STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF ANOKA **TENTH JUDICIAL DISTRICT**

State of Minnesota,

Plaintiff,

vs.

[redacted]

Defendant,

and,

J[redacted] Y[redacted]

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Court File No. [redacted]

Court File No. [redacted]

The above-entitled matter came on for a joint Contested Omnibus Hearing, before the Honorable Suzanne Brown, District Court Judge, on August [redacted] 2020. [redacted] Esq., appeared on behalf of the State of Minnesota. [redacted] Esq., appeared on behalf of the defendant, [redacted] who was present. Ryan Garry Esq., appeared on behalf of defendant, J[redacted] Y[redacted], who was present.

On June [redacted] 2020, Defendants each filed, by and through their attorneys, a motion to Suppress and Dismiss on the following grounds: lack of probable cause to support the charges, suppression of evidence and dismissal of charges based on an unlawful search of the property shared by both defendants and dismissal of the charges based upon a violation of the Defendants' Fourth Amendment Rights. Both Mr. Y[redacted] and [redacted] also filed a motion to dismiss the Complaint alleging the conduct is protected religious activity and speech.

On the August [redacted], 2020, a joint Contested Omnibus Hearing, was held by agreement of the parties. The Court heard sworn testimony from two witnesses, [redacted] Community Service Officer, Katie McNally and [redacted] Investigator, Cheryl Hassel. The parties stipulated to and the Court received into evidence fifteen (15) exhibits. Exhibit #1 contained police reports and

investigative reports. Exhibit #2 was a DVD depicting squad car footage from Officer McNally.[1] Exhibits #3 through Exhibit #15 were various photos of the Defendants' property.

Following the hearing the parties agreed to submit memoranda in support of their respective positions. Defense Counsel agreed to submit a joint brief on behalf of their clients. The Defense brief was due by September , 2020. The State's brief was due by October , 2020. The parties agreed to waive the timelines under Minnesota Rules of Criminal Procedure 11.07. After receiving all submissions, the Court took the matter under advisement.

Based on the evidence presented, the arguments of counsel, and all of the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. On June , 2019, Community Service Officer (CSO) Katie McNally was employed by the Police Department and was on duty.
2. CSO McNally is not a licensed peace officer.
3. CSO McNally's duties include, among other things, responding to investigate violations of City Ordinances.
4. It is a violation of City Ordinance for a citizen to possess a rooster on their property in the City of . Citizens may, however, lawfully possess chickens on their property.
5. A violation of a City Ordinance is a crime.
6. On June , 2019, CSO McNally was dispatched to investigate a noise complaint involving unlawfully possessed roosters on private residential property located at , Anoka County, Minnesota.

[1] Exhibit #2 contains squad video from CSO McNally on June , 2019, and July , 2019, but it also contains additional information that was not offered for the Court's consideration. Therefore, the Court only considered the squad video from CSO McNally.

7. CSO McNally admitted she was investigating a crime when she went to residential property located at [redacted], Anoka County, Minnesota.
8. Defendants, [redacted] and Y[redacted], reside at [redacted] Anoka County, Minnesota.
9. Upon arrival, CSO McNally pulled into the driveway but was unable to see any roosters from the driveway.
10. Exhibit #3 depicts the view from the driveway looking toward the house and garage. No chickens, roosters, or kennels are visible from this vantage point.
11. CSO McNally testified she could hear either roosters or chickens crowing but was unable to distinguish the sounds.
12. CSO McNally did not approach the front door of the residence. Instead she utilized a door located on the side of the residence.
13. Exhibit #6 depicts the walkway and front door of the residence. The walkway is clear and unobstructed. The front step is clear and unobstructed. Two bushes on either side of the stoop have branches that encroach slightly on the stoop but do not block or impeded access to the front door. CSO McNally could have utilized this door but opted not to use it.
14. Exhibit #4 depicts three points of entry into the home. A front door and two doors located on the west side of the residence. A sidewalk is positioned on the west side of the residence giving access to the two side doors. The detached garage is positioned parallel to the west side of the residence.
15. Exhibit #5 depicts a view of the two visible west side doors taken from a position on the driveway. There is a sidewalk that leads from the driveway to the front door. There is also a sidewalk that leads to the first side door on the west side of the residence. The first side door

is located closest to the driveway. It is depicted with a common entry screen door and stoop. The sidewalk ends and changes to pavers as one approaches the first west side doorway of the residence.

