1-6-81
O.A.

59,054

IN THE SUPREME COURT OF FLORIDA

CASE NO. 59-054

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, Et Al.

Respondents.

BRIEF OF RESPONDENT, FRANK J. BRADY

FOLEY AND COLTON, P.A.
406 North Dixie Highway
West Palm Beach, Florida 33401

AND

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PREFACE

In this brief on the merits the Petitioner is the State of Florida. The Petitioner was the prosecution in the Nineteenth Judicial Circuit Court of Florida and the Appellant in the Fourth District Court of Appeal. The Respondent Brady was a defendant in the trial court and an Appellee in the Fourth District Court of Appeal. The Respondent will be referred to by his proper name and the State by the names of their witnesses.

The following symbols will be used:

(T.) Transcript of the hearing on the Motion to Suppress heard September 26, 1978.

(BP.) Brief of the Petitioner

STATEMENT OF THE CASE

The Respondent Brady accepts the Statement of the Case as presented by the Petitioner. However, Respondent draws this Court's attention to some important observations made by the Honorable C. Pfeiffer Trowbridge at the conclusion of the Hearing on the Motion to Suppress the search of the Brady Ranch.

Judge Trowbridge indicated:

> This case started as far as Martin County's concerned, about 2:30 on Friday. Thirty-one hours before the airplane landed.
>
> * * * * * *
>
> The better information on Saturday came from further interceptions of communications.
>
> So, here we have on 2:30 Friday afternoon, Martin County Sheriff's Department knew that one of two airplanes were going to come either to the Brady ranch here in Martin County or to a place in Palm Beach County. Knew the FAA numbers. Knew they were Twins and Cessna's and that they were to be carrying either marijuana or cocaine. You had time enough to assemble surveillance teams and go out and sit that evening and find out nothing happened.***
> The next day at 2:30 was when he got the second phone call. Additional information. You knew about the radio frequency that would key the landing lights. And a team was assembled - three teams were assembled when you went out there. I guess we could say tht he had time to go see a Judge. You certainly had time to contact the State Attorney's Office.

And somehow or other these teams went out there, and I'm told that no search warrant was obtained because the information wasn't sufficient.

Well, of course, the information as to the legal description of that piece of land out there certainly could have been obtained between 2:00 on Friday and 9:30 on Saturday.

* * * * * *

I'm told, well, you couldn't issue a search warrant because you didn't know enough about the - you couldn't give a legal description of the airplane. Now, that sort of throws me for a loop cause I don't know what a legal description of an airplane is, but certainly if you have the FAA registration number there all you need because no other airplane is supposed to have them. He's got a description. Certainly the FAA files will disclose other information about the make and model. Certainly enough information that I think a Judge would be willing to sign a warrant.

* * * * * *

And yet here in my opinion they had probable cause from about 2:00 on Friday afternoon on. And they could of obtained a search warrant.

* * * * * *

And as I've indicated I think there was sufficient evidence, sufficient probable cause to prepare an affidavit and to get a search warrant based upon what was testified here.

* * * * * *

* * * * * *

On Friday night they didn't break and enter Mr. Brady's property. But on Saturday night - and it seems fantastic - I had a little trouble when Lieutenant Frawley was on the stand. I really just about broke up from sadness when he announced that he was present when Sergeant Murphy cut the chain and entered that property. Now, a Lieutenant is supposed to know more than the Sergeant, and I won't comment on Sergeant Murphy, but I was going to ask him myself by what right he thought he had to cut a chain lock and go on someone's private property without a search warrant.

* * * * * *

He seems to think that he had probable cause to break into the property but didn't have probable cause to go get a warrant or else he didn't think the Judge would issue a warrant if he tried to get it.

* * * * * *

So we're sort of left with the fact that these officer's broke down gates and cut chains to enter private property who admit that they didn't have any probable cause and couldn't get a search warrant if they tried. Sort of got egg on their face when they then turn around and say that the evidence that they seized in violation of his Constitutional rights should never the less be admissable.

There is just no getting around it. They had to have a search warrant to enter the property under those circumstances. (T. 117-122)

STATEMENT OF THE FACTS

In spite of the presentation of four (4) pages of facts by the Petitioner, State of Florida, this statement has ignored certain salient events and testimony which the Respondent, Mr. Brady, herewith supplies.

