OA 1-6-81

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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 78-2121 and 78-2771

STATE OF FLORIDA,

Appellant,

vs.

FRANK J. BRADY, PHILIP M. ECKARD, RONALD B. ELLIOT, DAVID A. LIST and HERMOGENES MANUEL

Appellees

STATE OF FLORIDA,

Appellant

vs.

HERMOGENES MANUEL and DAVID LIST,

Appellees

BRIEF OF RESPONDENT, HERMOGENES MANUEL

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PRELIMINARY STATEMENT

Respondent, HERMOGENES MANUEL, accepts the Preliminary Statement as presented by the State of Florida in its Brief.

STATEMENT OF THE CASE

Respondent, HERMOGENES MANUEL, accepts the Statement of the Case as presented by the State of Florida in its Brief.

STATEMENT OF THE FACTS

The Statement of the Facts, as stated by the State of Florida in its Brief, is accurate, but omitted the following additional facts:

The back gate of the property was not knocked down.(T 10) However, two other gates on the property were found wide open the next day and the fence was also cut (T 10).

Brady testified that the property is not only entirely fenced, but there is a dyke running all the way around the property (T 15). He also testified that he has had trouble with trespassers in the past, such as cattle rustlers, poachers and people that steal batteries and tires off the vehicles and equipment. (T 16). The fence is barbed-wire.(T 16) There are other buildings on the property which were not searched on the night in question. (T 17).

Mr. Brady first became aware of the law enforcement officials at 9:30 P.M or 10:00 P.M. It was dark and he could not see them until there were thirty - forty feet away (T 18), or approximately 3/4 of a mile from his closest boundary fence.(T 18) Mr. Brady testified that an NBC news crew, without permission, was also on his property. (T 18)

A possible second aircraft, a Cessna Titan, was parked at the Bartow Air Base (5411 Golf). This information was relayed to Capt. Frank Fogelman, of the West Palm Beach Sheriff's Office (T 22)

Capt. Dempsey knew specifically that the plane would be

coming in in the neighborhood of 2100 hours, that is 2100 to 2130 hours, the evening of April 22nd. He never had information that it might be coming in on the 21st of April. (T 23)

The information was obtained as a result of a wiretap on Ron Elliott's phone. (T 23)

Although the police had information that they may be landing on the 21st of April, a later interception indicated that the actual aircraft was to land on April 22. (T 23)

They had information that frequency 121.95 would be used to activate runway lights at the airport. (T 24) They had heard some information previously with reference to an airstrip that was Frank Brady's. (T 24)

On October 23, 1977, Capt. Dempsey had a meeting with Palm Beach County law enforcement officials regarding Frank Brady. (T 26)

In October of 1977, aerial surveillance was made of the Brady ranch. (T 26) Surveillance revealed the presence of an airstrip at the residence and a hangar. (T 26) This surveillance was of the Brady ranch in West Palm Beach County. (T 26)

Sgt. Frawley first received information concerning the ranch April 21, 1978 at 2:00 P.M.,(T 28) from Ray Mango, DEA office, West Palm Beach, Florida. Mango told them he received information that one plane, possibly two, would be landing at the Brady ranch and at that time, he gave the call numbers of the two planes. (T 28)

Mango told him the contraband would be marijuana and/or cocaine. (T 29) Upon Mango's request, Frawley contacted Capt. Fogelman, of the Palm Beach County Sheriff's office, Delray sub-station. (T 29)

Pursuant to Fogelman's request, Frawley set up surveillance of the Brady ranch on the 21st. Lt. Shuttle, Sgt. Murphy of the Martin County Sheriff's office, and Frawley, met at approximately 7:00 at the sub-station. They drove to the southwest corner of the ranch and set up surveillance. (T 30)

Surveillance was set up on the adjoining property and no entry was made onto Mr. Brady's property. (T 30)

Surveillance continued from 7:00 P.M. to 7:30 P.M. until around 11:00 P.M. (T 30) On that evening they had no reason to believe that at that time the planes would be landing either later that evening or the next day. (T 31)

The next day, the 22nd, Frawley contacted Capt. Fogelman who presented him with the same information previously supplied, except he supplied radio frequency numbers that he indicated the plane was to be using. He was further told that around dusk that frequency would be used to trigger the runway lights. Surveillance was set up for approximately 7:00 P.M. on the 22nd, with various members of the Palm Beach County Sheriff's office and Martin County Sheriff's office and Drug Enforcement Administration. (T 32) Surveillance was set up as follows: Det. Lockwood and DEA Agent Oslieber were situated in an orange grove, south of the main gate, off State Road 710. (T 33) Murphy and Frawley entered the southeast gate and came into the pasture on the south

side of the airstrip on Brady's property. (T 33) The third surveillance team entered Brady's property and set up surveillance on the west end of the ranch. (T 33)