16. The detached garage is located directly across from this first west side door.
17. Exhibit #7 depicts the west side of the home and the pathway leading from the driveway toward the backyard. The west side of the home has two side doors, the east side of the detached garage is depicted on the other side of the pathway. The distance between the house and detached garage is mere feet.
18. From the vantage point of the first side doorway stoop a full backyard view is not possible because the detached garage impedes the view. If standing on the stoop of the first side doorway (closest to the driveway), one could turn to the side and view the street and driveway, turn to the other side and view the patio and second side patio-style door, or turn around and view the east side of the detached garage.
19. The first side doorway is unobstructed and easily accessible. The second side doorway appears to be a sliding patio door located toward the rear of the residence and located off the backyard. It is located behind the garage. To access this second side doorway one would need to ignore the front door and walk passed the first west side door.
20. The first west side door appears to accept visitors. There would be no reason for a visitor to ignore the front door and the first west side door and access the second west rear sliding glass patio door.
21. Officer McNally testified she approached the second door, located off the patio, closer to the rear of the home. However, Exhibit #2 contradicts her testimony and shows she actually approached the first west side door located closest to the driveway.

22. The video[2] depicts CSO McNally climbing up the stairs, knocking, retreating down the stairs and waiting a few seconds for an answer.
23. CSO McNally could not see kennels containing birds from her position standing near the first west side doorway.
24. After knocking and receiving no response, CSO McNally had no reason to remain on the property.
25. Exhibits 11, 12, & 13, depict the backyard. The grass is long but maintained. It appears to be a typical backyard. This first portion of the backyard is secluded and private. It is tree lined along the back and is blocked by the garage, house and a fence on the other three (3) sides.
26. When CSO McNally received no response to her knocking she walked into the backyard and proceeded to the area behind the garage where she testified that she observed kennels containing birds. This area is not impliedly open to the public.
27. Exhibit #13 depicts a view showing the back of the garage. Kennels with birds contained therein are not visible.
28. CSO McNally admitted she could not tell what type of birds were inside the kennels and admitted she approached the kennels to investigate whether the kennels contained roosters in violation of the City Ordinance.
29. CSO McNally was investigating a crime when she approached the kennels but did not have consent or a warrant to search the premises.
30. Even after approaching the kennels, CSO McNally could not distinguish if the birds were chickens or roosters.

[2] Exhibit #2.

31. In the backyard, running parallel to the property line and located behind the garage, was a wooden fence that split the backyard into two parts (Exhibit #11). The fence has an archway or opening to allow one to enter the second portion of the backyard.
32. From the backyard patio looking through the fenced archway no birds were visible in the second portion of the backyard. The only thing visible was an open area of weeds.
33. In order to access the second area of the backyard, behind the fence, a person must first walk through the first backyard.
34. CSO McNally heard a sound coming from the other side of the fence. She announced herself but received no response.
35. CSO McNally looked on the other side of the fence and observed what she described as wire silos containing more birds. CSO McNally believed these birds were a combination of chickens and roosters.
36. Upon observing roosters, which is a crime, CSO McNally did not obtain a warrant to search. Instead, CSO McNally admitted she approached the birds to further investigate the crime.
37. CSO McNally admitted she did not have a warrant to conduct a search of the premises.
38. Upon further investigation she determined that some of the birds were missing feathers and appeared to be in poor condition. She testified that she was concerned for the manner in which the birds were being cared.
39. While investigating the second portion of the backyard, CSO McNally admitted she believed she was still on the property associated with [redacted]. She admitted she continued investigating on the backside of the fence (referred to as the second part of the backyard).

40. While on the Defendants' private property CSO McNally took photographs of the birds with the intent to consult with an investigator from the Animal Humane Society. She hoped to confirm whether roosters were depicted as well as to consult on the condition of the birds.

41. CSO McNally was on the property of Defendants, [redacted] and Y[redacted], without consent and without a search warrant when she walked around and gathered information regarding the presence of illegal rooster possession as well as possible animal neglect.

42. No emergency existed to enable CSO McNally to search the premises without consent or without obtaining a warrant.

43. CSO McNally testified she never thought to obtain a search warrant because she was investigating an Ordinance violation but then admitted a violation of [redacted] City Ordinance is a crime which would require a search warrant.