Respondent is a farmer/rancher occupying the ranch in question under an option to buy. He occupies eighteen hundred (1,800) acres twelve (12) miles north of Indiantown. (T. 4-24) This area is totally fenced in by barbed wire cultivated, enclosed and posted with padlocks on the gates. It is also diked. (T. 5,7,15,) The gates on it are never open to the public although the area is primarily cultivated as pasture land the property also contains an airstrip. The purpose of the barbed wire is to keep out cattle rustlers, poachers, people that steals batteries and tires off your vehicles or equipment. (T. 16)

On April 22, the locks to this barbed wire fence were secured about noon.

There is no question about the fact that the police officers were never given permission to enter the property and that they rammed the front gate, busted it down, used bolt cutters and cut the chain on the back gate and left it laying. (T. 8) They also cut the fence. (T. 10) Photographs were introduced into evidence showing this physical damage. (T. 12) Bolt cutters had been used to cut the chain across

the gate. (T. 44)

There is no doubt and no dispute as to the testimony that the officers first obtained knowledge as to a plan for possibly two (2) planes to land at the Brady ranch at 2:00 P.M. on Friday, April 21, 1978, and they took up surveillance that evening. (T. 28) The surveillance was discontinued but, on Saturday, April 22, the officers were supplied with the radio frequency for the plane which was reported to be about to land as well as the fact that it was likely to be a Cessna with twin engines that it was red and white with insignia N5411 Golf. (T.21-42)

There was testimony that at the time of the break in of the Brady property, NBC News was there with the Martin County Sheriff's Department! (T. 8) That the NBC camera people had been notified in time so that they were present on the scene as they arrived in Sheriff Holt's car. (T. 43) Yet, the testimony was that although the officers had an "N" number for the aircraft, they never did check with the Federal registry for a description of the aircraft through either the FAA or DEA. (T. 58)

Additionally, the testimony was that the officers did not attempt to obtain a search warrant because they lacked a complete legal description of the aircraft even though they had the numbers of the Cessna and the fact that it was possibly a twin engine plane. (T. 36) They never sought to get a search warrant on Friday afternoon although

Court's were open. (T. 38) Detective Frawley had time to make phone calls to sheriffs and Captains, to have something to eat, to go home to change his clothes, but not to obatain a warrant. He did admit that he had "some probable cause" on Friday the 21st at about 2:00. (T. 52) And yet he never called any of the County Magistrates or Judges. He also admitted having the numbers of the plane. (T. 53)

Mark Wethington, a Narcotics agent for the Palm Beach County Sheriff's Department acknowledged that he knew the numbers of the aircraft that would be landing at about 9:30 P.M. (T. 77)

QUESTION ON APPEAL

DOES THE "OPEN FIELDS DOCTRINE" APPLY TO THE FACTS OF THE INSTANT CASE AND IF SO DOES IT CONSTITUTE AN EXCEPTION TO THE NECESSITY FOR THE OFFICERS TO OBTAIN A WARRANT BEFORE ENTERING UPON THE PROPERTY OF THE DEFENDANT BRADY

POINT ONE

THE "OPEN FIELDS DOCTRINE" HAS VITALITY BUT IT DOES NOT CONSTITUTE AN EXCEPTION TO THE WARRANT REQUIREMENT UNDER THE FACTS OF THE INSTANT CASE.

The Petitioner herein has cited an impressive list of cases to support its contention that the Open Fields Doctrine as it exists today constitutes an exception to the warrant requirement under the facts of the instant case. However, in large measure these cases do not apply to the fact situation at hand. The events are at great variance.

Air Pollution Variance Board v. Western Alfalfa Corporation, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974) (BP. 9) did not deal with premises from which the public was excluded; Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d. 387 (1978) dealt with at situation in which there was an effort to suppress evidence seized in an automobile in which the Petitioner's defendant's had been passengers. Therein Mr. Justice Rehnquist held that Petitioners who asserted neither a property nor a possessory interest in the automobile searched nor in the property seized and who failed to show that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the vehicle in which they were merely passengers were not entitled to challenge the search of those areas. Furthermore, the statement quoted by the petitioner (BP. 10)

about rejecting arcane distinctions made by that Court was specifically that "arcane distinctions developed in property and tort law between guests, licensees, invitees and the like ought not to control." (Page 430).

This Court then reviewed the protection of the Fourth Amendment emphasizing that the protection depends not alone upon a property right in the invaded place but upon whether the person who claims protection of the Amendment has a legitimate expectation of privacy in the invaded place. (Page 430). The Court further observed that one of the main rights attaching to property is the right to exclude others.

In the present case, Mr. Brady operated a ranch for cattle and the very nature of the enclosure announced to one and all that he expected privacy to carry out his business as rancher.

