AMENDED DISSENTING AND CONCURRING OPINION BY FUJISE, J.

> It is well settled that an area in which an individual has a reasonable expectation of privacy is protected by the fourth amendment of the United States Constitution and by article 1, § 7 of the Hawai'i Constitution and cannot be searched without a warrant. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Wong, 68 Haw. 221, 708 P.2d 825 (1985); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977).

State v. Biggar, 68 Haw. 404, 407, 716 P.2d 493, 495 (1986). However, it is also

> well established that the protections of the fourth amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution extend only to circumstances in which an individual has a reasonable expectation of privacy[.] . . . In ascertaining whether an individual's expectation of privacy brings the governmental activity at issue into the scope of constitutional protection, [the Hawai'i Supreme Court] utilizes the two-part test derived from Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 . . . (1967) (Harlan, J., concurring): First, [the person] must exhibit an actual, subjective expectation of privacy. Second, that expectation must be one that society would recognize as objectively reasonable.

State v. Hauge, 103 Hawai'i 38, 50-51, 79 P.3d 131, 143-44 (2003) (formatting altered, some citations omitted, quotation marks omitted). Under the open view exception, "where an object or activity is open and visible to members of the public . . . it is obvious that no reasonable expectation of privacy can be asserted since the object or activity is in open view for any person to observe." Stachler, 58 Haw. at 416, 570 P.2d at 1326-27; see also, State v. Cuntapay, 104 Hawai'i 109, 117-18, 85 P.3d 634, 642-43 (2004) citing Stachler. "[T]he expectation-of-privacy test . . . must be measured in terms of all factors on a case-by-case basis." State v. Knight, 63 Haw. 90, 93, 621 P.2d 370, 373 (1980).

In Knight, the police observed the premises by helicopter approximately 400-500 feet above the ground but were unable to determine what was in the greenhouse because of the opaque roof. Id. at 91, 621 P.2d at 372. Later, police concluded the greenhouse contained marijuana after viewing it for about two hours from a neighboring property about 100 yards away, using 7 x 50 high-powered binoculars. Id. In reviewing this helicopter surveillance, the Hawai'i Supreme Court found "no offensive conduct by the police in their observation of

appellant's premises and appurtenances; since they were in open view, they were not constitutionally protected." Id. at 93, 621 P.2d at 373. In reviewing the binocular surveillance, the supreme court held that the use of binoculars to view the contents of the greenhouse which were not visible to the naked eye was unconstitutional. Id.

In Stachler, police observed a patch of marijuana using binoculars via helicopter at about 300 feet in altitude in a sparsely populated area not visible from the nearest public road while conducting general surveillance for criminal activity. Stachler, 58 Haw. at 413-14, 570 P.2d at 1325. In reviewing the conduct of the police under Article I sections 5 and 7 of the Hawai'i Constitution, the supreme court did not disturb the lower court's finding that the police helicopter was flying at a lawful and reasonable height but noted that

> if the lower court had found that the height of a helicopter was unreasonably low or violated applicable laws and regulations, or that there had been continued aerial harassment or prolonged aerial surveillance of the Stachler property stretching out over hours or days, or that highly sophisticated viewing devices had been employed,

it might have decided differently. Id. at 418-19, 570 P.2d at 1328. The supreme court also noted that if "helicopter flights were rare occurrences in the area, the objective reasonableness of defendant's expectation of privacy would be more credible," but that the lower court found there were regular flights over the area. Id. at 419, 570 P.2d at 1328.

Thus, in light of Stachler and Knight, I agree with the majority that relevant factors to consider for the expectation of privacy test include (1) compliance with state and federal flight regulations; (2) the prolonged nature of the aerial surveillance; (3) the use of highly sophisticated viewing devices; and (4) the frequency of other aircraft over the area. However, I disagree that the circuit court erred in concluding that Quiday did not, on the present record, have a reasonable expectation of privacy in the area surrounding his house from aerial surveillance and would instead remand the case for a full evidentiary hearing on the relevant factors. In my view, the record is insufficient to

conclude Quiday carried his burden, State v. Estabillo, 121 Hawai'i 261, 269, 218 P.3d 749, 757 (2009), which consists only of ambiguous evidence regarding the prolonged nature of the surveillance.[1] As the majority notes, there is no evidence that Officer Hanawahine did not comply with state or federal flight regulations, that he used a sophisticated viewing device, or the frequency of flights in the area.

I also disagree with the formulation of some of the factors employed by the majority. Unlike the "plain view" doctrine, the observation of evidence in open view need not be inadvertent. Stachler, 58 Haw. at 417, 570 P.2d at 1327 ("[I]n the 'open view' situation no search is involved and the requirement that the view be inadvertent is not applicable."). Thus, I do not believe whether the surveillance is "targeted" is relevant to evaluating an open view observation.

Nor do I agree that protections should turn on whether the premises observed is urban or rural. While the supreme court in Knight did consider the facts that Knight's "premises were located in a remote area, surrounded by vegetation and forest[,]" those facts were evaluated in the context of the ground surveillance using binoculars. Rather, the inquiry is whether the object or activity is left in open view for any person to observe.

In this case, the record indicates that Sergeant Gregory Obara was able to observe a man watering plants while conducting a ground reconnaissance. Officer Hanawahine's aerial observation was conducted from helicopter above 400 feet. However, the record lacks evidence regarding the nature of the premises and its surroundings, the location of the plants in relation to the curtilage of the house, and most importantly, the

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[1] In his sealed affidavit attached as an exhibit to the felony information filed in this case, Officer Joseph Hahawahine (Officer Hanawahine) stated that he "conducted reconnaissance" at the residence on three separate occasions during October 2012. However, in his affidavit in support of the warrant, he indicated he conducted aerial surveillance on October 22 and October 23 and ground surveillance on October 23. Neither the Circuit Court in its ruling, nor Quiday in his motion to suppress, mention a third aerial observation and Quiday argues there were two helicopter flights. See also, State's Memorandum in Opposition at 2-4.

precautions taken to ensure privacy. The property was in a residential neighborhood, where the marijuana plants may have been easily viewable from the neighboring property. In a case-by-case analysis of whether Quiday had a reasonable expectation of privacy, these are questions of fact which need to be determined through an evidentiary hearing by the circuit court. I would remand for further proceedings consistent with this opinion.