

## FLORIDA CASE LAW UPDATE 14-02

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**Case:** Bainter v. State, 39 FLW D677a (Fla. 5th DCA)

**Date:** March 28, 2014

**Subject:** Entry onto defendant's property in order to conduct a "knock and talk" was illegal where the property was surrounded by a barbed-wire fence, had a "No Trespassing" sign posted at the gate, and the officers had neither consent nor a warrant to enter the property

**FACTS:** Police received an anonymous tip that Bainter might be growing marijuana on his property. The property in question was large, with a few cleared acres. The property was surrounded by a barbed wire fence, had a chain-link push gate at the entry of the dirt driveway, and had a "No Trespassing" sign posted at the entry to the driveway. The officers drove to the property, entered the driveway through the open gate, then parked and walked about 40 yards to the home, where a "knock and talk" took place. This encounter resulted in the seizure of cannabis plants and the arrest of Bainter. The officers later testified that they did not have consent to enter the property, and that they did not see anything illegal in plain view. The defendant sought to suppress the plants, arguing that the seizure was the result of an illegal, warrantless search. The trial court upheld the seizure, and Bainter appealed.

**RULING:** The 5th District Court of Appeal reversed the trial court, and ruled that since Bainter had fenced and posted his property, the officers' entry, without a warrant, consent, or exigent circumstances violated the defendant's reasonable expectation of privacy. Accordingly, the subsequent seizure was illegal and the evidence must be suppressed.

**DISCUSSION:** In this case the property owner described the property as being surrounded by a barbed wire fence, with a six-foot chain link gate at the entrance to the driveway. The mailbox is located several feet outside the gate, and several "No Trespassing" signs are posted on a pole by where the gate closes. He stated that he rarely has visitors, and that salesmen and solicitors never come up to the house. When someone is home, the gate is usually open. UPS packages are left at the gate, unless a signature is required, at which time the driver comes to the house. The power company also comes to the house to read the meter. In determining whether the defendant had established a subjective expectation of privacy, the appellate court relied on *Fernandez v. State*, 63 So.3d 881 (Fla. 3d DCA 2011), which held that putting up fences and taking express steps to exclude the public or other persons from using the area or gaining access to it are ways to establish an expectation of privacy. The court also cited *Powell v. State*, 120 So.3d 577 (Fla. 1st DCA 2013), which held that "the existence and extent of a license that would permit a "knock and talk" depends on the circumstances; homeowners who post "No Trespassing" or "No Soliciting" signs effectively negate a license to enter the posted property." In the present case, the posting of the signs and the fencing of the property created an expectation of privacy which the court accepted as reasonable, and neither the open gate nor the occasional entry of friends or service providers acted to negate that expectation. Accordingly, the officers had no authority to go onto the property, for purposes of a knock and talk, without prior consent or invitation. Cannabis suppressed.

**COMMENTS:** The "No Trespassing" signs appear to be a critical component in this decision. In a case with very similar facts, the 2<sup>nd</sup> DCA upheld an entry onto fenced land through an open gate in order to conduct a knock and talk, and held that the owner in that case did not establish an expectation of privacy because "the property was not posted and did not have any other signs that might discourage a person from entering the property for the purpose of knocking on the front door." See *Nieminski v. State*, 60 So.3d 521 (Fla. 2d DCA 2011).

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Officers should consult with their agency legal advisors to confirm the interpretation provided in this Update and to determine to what extent the case discussed will affect their activities.