

BREYER, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 97-1147

MINNESOTA, PETITIONER v. WAYNE
THOMAS CARTER

MINNESOTA v. MELVIN JOHNS

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF MINNESOTA

[December 1, 1998]

JUSTICE BREYER, concurring in the judgment.

I agree with JUSTICE GINSBURG that respondents can claim the Fourth Amendment's protection. Petitioner, however, raises a second question, whether under the circumstances Officer Thielen's observation made "from a public area outside the curtilage of the residence" violated respondents' Fourth Amendment rights. See Pet. for Cert. i. In my view, it did not.

I would answer the question on the basis of the following factual assumptions, derived from the evidentiary record presented here: (1) On the evening of May 15, 1994, an anonymous individual approached Officer Thielen, telling him that he had just walked by a nearby apartment window through which he had seen some people bagging drugs; (2) the apartment in question was a garden apartment that was partly below ground level; (3) families frequently used the grassy area just outside the apartment's window for walking or for playing; (4) members of the public also used the area just outside the apartment's window to store bicycles; (5) in an effort to verify the tipster's information, Officer Thielen walked to a position about 1 to 1½ and one-half feet in front of the window; (6) Officer Thielen stood there for about 15 min-

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utes looking down through a set of Venetian blinds; (7) what he saw, namely, people putting white powder in bags, verified the account he had heard; and (8) he then used that information to help obtain a search warrant. See App. E-1 to E-3, E-9 to E-12, G-8 to G-9, G-12 to G-14, G-26, G-29 to G-30, G-32, G-39 to G-40, G-67 to G-71, I-2 to I-3.

The trial court concluded that persons then within Ms. Thompson's kitchen "did not have an expectation of privacy from the location where Officer Thielen made his observations . . .," No. K9-94-0985 (Minn. Dist. Ct., Dec. 16, 1994), App. E-10 (unpublished), because Officer Thielen stood outside the apartment's "curtilage" when he made his observations, *id.*, at E-10 to E-12. And the Minnesota Supreme Court, while finding that Officer Thielen had violated the Fourth Amendment, did not challenge the trial court's curtilage determination; indeed, it assumed that Officer Thielen stood outside the apartment's curtilage. 569 N. W. 2d 169, 177, and n. 10 (1987) (stating "it is plausible that Thielen's presence just outside the apartment window was legitimate").

Officer Thielen, then, stood at a place used by the public and from which one could see through the window into the kitchen. The precautions that the apartment's dwellers took to maintain their privacy would have failed in respect to an ordinary passerby standing in that place. Given this Court's well-established case law, I cannot say that the officer engaged in what the Constitution forbids, namely, an "unreasonable search." See, *e.g.*, *Florida v. Riley*, 488 U. S. 445, 448 (1989) (finding observation of greenhouse from helicopters in public airspace permissible, even though owners had enclosed greenhouse on two sides, relied on bushes blocking ground-level observations through remaining two sides, and covered 90% of roof); *California v. Ciraolo*, 476 U. S. 207, 209 (1986) (finding observation of backyard from plane in public airspace permissible despite

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6-foot outer fence and 10-foot inner fence around backyard); cf. *Katz v. United States*, 389 U. S. 347, 351 (1967).

The Minnesota Supreme Court reached a different conclusion in part because it believed that Officer Thielen had engaged in unusual activity, that he “climbed over some bushes, crouched down and placed his face 12 to 18 inches from the window,” and in part because he saw into the apartment through “a small gap” in blinds that were drawn. 569 N. W.2d, at 177–178. But I would not here determine whether the crouching and climbing or “plac[ing] his face” makes a constitutional difference because the record before us does not contain support for those factual conclusions. That record indicates that Officer Thielen would not have needed to, and did not, climb over bushes or crouch. See App. G–12 to G–13, G–27 to G–30, G–43 to G–46 (Officer Thielen’s testimony); *id.*, at I–3 (photograph of apartment building). And even though the primary evidence consists of Officer Thielen’s own testimony, who else could have known? Given the importance of factual nuance in this area of constitutional law, I would not determine the constitutional significance of factual assertions that the record denies. Cf. *Walters v. National Assn. of Radiation Survivors*, 473 U. S. 305, 342 (1985) (Brennan, J., dissenting) (citing *Brown v. Chote*, 411 U. S. 452, 457 (1973)).

Neither can the matter turn upon “gaps” in drawn blinds. Whether there were holes in the blinds or they were simply pulled the “wrong way” makes no difference. One who lives in a basement apartment that fronts a publicly traveled street, or similar space, ordinarily understands the need for care lest a member of the public simply direct his gaze downward.

Putting the specific facts of this case aside, there is a benefit to an officer’s decision to confirm an informant’s tip by observing the allegedly illegal activity from a public vantage point. Indeed, there are reasons why Officer

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Thielen stood in a public place and looked through the apartment window. He had already received information that a crime was taking place in the apartment. He intended to apply for a warrant. He needed to verify the tipster's credibility. He might have done so in other ways, say, by seeking general information about the tipster's reputation and then obtaining a warrant and searching the apartment. But his chosen method— observing the apartment from a public vantage point— would more likely have saved an innocent apartment dweller from a physically intrusive, though warrant-based, search if the constitutionally permissible observation revealed no illegal activity.

For these reasons, while agreeing with JUSTICE GINSBURG, I also concur in the Court's judgment reversing the Minnesota Supreme Court.