The plane was first observed at approximately 9:30 P.M. (T 33) The plane landed two minutes later at which time Sgt. Murphy and Frawley immediately started towards the plane. (T 34) When they reached the aircraft, a Cessna Titan II, another surveillance team had already taken three of the defendants into custody. One vehicle, a jeep scout, had marijuana covered with black plastic covering in its back. (T 34)

The odor of marijuana could not be detected by Frawley at that time. (T 35) Frawley stated that he did not obtain a search warrant because he really didn't know whether a Judge would sign one. (T 35)

Martin County has two County Court Judges, and two permanent and one part-time Circuit Judge. The police, on Friday and Saturday, made no attempt to obtain warrants. (T 38)

On Friday night, before the search, Frawley stated that he crossed the ditch by a foot bridge which surrounds the Brady property. (T 38)

No State Attorney's office personnel was contacted regarding the planned raid (T 41), and no judicial officers were asked to be on stand-by. (T 41)

NBC camera people were allowed to enter the Brady ranch after the arrests took place and the scene was secured. (T 42)

The camera crew arrived in Sheriff Polk's car. (T 43)

Frawley entered the ranch at the southeast corner, by cutting the chain securing the gate. (T 44) The chain on the fence was cut by Sgt.Murphy with a pair of bolt cutters. (T 44) The police waited two (2) hours on Brady's property after entering a considerable distance onto the ranch. (T 46)

Agent Oslieber, Drug Enforcement Administration, was also in the same general area at the time the plane landed. (T 47) Det. Frawley was not present when the arrest was made. (T 51) Frawley testified that the reason he did not attempt to get a search warrant was because he did not have a full legal description of the aircraft. (T 51)

The only further information that Frawley had on Saturday that he did not have on Friday, was the air frequency to turn the aircraft lights on. (T 53) Frawley did not make a federal registry check for description of the aircraft (T 58) based on an N number.

Agent Wethington was on one of the surveillance teams. (T 60)

At 8:30 P.M. Wethington, Lt. Shuttle, and Paul Aster observed yellow-colored lights which were located on fence posts around an airstrip on the Brady ranch come on. They remained on for three minutes and they were turned off. (T 61) At 9:30 that night, he was located four hundred yards southwest of the runway and saw a plane land. (T 61) He entered the property by climbing over the fence. (T 61) On the south edge of the landing strip there is a barbed-wire fence running around the perimeter of the runway. (T 62) Wethington and Shuttle were next to the fence and

observed three males around the area of the airplane. Wethington heard defendant Brady state: "Let's load it, let's go." (T 62), at which time, they were arrested. (T 63) After the arrest, he noticed what appeared to be bales of marijuana rapped in dark plastic covering in the jeep. (T 63) He smelled the odor of marijuana eminating from the vehicle in question.(T 64) He saw the same type of package material and smelled the same type of odor coming from the airplane. (T 65) He first received information regarding the surveillance by Sgt. William Tremor on the 21st day of April,1978, Palm Beach County Sheriff's office. (T 67) He was told that marijuana would be smuggled into the Glades area shortly and Frank Brady would receive the contraband either at his residence on Hatcher Road, or at the Brady ranch in Indiantown. He was told that aircraft would be a Cessna Titan II, Registration No.5411G. (T 67) He received information from Lt. Frawley that he, Lt. Shuttle, and Paul Aster would set up surveillance near the airstrip and, if in fact the aircraft landed, that they would detain the suspects and arrest them if contraband was found. (T 70) They entered by climbing over barbed wire fence and proceeded more than five hundred yards onto the property (T 71). He was armed with a nightscope. (T 72) Individuals could not be identified at this distance, even with a nightscope, (T 72) and bales of marijuana could not be observed at that distance either. (T 72) He observed the plane land. It taxied to the end of the runway where the engines were shut down. He observed a vehicle back up to the aircraft, at which time he pro-

ceeded to the area of the aircraft on foot. (T 73) He observed a jeep-type vehicle travel from the east end of the airstrip and travel west along the airstrip down a road which leads to one of the houses near the airstrip itself. After crossing the fence, he realized that the bales might possibly be contraband. (T 75) He could not smell the marijuana until he was right outside the truck (T 75), some three or four feet away. (T 76)