44. CSO McNally admitted she was on private property when she was walked around and gathered information from the property located at [redacted] Anoka County, Minnesota.

45. When CSO McNally returned to the [redacted] Police Department she admitted that she forwarded the photographs to an investigator at the Animal Humane Society to obtain an opinion regarding identification of the birds, as well as the treatment and living conditions of the birds.

46. Roosters were identified as being depicted in the photographic images.[3]

47. CSO McNally wrote in her report:

> ". . . looking through the archway I was able to see about five tall silo looking cases and two smaller ones. There was a mixer of roosters and chickens in them . . . I took some photos for the rooster violation per city ordinance. . ."[4]

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[3] These images were not submitted as exhibits for the Court to review.
[4] Exhibit #1.

48. CSO McNally also noted in her report that she sent the images to "Ashley" at the Animal Humane Society and then followed up with her by telephone. CSO McNally and "Ashley" determined that based on the images the chickens and roosters were not being cared for properly. She then wrote, "We have set up a date to go out there together *to investigate* a *little more*." (emphasis added).[5]

49. The second investigation, occurring on July [redacted], 2019, can fairly be considered a confirmatory investigation.

50. CSO McNally noted in her report that a search warrant might be required to seize the animals due to abuse. CSO McNally misunderstands the purpose of the search warrant as she missed the need for a search warrant to lawfully search the premises before seizing property.

51. CSO McNally went on vacation after June [redacted], 2019, and returned to work on or about July [redacted] 2019. No further investigation took place between June [redacted], 2019 and July [redacted] 2019.

52. On the morning of July [redacted], 2019, CSO McNally met with an investigator from the Animal Humane Society, identified as Ashley Pudas, and with [redacted] Investigator Cheryl Hassel at the [redacted] Police Department, to view photographs taken on June [redacted], 2019, and discuss the possession of roosters as well as the physical condition of the roosters on the property located at [redacted], Anoka County, Minnesota.

53. The images depicted a combination of roosters and chickens. The images also depicted injured roosters with fresh wounds and missing feathers.

54. By July [redacted], 2019, CSO McNally and Investigator Pudas already determined that animal abuse was occurring and they shared that information with Investigator Hassel prior to returning to [redacted] Minnesota on July [redacted], 2019.

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[5] *Id.*

55. Before returning to the property, Investigator Pudas opined that the roosters depicted in the images taken by CSO McNally on June [redacted], 2019, showed signs of cock fighting.

56. Investigator Cheryl Hassel is a licensed peace officer employed for 23 years in that capacity with the [redacted] Police Department.

57. Between 2017 and continuing through 2020, Investigator Hassel worked as an investigator with the [redacted] Police Department.

58. After meeting with CSO McNally and with Animal Humane Society Investigator Ashley Pudas, and after learning that crimes were being committed on the property, Investigator Hassel decided to inspect the property without first obtaining a search warrant.

59. Investigator Hassel conceded the images depicted signs of animal neglect and animal abuse and that she possessed that information before proceeding to the private property without a search warrant.

60. Investigator Hassel conceded she was aware a crime was committed when she returned to the private property without a search warrant.

61. Investigator Hassel testified she hoped to speak with [redacted] and Y[redacted] and obtain consent to search when she arrived at the property on July [redacted], 2019, but [redacted] and Y[redacted] did not answer the door. Consent to search was therefore not obtained on July [redacted], 2019.

62. Despite a lack of consent and without a search warrant, a seasoned peace officer participated and allowed a search of private property without a warrant and without a valid exception to the warrant requirement.

63. Investigator Hassel, CSO McNally, and Investigator Pudas inspected and searched the premises at [redacted], Anoka County, Minnesota. The

search included inspection of the backyard kennels behind the garage, the silos behind the fence in the second part of the backyard, and a search of the garage.

64. The garage is detached and located adjacent to the homestead.

65. Both CSO McNally and Investigator Hassel testified it is a crime to possess roosters and that they were investigating that crime. In addition, after viewing the photographs taken by CSO McNally on June [redacted], 2019, they were investigating potential animal neglect or animal cruelty charges.

66. Investigator Hassel testified she did not obtain a search warrant because she planned to warn the residents rather than to cite them with an Ordinance violation.

67. Investigator Hassel testified that once she searched the premises (without a warrant) she determined the violation was more serious so at that point she froze the scene and secured a search warrant.

