

Kyllo v. United States

(June 11, 2001) __ US __

ISSUE

Under what circumstances must officers obtain a warrant to utilize surveillance technology that “looks” inside homes?

FACTS

Agents with the U.S. Department of the Interior received information that Kyllo might be growing marijuana inside his home in Oregon. But because this information did not constitute probable cause, they needed some additional evidence in order to apply for a warrant.

The agents were aware that people who grow marijuana inside a home must use high-intensity lighting that naturally raises the temperature of the rooms in which marijuana is being grown. Consequently, they thought they might be able to establish probable cause for a warrant if they could show that some rooms in the house were unusually warm, especially in relation to the other rooms in the house.

There is, in fact, a device that can provide such information. It is known as a thermal imaging scanner or thermal imager, and it works as follows: Officers who are outside the home or building aim the scanner at the outside surfaces of the structure, going from room to room. As they do so, the scanner detects infrared radiation and converts this radiation into images. As the Court explained, cool temperatures are shown as black, hot temperatures are white, and “shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images.”

Armed with a thermal imager, the agents parked across the street from Kyllo’s house at about 3:20 a.m. and conducted a scan which took “only a few minutes.” The imager showed that “the roof over the garage and a side wall of [Kyllo’s] house were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex.”

Based on this information, plus tips from informants and utility bills for the house, the agents were able to obtain a warrant to search the house for marijuana. The search netted over 100 marijuana plants, and Kyllo was charged with cultivation of marijuana.

DISCUSSION

Kyllo contended that thermal imaging of a house constitutes a “search.” If so, its use would be unlawful without a warrant unless there were exigent circumstances. The Government countered that a thermal imager does not conduct a “search” because its beams do not actually penetrate the walls; they simply detect and measure escaping heat on the *outside* surfaces. Thus, it urged the Court to rule that surveillance technology that goes “through the wall” is a search, while technology that bounces “off the wall” is not.

Such a rule would have constituted a major shift in the law of police surveillance. As things stand now, officers must obtain a warrant to conduct surveillance of a house if the surveillance revealed things, conversations, conditions, or activities that the occupants reasonably believed would remain private. As we explained in the article entitled “Police Surveillance” in the Winter 2001 edition, surveillance becomes a “search”—which requires a warrant—if “a reasonable person in the suspect’s position would have believed that that which was seen, heard, or detected would be private.” But under the proposed “through the wall” test, the focus would shift from reasonable privacy expectations to whether the surveillance technology somehow penetrated the walls or roof.

The Court in *Kyllo* decided to stay with the “reasonable expectation of privacy” test, mainly because, said the Court, the “through the wall” test would “leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home.”

Consequently, the Court ruled that the use of surveillance technology to obtain information about things, people, conditions, or activities inside a home is a “search” if, (1) the technology enables officers to see, hear, or detect things that could otherwise be detected only by means of a physical intrusion into the house, and (2) the technology is not in general public use. In the words of the Court:

Where, as here, 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,

Applying this test to thermal scanning of a home, the Court ruled a warrant is required because scanners furnish officers with information that could otherwise be obtained only by means of a physical intrusion.¹T

DA’s COMMENT

Although *Kyllo* dealt only with thermal imaging, it will certainly have an impact on the use of other surveillance technology that will be available in the future. In fact, the Court was quite aware that its decision had long-range implications. “While the technology used in the present case was relatively crude,” said the Court, “the rule we adopt must take account of more sophisticated systems that are already in use or in development.” For example, *Kyllo* undoubtedly means that a warrant will be required to utilize sonic wave detectors or parabolic microphones to overhear conversations occurring inside the home or other building.²

As a practical matter, however, *Kyllo* should not change things for law enforcement because we have consistently operated under rule that a warrant is required to detect sights, sounds, and conditions inside a home unless officers obtained consent, or there were exigent circumstances, or if that which was detected was in plain view. The Court in *Kyllo* served notice it was not about to water down this rule when it pointed out, “[T]he Fourth Amendment draws a firm line at the entrance to the house.” Accordingly, when officers cross that line—whether they walk or beam over it—they need a warrant.

¹ **NOTE:** The Court referred the case back to the trial court to determine whether probable cause for the warrant existed after the information obtained from the scanner was deleted from the search warrant affidavit.

² **NOTE:** The Court pointed out, “The ability to ‘see’ through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of Justice, features on its Internet Website projects that include a ‘Radar-Based Through-the-Wall Surveillance System,’ ‘Handheld Ultrasound Through the Wall Surveillance,’ and a ‘Radar Flashlight’ that ‘will enable law officers to detect individuals through interior building walls.’ www.nlectc.org/techproj/ (visited May 3, 2001) Some devices may emit low levels of radiation that travel ‘through-the-wall’ but others, such as more sophisticated thermal imaging devices, are entirely passive, or ‘off-the-wall’ as the dissent puts it.”