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE

Petitioner's analysis of the question of whether the search and seizure in question was a reasonable one under the Fourth Amendment continues to be permeated with the antiquated thought that it is places, not people, which are protected by the Fourth Amendment. The reliance on MARTIN v. UNITED STATES, 155 Fed 503 (5th Cir.) a 1946 case, emphasizes the fact that Appellant has chosen to ignore the progress that has been made in the analysis of the Fourth Amendment. The distinction between open fields, curtilage and residences, as annunciated in HESTER v. UNITED STATES, 265 U.S. 5744, S.Ct. 445 68 L.Ed 898 (1924), no longer has any significant meaning in Fourth Amendment analysis. KATZ v. UNITED STATES, 389 U.S.347, 88 S.Ct. 507, 19 L.Ed. 2d 576, (1967), rejected the notion that constitutionally protected areas can serve as a talismatic solution to every Fourth Amendment problem. The test is now whether the police conduct "violated the privacy upon which [the defendant] justifiably relied". The importance of KATZ is that certain places where searches and seizures are made, do not per se, justify or make reasonable the search and seizure. Hester should now be viewed as merely an application of the principal that Fourth Amendment protections do not apply where no reasonable expectation of privacy exists. This expectation of

privacy is based upon subjective intent. In other words, the reasonableness of an expectation of privacy, based on the fact of private ownership, must be judged in the light of what a reasonable person might anticipate as to how the lands would appear to other persons. Under KATZ, the Fourth Amendment inquiry is not about geography but about the state of the mind of the person asserting the Fourth Amendment claim and the reasonableness of that person's expectation of privacy in respect of the area or the thing searched. See UNITED STATES v. FREIE, 545 F.2d. 1217 (9th Cir.1976) and NORMAN v. STATE, 379 So. 2d 643 (Fla. 1980). Hester no longer has any independent meaning, but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy. This is because a direct and unthinking application of the Hester "open fields" doctrine will, on occasion, produce a result which is offensive to the theory underlying KATZ. KATZ, in the last analysis, calls for the making of an important value judgment: "whether, if the particular form of surveillance practiced by the police,is permitted to go unregulated by constitutional restraint, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. See AMSTERDAM, PERSPECTIVES ON FOURTH AMENDMENT, 58 Minn. L. Rev. 349, 403 (1974). The State's view of Hester and Katz would have the Court arbitrarily declare that land beyond the curtilage would be subject to scrutiny by the police at their whim no matter how careful the occupant has been to keep those lands private. Further,

KATZ is also likely to produce a different result than Hester when the degree of police scrutiny is particularly intense. KATZ, as noted earlier, requires assessment of "the particular form of surveillance practiced by the police," while Hester - at least as commonly interpreted - gives the police carte blanche so long as they stay outside the curtilage. The abusive danger of Hester as compared to KATZ, is that if a search is unsuccessful in its fruits, the police could, under the blanketed provisions of Hester, proceed to make a comparable search of a whole group of private fields under the assumption that if they search long enough and far enough, they will find some evidence of some crime.

Cases cited by Appellant are all clearly distinguishable on the facts and were so distinguished by the District Court of Appeals in its decision. In UNITED STATES v. BASILE, 569 F 2d 1053 (9th Cir.1978), the police crossed an old railroad right-of-way fence. In UNITED STATES v. BROWN, 473 F 2d 952, (5th Cir.1973), a broken-down wire fence made of chicken wire was mentioned surrounding a chicken coop next to an abandoned farm. The decision in UNITED STATES ex rel. SAIHEN v. BENSINGER, 546 F 2d 1292 (7th Cir.1976) made no mention of a fenced-in property, but concerned itself with a discussion of curtillage. In FULLBRIGHT v. UNITED STATES, 392 F 2d 432 (10th Cir.1968), agents crossed what presumably was the boundary fence of the farm, then a field, and another little fence, to reach their position. The Court, in its decision, emphasized that there was no testimony from the landowner or anyone else that the

place from which the observations were made was within any yard or other enclosure. In UNITED STATES v. GREENHEAD,INC., 256 F Sup 890 (D.C. Ca.1966), the agents entered a hunting preserve with a key on routine patrol.

In short, the cases cited by Appellant all involve,at most, a mere trespass. In the case at bar, the police, in breaking down fences and cutting the padlocks with wirecutters, were guilty of no less than a misdemeanor of the first degree. Having forced an entry without either a search warrant or an arrest warrant to justify it, the criminal character of their entry followed every step of their journey inside the house and tainted its fruits with illegality.