68. While searching and gathering information at [redacted] Minnesota, Investigator Pudas informed Investigator Hassel that the roosters were missing feathers, had their spurs removed, had fresh injuries to their throat area, and had inadequate food, water and housing. Investigator Pudas opined the roosters had engaged in cock fighting.

69. While on the premises without consent and without a warrant, Investigator Hassel observed a garage window propped open. She looked inside and observed more roosters inside the garage.

70. The information used in the search warrant affidavit to later obtain a search warrant was based on information gathered from a warrantless search on June [redacted], 2019, and from the second confirmatory warrantless on July [redacted], 2019.

71. The property searched without a warrant on June [redacted], 2019, and July [redacted], 2019, included the divided backyard and a detached garage. All areas searched are curtilage.

72. Constitutionally protected areas include a home's curtilage. *State v. Crea*, 233 N.W.2d 736, 739 (Minn. 1975).

73. Curtilage is land immediately surrounding and associated with the home. *State v. Chute*, 908 N.W.2d 578 (Minn. 2018), *cert. denied*, 139 S.Ct. 413 (2018).

74. In order to search the home's curtilage law enforcement are required to obtain consent or a search warrant or identify an exception to the search warrant requirement.

75. Law enforcement searched the home's curtilage in this case without consent, without a warrant and without an exception to the warrant requirement.

76. The area containing the injured roosters is in close proximity to the home, is secluded behind a garage and a fence and is not visible from the front of the residence or roadway.

77. The actions of CSO McNally on June [redacted], 2019, and the actions of CSO McNally, Investigator Hassel, and Investigator Pudas on July [redacted], 2019, constituted a search of the home's curtilage.

78. A search occurs when a government agent seeks to obtain information by invading a person's reasonable expectation of privacy. *Katz v. U.S.*, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

79. The plain view doctrine does not excuse a search without a warrant. The plain view doctrine enables law enforcement to make a warrantless seizure of an object if officers are lawfully in position to plainly view the object. The plain view exception does not apply for a search of the property. *State v. Chute*, 908 N.W.2d 578 (Minn. 2018), *cert. denied*, 139 S.Ct. 413 (2018).

80. In this case, law enforcement was unlawfully searching the premises when they came across evidence involving the roosters. They were *not* lawfully in position to plainly view the object.

81. No exceptions to the warrant requirement existed for either search on June [redacted], 2019, or July [redacted] 2019.

82. Investigator Hassel testified the search was warranted based on exigent circumstances however, law enforcement waited six (6) days after observing the condition of the roosters before returning to the premises.

83. After Investigator Hassel searched the property and confirmed information obtained from CSO McNally's earlier search she froze the scene and requested a search warrant.

84. The search warrant was issued based upon information gathered from the premises, without consent, without a warrant and without an exception to the warrant requirement, on June [redacted], 2019, and July [redacted], 2019.

CONCLUSIONS OF LAW

I. UNLAWFUL SEARCH

The Fourth Amendment to the Constitution of the United States protects the "right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. "If police enter a constitutionally protected area without a warrant, that entry is presumed to be unreasonable, and evidence obtained as a result must be suppressed" if no exception applies. *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 746 (Minn. App. 2004). Warrantless searches are presumed to be unreasonable unless one of the few specifically established and well delineated exceptions applies. *Katz v. U.S.*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *see also State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003)

(citing *Katz* for the same proposition). Under the Fourth Amendment, a search occurs when government agents seek to obtain information by invading a person's reasonable expectation of privacy. *Katz*, 389 U.S. at 360, 88 S.Ct. 507. Or by trespassing upon one of the kinds of property enumerated in the Fourth Amendment. *U.S. v. Jones*, 565 U.S. 400, 404-05, 411, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

Police may enter and search a home or its curtilage without a warrant if they have either "(1) consent or (2) probable cause and exigent circumstances." *State v. Taylor,* 509 N.W.2d 155, 157 (Minn. App. 1999), *review denied* (Minn. May 18, 1999). Curtilage is the land immediately surrounding and associated with the home and is therefore considered "part of the home itself for Fourth Amendment purposes." *Oliver v. U.S.*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). Curtilage includes the garage. *State v. Crea*, 305 Minn. 342, 233 N.W.3d 736, 739 (Minn. 1975) (*citing Polk v. U.S.* 291 F.2d 230 (9 Cir. 1961*)*. The backyard and driveway of a home are often considered to be within the curtilage of a home. *State v. Chute*, 908 N.W.2d 578 (Minn. 2018) *see also U.S. v. Carter,* 360 F.3d 1235, 1241 (10th Cir. 2004) (recognizing the backyard as part of the curtilage of the home), *Dow Chem. Co. v U.S.*, 749 F.2d 307, 314 (6th Cir. 1984) ("The backyard and area immediately surrounding the home are really extension of the dwelling itself."). Areas of curtilage that are impliedly open to the public use, such as driveways and porches, may be searched without a warrant because they do not offer a person a reasonable expectation of privacy. *State v. Crea*, 305 Minn. 342, 233 N.W.3d 736, 739 (Minn. 1975).