Rawlings v. Kentucky, 100 S.Ct. 2556, 65 L.Ed.2d 633, (1980) does not deal with any property relating to an open field. The discussion pertains to the ownership of a purse. (BP. 10)

Ever since the decision of the United States Supreme Court in Katz v. Unites States, 389 U.S. 347, 88 S.Ct. 507, each Court which has been faced with an allegation that an Open Fields Doctrine is involved has attempted to interpret this case. In part the Court therein stated:

> What a person knowingly exposes to the public, even in his own

> home or office, is not a subject of the Fourth Amendment Protection.
>
> * * * * * *
>
> But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
> (389 U.S. 351, 88. S.Ct. 511)

Justice Harlan attempted to clarify this by stating:

> My understanding of the rule that has emerged from prior decisions is that there is a two fold requirement. First, that a person has exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as reasonable.

The evidence before the Court was sufficient to sustain the trial Judge's determination that Mr. Brady had a reasonable expectation of privacy. This was his private area, enclosed with wire fence, signs gates, dikes and padlocks. He explained his efforts to exclude unwanted intruders who would poach or steal cattle or property.

The Petitioner has also relied upon the recent statements of the Justices in United States V. Mendenhall, 100 U.S.S.Ct. 1870, 64 L.Ed.2d 497 (1980) (BP. 21-22) in their discussion regarding the desirability of detecting the illegal conduct of drug traffickers.

However, in that case the statement was made in attempting to give historical perspective to the structuring of the Drug Enforcement Administration. 100 S.Ct. 1881

Therein it was noted that in that case in which an airport traveler was searched, that the agents were carrying out a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution. They noted the skill with which those officers work.

Note to the contrary, the dismay with which Judge Trowbridge observed the work of the officers in the present matter. (T. 120-121) We quoted from this testimony above (T. 121-122) in which the Judge observed that he "could conceive of situations where officers could be where they were entitled to be and observe an airplane landing under suspicious circumstances and have perhaps the right to dash in at that time and seize the airplane, but not when they've been warned about it thirty-one (31) hours in advance and taken all the precautions that they'd taken." (T.122)

Regarding the standard of care in the apprehension of criminals it should be noted in Katz v. United States, supra: Page 516

> But the Fourth Amendment draws no lines in between various substanatives offenses. The arrests in cases of "hot pursuit' and the arrests on visible or other evidence of probable cause cut across the board and are not peculiar to any kind of crime.

It should also be noted that in United States v. Brown, 473 F.2d. 952 (5 Cir. 1973) (BP. 10) the key to

the determination of the validity of the search hinged upon the fact that that which they found was a suitcase which had been abandoned. Therefore no warrant was needed.

Of more relevance is the discussion in Unites States v. Holmes, 521 F.2d. 859 (1975) in which the Court noted the importance of the character of the property searched and the Court stated:

> Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate agents will be crawling through the underbrush by putting up signs warning the government to keep away.

"The concern with property rights is prompted by the realization that an individual often has a very reasonable expectation of privacy in his private property and it is that expectation that the Fourth Amendment protects." (521 F.2d 870), was also stated.

In all, the Petitioner appears to lose sight of the two important criteria to be determined in deciding whether or not this search was properly made without obtaining a warrant.

First, was the enclosed property an open field? We contend that it was not. It was commercial property used by Mr. Brady in his business of ranching. As stated by the

United States Supreme Court:

> The business man, like the occupant of a residence, has a constitutional right to go about his businesss free from unreasonable official entry upon his private commercial property.
> See v. City of Seattle
> 387 U.S. 541, 87 S.Ct. 1737 (1967)

A ranch of necessity requires the use of large acres of space. As noted in Holmes, supra, page 870, a contention that ignores the distinction in types of property is rather like arguing one may have no reasonable expectation of privacy because he failed to pull down blinds when his window could not be seen from the road! There can be no doubtthat if the officers had cut the chain of a warehouse gate or broken the door without search warrant, no one would question the propriety of the ruling that the evidence should be suppressed.

The Florida Courts in interpreting Katz v. United States, supra, have not deviated in holding that each case must be determined on the particular facts and circumstances as to whether or not the individual had a reasonalbe expectation of privacy. Olivera v. State, 315 So.2d 487, (Fla. 2DCA 1975), Huffer v. State, 344 So.2d 1332, (Fla. 2 DCA 1977), Lightfoot v. State, 356 So.2d 331, (Fla. 4 DCA 1978) and State v. Detlefson, 335 So.2d 371, (Fla. 1 DCA 1976).

The character of Mr. Brady's property was examined by the Fourth District Court of Appeal in State v. Brady,

379 So.2d 1294, (Fla. 4 DCA 1980), in which they questioned whether the number of acres should affect one's reasonable expectation of privacy and this Court as well as the trial Court chose to interpret the right of privacy as reasonable under the facts of the case.