The contention that any expectation of privacy, as to activities in plain view, is unreasonable and, therefore, the Fourth Amendment is inapplicable to a seizure of evidence located in an unenclosed space was specifically rejected in MORSEMAN v. STATE, 360 So. 2d 137 (Fla 2 DCA 1978). It is the Government's burden to prove that the observations were, in fact, made that way, without violating the expectation of privacy in the minds of Appellees, and the record is devoid of any testimony, by any law enforcement personnel, that they did, in fact, observe any illegal activity from outside the property of Mr. Brady's ranch.

In U.S. vs. MILLER, 589 F.2d 1117 (5th Cir. 1978), the Court held, at 1133:

> "Where an owner has not attempted to secure open fields and woods from 'invasion' by a casual or an official visitor, a police officer may cross private land in order to question the

> inhabitants of dwellings thereon. U.S. vs. Hirsh, 464 F.2d (9th Cir.1972); See Patler vs. Slayton, 503 F. 2d 472 (4th Cir.1972), (no privacy interest in unposted target range behind farm). The land involved there was not posted; there was no fence or chain to impede visitors; the officers approached openly in broad daylight. Thus, the entry was permissible.... The cases cited by Appellant to the contrary all involved an imperishable initial intent to search. E.g.,U.S.v. Holmes, 521 F.2d 859 (5th Cir.1975).

In U.S. vs. MILLER, 521 F. 2d 859 (1975), rehearing en banc 1976 525 F. 2d 1364, affirmed en banc on this issue 537 F.2d 227 (5th Cir.1976), the Court discussed the "plain view doctrine" as it related to a law enforcement agent trespassing solely to unearth evidence of a crime. Under the MILLER decision, which followed U.S. vs. WILLIAMS, 581 F.2d 451 (5th Cir. 1978), the Court applied the rational in HOLMES to open fields. Clearly, the reasonable expectation of privacy in an open field which is fenced, posted, ditched, and chained as to impede visitors, cannot be thwarted by law enforcement officers who trespass in order to secure a view in anticipation of a search.

The Court has found that the defendant had a reasonable expectation of privacy in the area where the plane landed.(T 121) The defendants did all that was humanly possible to insure their privacy. The acreage was fenced and posted. (T 4) It was never open to the public (T 5). A ditch (dyke) also surrounds the perimeter of the land.(T 15) All gates were padlocked.(T 10) The area surrounding the airstrip is also barb-wire fenced (T 16, T 62). No police could see alleged bales or smell marijuana until they entered the area of the second fence.(T 62-62) The police could not see the airstrip from outside the perimeter of

the ranch.

The instant case differs from all other "open field" decisions in that the officers who arrested the defendants did not see or smell the contraband in "Plain View" until after the defendants were arrested, (T 63) and assuming that the contraband was in "Plain View" before the arrest (contrary to the Court's findings), the State introduced no evidence regarding "exigent circumstances". MORSEMAN, supra; HORNBLOWER vs. STATE, 357 So. 2d 716 (Fla.1977)

Finally, the particular form of surveillance practiced by the police was particularly offensive.

The police made no attempt to secure a warrant, although they had probable cause.(T 119) No attempt to contact the State Attorney or Judges of the Circuit was made.

Law enforcement officials cut the chain on a locked gate and ran a gate down to enter the property before the airplane landed. (T 121) As Judge Trowbridge stated, the police behavior was reminiscent of Nazi Germany. To condone and allow such police activity because it is decided by the State that to not allow such activity would defeat police efforts to combat crime would make a mockery of the Constitution.

POINT II.

THE TRIAL COURT DID NOT ERR IN DISCHARGING RESPONDENTS, LIST AND MANUEL, ON SPEEDY TRIAL GROUNDS

Respondent respectfully relies upon the decisions of AYLIN vs. STATE, 362 So. 2d 435 (Fla. 1 DCA 1978), and REINERSMAN vs. STATE, 382 So.2d 325 (2 DCA 1979), and their reasoning.

CONCLUSION

WHEREFORE, based upon the foregoing citations and authority, Respondent, HERMOGENES MANUEL, respectfully prays this Court affirm the decision of the Trial Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing Brief was mailed this 6th day of November, 1980, to: ROBERT L.BOGEN,Asst.State Atty.General, 111 Georgia Ave., (Room 204),West Palm Beach,Fla.33401; ROBERT P.FOLEY,406 No.Dixie Highway,West Palm Beach,Fla.33401; ALAN KARTEN,ESQ.,3550 Bisc.Blvd. (Suite 504),Miami,Fla.33137; and STEVEN M. GREENBERG,ESQ.,744 N.W. 12th Avenue, Miami, Fla. 33136.

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