On June [redacted], 2019, CSO McNally entered the driveway of [redacted], Minnesota, to conduct a lawful investigation. Her presence on the driveway, and thereafter on the stoop of the first west side door was a lawful exception to the warrant requirement because those two areas are impliedly open to the public. From her vantage point on the driveway and

from the stoop of the first west side door she could not see into the backyard, she could not see roosters, and she could not see signs of illegal activity. She testified she could not audibly discern if she heard chickens versus roosters crowing. It is not illegal to possess chickens in the City of [redacted]. Accordingly, she was unable to form probable cause or even reasonable articulable suspicion that a crime was occurring. At this point, CSO McNally was merely curious.[6]

The Residents had an Expectation of Privacy in Their Backyard

When CSO McNally stepped off the sidewalk, proceeded onto the pavers and into the backyard she exceeded an area that was impliedly open to the public. The residents had an expectation of privacy in their backyard because the backyard is part of the home's curtilage.

In this case, the areas of the residence that are impliedly open to the public are the driveway, the front door and the first side door located just off the driveway. The second west side sliding patio door was not impliedly open to the public. To access the second west side sliding patio door, CSO McNally was required to venture down a path and into the backyard where the residents had an expectation of privacy.

The backyard is divided into two sections by a fence. The State conceded that the first backyard was part of the home's curtilage but argued the second backyard was an "open-field" and did not require a search warrant. The Court disagrees. The second portion of the backyard was not akin to an "open-field." The fence conveyed an expectation of privacy. In addition, in order to get to the portion of the backyard that is fenced off, officers trespassed onto property in

[6] CSO McNally provided inconsistent testimony and was repeatedly impeached. Her testimony regarding her location at the side door enabling her to see birds in the backyard is not credible. She testified she approached the second side door, a vantage point from where she could see birds, but exhibit #2 shows she actually approached the first side door. Based on exhibits provided the Court does not find it credible that CSO McNally could see into the backyard from the first side doorway. After receiving no response she did not proceed to the second side door. Rather, she began to search and investigate.

which the homeowners did have an expectation of privacy. The first backyard was not impliedly open to the public and the homeowners had an expectation of privacy. One cannot access the second backyard without walking through the first backyard. As in *Chute*, law enforcement deviated from an area that was impliedly open to the public. *Chute*, 908 N.W.2d at 588.

The divided backyard areas are both located behind the garage and both areas are part of the home's curtilage. In *Dunn* the Court identified four relevant factors to determine whether a disputed area falls within the 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." *U.S. v. Dunn*, 480 U.S.294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). Based on these factors, the areas searched by CSO McNally were protected curtilage.

The areas searched on June [redacted], 2019, and later on July [redacted], 2019, were in close proximity of the home. Both portions of the divided backyard (identified as #1 and #2) conveyed an expectation of privacy. The first backyard is enclosed by a tree line, the house, the detached garage and fence. The tree line forms a natural barrier. Enclosures formed by natural barriers are entitled to the same protection as those formed by artificial barriers. *See Daughenbaugh v. City of Tiffin*, 150 F.3d 594 599 (6th Cir. 1988). Neither backyard #1 nor #2 are in plain view to passersby. Neither backyard area is visible from the front door or the first west side door. Neither area is in plain view from the driveway. The exhibits depict that the first portion of the backyard is used for family leisure, play and BBQ's. These activities are associated with the privacies of life much the same as a fire pit. *See Chute,* 908 N.W.2d 578, 585; *Widgren v. Maple Grove Twp.*, 429 F.3 575, 582 (6th Cir. 2005) (relying, in part, on the existence of a fire pit in

area near a house in holding that the area was within the curtilage). Nothing suggests that this area is open to the public for use or entry.