That Court also distinguished the present situation from Norman v. State, 362 So.2d 444, (Fla. 1 DCA 1978), remanded in 379 So.2d 643 (Fla. 1980), noting that that case might have held otherwise had the farm been occupied and therefore it was distinguishable from the case at bar. Noting further that no case had presented a clear cut definition of open fields and nowhere was there a case where a warrantless search has been allowed based upon the necessary breaking down of a fence, lock or gate to get on the property, absent exigencies which are not present in the case before us. (379 So.2d 1295, 1296)

Petitioner has cited Cobb v. State, 213 So.2d 492, (Fla. 2 DCA 1968) (BP. 12,14) and Phillips v. State, 177 So.2d 243, (Fla. 1 DCA 1965) (BP. 12,14,20), which involve intrusions by law enforcement officers onto the land. However, in neither of those cases did the property owner make any effort to exhibit an actual expectation of privacy. It had not been fenced, locked nor posted. There was no indication of an intent to exclude members of the general public.

This Supreme Court has stated in Norman v. State, supra, that Katz stands for the proposition that the capacity to claim the protection of the Fourth Amendment depends upon whether a person has a legitimate expectation of privacy in the invaded area. Where the person has exhibited such an expectation, and the expectation is one that society is prepared to recognize as reasonable, he is protected.

Therefore we come to the second important determination, by this Court, which is whether the officers had a right to search this fenced area without a warrant. Hornblower v. State, 351 So.2d 716, (Fla. 1977), dealt with this problem and held that probable cause itself is not sufficient to support a warrantless search absent exigent circumstances. Therein the Court stated:

> The Fourth Amendment to the United States Constitution is an expression of our founding fathers' uneasiness with the potential omnipotence of a federal government. It reflects the notion that an individual can never enjoy the tranquility which he deserves if the government is free to tamper with his expectations of privacy through arbitrary searches.
>
> * * * * * *
>
> In essence, the Fourth Amendment forbids those occurances and evinces the axiom that privacy is not a gratuity which we hold at the whim of our government only when there is a special

> governmental need that can be stated with particularity, will we allow the government to intrude on an individual's privacy. (Page 717)

This case then went on to note:

> That the exceptions to the principal that warrantless searches are per se unreasonable under the Fourth Amendment are subject to only a few specifically established and well-delineated exceptions which have been jealously and carefully drawn. 351 So.2d 716

As stated in Hornblower, supra, and the many Federal cases listed thereunder, the burden is upon the State to demonstrate that the procurement of a warrant was not feasible "because the exigencies of the situation made that course imperative." 351 So.2d 717. Nowhere have these criteria been met in the present situation. The officers simply opined that they did not believe a Judge would give them a warrant, but they never tested to find out if they could get it or not. The testimony stressed the availability of judges in the area.

In Miranda v. State, 354 So.2d 411, (Fla. 3 DCA 1978), these same criteria were restated. Therein a recognized exception was noted regarding a boat temporarily moored in State waters, But that is not what we are dealing with here.

We are dealing with the right to come upon property, to break down the enclosure and come upon the land of one who has legitimately fenced it in for his own commercial purposes.

These same criteria were re-examined in Johnson v. State, 386 So.2d 302, (Fla. 5 DCA 1980), where an emergency situation gave rise to invoking the exigency rule. Again, that is easily distinguished from the present situation where the officers at least had thirty-one (31) hours notice and never took one move towards obtaining a warrant. There was no emergency at the Brady Ranch!

CONCLUSION

Based upon the particular facts of this case and the precedent law cited herein, it is the contention of the Respondent, Frank Brady, that the Trial Judge properly granted the Motion to Suppress the Evidence obtained by improper entry upon his land and the decision of the Fourth District Court of Appeals, State v. Brady, 379 So.2d 1294, (Fla. 4 DCA 1980) should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the the foregoing has been furnished by mail to Robert L. Bogan, Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach Florida 33401 and to Jim Smith, Attorney General, Tallahassee, Florida, Steven M. Greenberg, Esquire, 744 Northwest 12th Avenue, Miami, Florida 33136, Alan Karten, Esquire, 3550 Biscayne Boulevard, Suite 504, Miami, Florida 33137, Bruce Fleisher, Esquire, 370 Minorca Avenue, Suite 15, Coral Gables, Florida and Joel S. Fass, Esquire, 11610 Biscayne Boulevard, Suite 202, North Miami, Florida 33181 this 17th day of November, 1980.

By: Janet W. Freeman
JANET W. FREEMAN