachments to Aple. Br. The Task Force agents knew from New Mexico Probation and Parole that Ruben Cantu, the defendant, lived in the residence next to Rolando Cantu. The agents compared a photograph of Ruben Cantu with the still photographs from the video camera, which allowed them to

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identify the man carrying the assault rifle as Ruben Cantu. After reviewing his criminal history and seeing a prior felony conviction, the Task Force obtained a search warrant for Ruben Cantu's property. The agents found an AR-15 assault rifle and over 100 rounds of ammunition.ⁱⁱ

Cantu filed a motion to suppress and argued that the use of the pole camera violated his Fourth Amendment rights. The district court denied the motion and Cantu pleaded guilty with the right to appeal. He then filed a timely appeal to the Tenth Circuit Court of Appeals.

On appeal, the issue was whether the warrantless use of camera on a utility pole that viewed the front of his residence violated his rights under the Fourth Amendment.

The Tenth Circuit first noted that they decided the *United States v. Jackson* in 2000 and it had very similar facts to Cantu's case. In *Jackson*, police installed telephone pole cameras that overlooked the residences of suspected drug dealers. Like the camera in Cantu's case, the cameras could be adjusted by officers at the police station, and could zoom in and read license plates. The cameras did not record sound and could not see into the residences. On appeal, Jackson argued that the pole cameras violated her rights under the Fourth Amendment because they were installed without a warrant. The court stated

We disagreed, holding that **"[t]he use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment."** *Id.* at 1280-1281 (citing *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986); *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). Not only that, but **"activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection, and thus, is not constitutionally protected from observation."** *Id.* at 1281 (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)). Pointing to two facts—(1) the pole cameras could not see inside the houses and (2) the pole cameras could only see what a passerby could observe—we found the subject of the surveillance **"had no reasonable expectation of privacy that was intruded upon by the video cameras."** *Id.* The surveillance therefore did not violate the Fourth Amendment, and the police officers did not need to obtain a warrant to install or use the pole camera. *Id.*ⁱⁱⁱ [emphasis added]

Cantu argued that the difference between his case and Jackson's case was that Jackson was a subject of the investigation whereas he was *not* the subject of the investigation that prompted the use of the camera. Therefore, he argued that he simply walked into the path of the camera so he had an expectation of privacy. The court stated

Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes." *Ciraolo*, 476 U.S. at 213. **And it has never been extended to prevent them from acting when in the course of their investigation they see someone other than their target committing a likely criminal act.**^{iv} [emphasis added]

Cantu also argued that *Florida v. Jardines*^v in which the Supreme Court held that the police use of a canine to enter the curtilage of a residence and sniff the front porch for drug odor emanating from the

house, violated the Fourth Amendment under a trespass theory of privacy. However, the court in *Cantu* distinguished *Jardines* by noting that the police did not install the camera on Cantu's property, thus there was no trespass. The case must be analyzed under a "reasonable expectation of privacy" theory, and as discussed previously, under *Jackson*, Cantu did not have a reasonable expectation of privacy where he was walking with the rifle.

Cantu also argued that the area where he was carrying the rifle was his curtilage and, as such, he was protected under the Fourth Amendment. To this argument, the court stated

Even assuming for the sake of argument that it was curtilage, the surveillance did not violate Cantu's constitutional rights. **"That [an] area is within the curtilage does not itself bar all police observation."** *Ciraolo*, 476 U.S. at 213. **The question is still whether society is willing to recognize Cantu's expectation of privacy as reasonable.** See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 (1979). **And Jackson stands for the proposition that it is not.** 213 F.3d at 1281.^{vi} [emphasis added]

Therefore, the court of appeals affirmed the denial of the motion to suppress.

ⁱ No. 16-2191 (10th Cir. Decided April 5, 2017)

ⁱⁱ Id. at 2-3

ⁱⁱⁱ Id. at 4

^{iv} Id. at 5

^v 133 S.Ct. 1409 (2013)

^{vi} Cantu at 6