While the first portion of the divided backyard (backyard #1) is visible from the second west-side patio door located near the rear of the home this does not diminish the expectation of privacy. First, in order to approach the second west side sliding patio door one would need to enter the private backyard. Second, the homeowners had a right to expect visitors to either approach the front door or the first west side door which is located just off the driveway. It is unreasonable for a guest to bypass both options and proceed into the backyard and knock on a sliding glass patio door. Third, the curtilage of a home need not be completely shielded from public view in order to maintain some expectation of privacy. *Chute, 908 N.W.2d at 858; U.S. v. Wells*, 648 F.3d 671 (8th Cir. 2011). In this case, the first backyard is shielded from public view until one actually walks to the backyard. The second portion of the divided backyard (backyard #2) is fenced off and was used for storage and for housing roosters and chickens. The privacy fence blocks the view from all areas of the house, driveway and first backyard area. The fence undoubtedly conveyed an expectation of privacy to whatever lay behind it.

Officer McNally's search of the premises was unlawful. She testified she could not see roosters or chickens from the driveway. She could not discern if the crowing noise was a rooster or chicken. It is only unlawful to possess roosters. Because she did not see roosters present and could not audibly discern the difference between chickens and roosters she had no reasonable basis to conclude that a rooster was unlawfully present on the premises. She lacked probable cause to obtain a search warrant. To gain probable cause necessary to support a search warrant she deviated from the areas that were impliedly open to the public and she unlawfully searched

the homes curtilage. The search was conducted without a warrant, without consent and without the existence of a valid exception to the warrant requirement.

No Exception to the Warrant Requirement Existed to Search the Curtilage

The entire backyard in this case is protected curtilage. The Fourth Amendment protects people's houses and the curtilage of the house. U.S. CONST. amend. IV; MINN. CONST. Art. I, § 10; *United States v. Dunn*, 480 U.S. 294, 300 (1987); *State v. Krech*, 403 N.W.2d 634, 637 (Minn. 1987). A search of a home's curtilage requires a search warrant or an exception to the warrant requirement.

Aside from consent, recognized exceptions to the warrant requirement include: (1) hot pursuit of a fleeing felon; (2) imminent destruction or removal of evidence; (3) protection of human life; (4) likely escape of the suspect; and (5) fire. *State v. Lussier*, 770 N.W.2d 581, 586-87 (Minn. Ct. App. 2009). CSO McNally did not obtain consent to search the property. None of the exceptions to the warrant requirement existed when she conducted the warrantless search of the property.

CSO McNally admitted she entered the backyard to investigate a crime. When CSO McNally entered the backyard of [redacted], Minnesota, to investigate whether roosters were illegally on the premises she was conducting an unlawful search.

When CSO McNally ventured off the sidewalk and searched the two backyard areas, which are considered curtilage, she conducted a search of the curtilage without consent, without a warrant and without a valid exception to the warrant requirement. She was not in hot pursuit of a fleeing felon. There was no danger of imminent destruction or removal of evidence. In fact, she left the evidence on the property for six (6) days and went on vacation. There was no need to protect human life and there was no risk that a suspect would escape. Likewise, there was no fire.

Accordingly, her search was in violation of Defendant's and Defendant's reasonable expectation of privacy and in violation of the Fourth Amendment. On June , 2019, all observations made and evidence collected by CSO McNally after she left the driveway were unlawfully obtained. All evidence obtained as a result of the unlawful search on June , 2019, shall be suppressed.

On July , 2019, CSO McNally wanted to return to *further investigate*.[7] Investigator Hassel and Investigator Pudas joined CSO McNally and again searched the same areas of curtilage without a warrant, without consent and without an exception to the warrant requirement. In addition, they searched the garage without a warrant and without an exception to the warrant requirement. Curtilage includes the garage. *Crea*, 233 N.W.3d at 739.

Investigator Hassel admitted she returned to the property without a warrant because she wanted to warn and educate the homeowners. When no one answered the door it was apparent she could not warn or educate the homeowners. At that point, Investigator Hassel admitted she searched without consent and claimed exigent circumstances existed for the protection of animal life. However, protection of animal life is not a recognized exigent circumstance. Also, if it were an exception, the actions of law enforcement demonstrate that no exigent circumstance existed since the initial observation of the alleged animal neglect was observed on June , 2019. Law enforcement waited six (6) days - until July , 2019, - to act on it. Because law enforcement did not have consent, did not possess a warrant to search the premises and because no exception to the warrant requirement existed, the search of the garage and backyard curtilage on July 1, 2019, violated Defendant's and Defendant Y's constitutional rights. Any evidence obtained as a result of the unlawful search on July , 2019, shall be suppressed.

[7] Officer McNally's report – Exhibit #1.

Plain View is Not an Exception to Search Without a Warrant

Plain view is *not* an exception to a warrantless search. The plain view doctrine enables law enforcement to make a warrantless seizure if officers are "lawfully in a position from which they view the object, if the objects incriminating character is immediately apparent, and if the officers have a lawful right of access to the object." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct 2130, 124 L.Ed.2 334 (1993). In this case, that argument fails because law enforcement was not lawfully in a position from which to view the roosters. In addition, the incriminating character was not immediately apparent. CSO McNally testified she could not discern whether the birds in the kennels were chickens or roosters. Only roosters are illegal in the City of [redacted]. CSO McNally not only had to approach the kennels for a closer look but she had to photograph them and ask Investigator Pudas to identify whether roosters were present. After roosters were identified and discussed then, on July [redacted], 2020, law enforcement returned to further investigate unlawful activity and to conduct a confirmatory search.

Investigator Hassel incorrectly asserted that the violations were in plain sight. The violations were not in plain sight from areas open to the public. Officers first had to enter the secluded backyard curtilage, where the homeowners had an expectation of privacy, before any birds were visible. The presence of roosters and/or chickens were not plainly visible from the front of the home, from the driveway, from the sidewalk on the side of the home, or from the stoop associated with the first west side door located closest to the driveway. Only upon entry into the secluded backyard curtilage could birds be observed. Even then, it was not readily apparent if the birds were chickens or roosters.

There is no exception to the warrant requirement that would have allowed officers to gather information in the backyard. In order to observe the kennels in backyard #1 the officers

trespassed on private property. Also, while standing in the first backyard no birds were visible behind the fence that divided the backyard into two parts. No plain view exception applies to what was hidden behind the fence in backyard #2. Finally, the roosters inside the garage were not in plain view. They only became visible when Investigator Hassel peered through a window to look inside.

On June [redacted], 2019, and again on July [redacted], 2019, law enforcement conducted unlawful searches of property protected by the Fourth Amendment. They did so without consent, without a search warrant, and without a valid exception to the search warrant requirement. All evidence obtained from the two unlawful searches must be suppressed.

II. SEARCH WARRANT OBTAINED BASED ON FRUITS OF AN ILLEGAL SEARCH

In the present case, law enforcement illegally entered the curtilage protected by the Fourth Amendment without consent, without a warrant and without an exception to the warrant requirement. Law enforcement then used the illegally obtained information to secure a search warrant. The initial two warrantless searches of the premises in question invalidates the search warrant subsequently issued. The affidavit accompanying the search warrant application is insufficient to establish probable cause once the tainted information is excised.

The exclusionary rule prohibits introduction of evidence seized during an unlawful search, including derivative evidence that is the product of the evidence acquired as an indirect result of the unlawful search. *Wong Sun v. U.S.*, 371 U.S.471, 484-85, 83 S.Ct. 407, 415-16, L.Ed.2d 441 (1963). The search warrant affidavit in this case contained illegally obtained information in violation of Defendant [redacted]'s and Defendant [redacted]'s Fourth Amendment rights. Suppression of evidence obtained subsequent to issuance of the search warrant is required because a redaction of the tainted information does not provide independent probable cause to issue the warrant.

To determine whether search warrant issued is independent of illegal entry, one must ask whether the warrant would have been sought even if what actually happened had not occurred. *Murray v. U.S.*, 487 U.S. 533, 540, 18 S.Ct. 2529, 2534-35, 101 L.Ed.2d 472 (1988). The ultimate question is whether the search pursuant to the warrant was in fact a genuinely independent source of the information and tangible evidence at issue. This would not have been the case if the agent's decision to seek the warrant was prompted by what they had seen during the initial entry. *Id* at 542, 108 S.Ct. at 2535-36.

In the present case, all information in the supporting search warrant affidavit is based on the information obtained during the unlawful June [redacted], 2019, search and the unlawful July [redacted], 2019, search prior to issuance of the search warrant. In this case, the illegal searches had a full effect on producing the warrant. The first search was illegal, the second search was confirmatory and was also illegal. *See State v. Lozar*, 458 N.W.2d 434 (Minn. App. 1990) (a "true confirmatory search" requires suppression of the later-obtained evidence). Applying the Fourth Amendment to these facts leads to the conclusion that all evidence obtained as a result of the search warrant execution must be suppressed.

III. PROBABLE CAUSE

The purpose of a probable-cause hearing is to "protect a defendant unjustly or improperly charged from being compelled to stand trial." *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (quotation omitted). "Probable cause exists where the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime." *State v. Trei*, 624 N.W.2d 595, 597 (Minn. Ct. App. 2001). A probable-cause determination is fact intensive and must be made on a case-by-case basis. *State v. Knoch*, 781 N.W.2d 170, 178 (Minn. App. 2010) *review denied* (Minn. June 29, 2010). A district

court should deny a motion to dismiss charges for lack of probable cause where the facts in the record preclude the granting of a motion for a judgment of acquittal if proved at trial. *State v. Florence*, 306 Minn. 442, 239 N.W.2d 892 903 (1976).

Rule 11.04, subd. 1(a) of the Minnesota Rule of Criminal Procedure provides that "[t]he court must determine whether probable cause exists to believe that an offense has been committed and that the defendant committed it." Rule 11.04, subd. 1(c) further provides, in part, that "[t]he court may find probable cause on the face of the complaint or the entire record, including reliable hearsay." The Minnesota Supreme Court, in setting the standard for a probable cause hearing, stated that "it is not necessary for the state to prove the defendant's guilt beyond a reasonable doubt. The state is ... required to submit only sufficient evidence to establish probable cause. It has been said that the test of probable cause is whether the evidence worthy of consideration, in any aspect for the judicial mind to act upon, brings the charge against the prisoner within reasonable probability." *State ex rel. Hastings v. Bailey*, 116 N.W.2d 548, 551 (Minn. 1962).

The Minnesota Supreme Court reasoned that "there is a distinction between a hearing to test the right to detain and a hearing to determine whether a defendant should stand trial." *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976). The determination at the omnibus hearing requires an answer to the question "[g]iving the facts disclosed by the record, is it fair and reasonable... to require the defendant to stand trial?" *Id.*

In the present case, all evidence has been suppressed leaving the State with no facts or evidence. Accordingly, the charges are dismissed based upon a lack of probable cause.

ORDER

1. The search of the curtilage located at [redacted], Minnesota that occurred on **June [redacted], 2019**, was conducted without a search warrant and without a valid exception to the search warrant requirement. The search was therefore unlawful and in violation of Defendant [redacted]'s and Defendant Y[redacted]'s Fourth Amendment rights. Accordingly, Defendant [redacted] and Defendant Y[redacted]'s joint motion to suppress evidence obtained as a result of the unlawful search is **GRANTED.**
2. The second search of the curtilage located at [redacted], Minnesota that occurred on the morning of **July [redacted], 2019**, was conducted without a search warrant and without a valid exception to the search warrant requirement. The search was therefore unlawful and in violation of Defendant [redacted]'s and Defendant Y[redacted]'s Fourth Amendment rights. Accordingly, Defendant [redacted] and Defendant Y[redacted]'s joint motion to suppress evidence obtained as a result of the unlawful search is **GRANTED.**
3. The search warrant, granted on the afternoon of July [redacted], 2019, was based on illegally obtained evidence and information. When the illegally obtained information is excised from the search warrant affidavit probable cause is lacking to support the warrant. Accordingly, Defendant [redacted] and Defendant Y[redacted]'s joint motion to suppress evidence seized after execution of an invalid search warrant is **GRANTED.**
4. All relevant evidence has been suppressed. Probable cause to support the charges no longer exists. Defendant [redacted] and Defendants Y[redacted]'s motion to dismiss the charges for a lack of probable cause is **GRANTED.**
5. No argument was presented regarding the parties' protected religious rights or speech. There is no need to address the issue since the charges are being dismissed on other grounds.

6. A copy of this Order shall be sent to the parties or their attorneys, if any, by U.S. Mail or e-service as appropriate. Such service shall constitute due and proper notice for all purposes.

BY THE COURT:

Brown, Suzanne (Anoka Judge)

The Honorable Suzanne Brown
Judge of District Court