59,054

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant, vs. FRANK J. BRADY, PHILIP M. ECKARD, RONALD B. ELLIOT, DAVID A. LIST: HERMOGENES MANUEL, Appellees.	)	CASE NO. 78-2121 and 78-2771
STATE OF FLORIDA, Appellant, vs. HERMOGENES MANUEL and DAVID LIST, Appellees.	)	

RESPONDENT'S BRIEF IN OPPOSITION
TO JURISDICTION

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PRELIMINARY STATEMENT

Respondents, RONALD B. ELLIOT and PHILIP M. ECKARD, adopt the Preliminary Statement filed by the State of Florida in its Brief on Jurisdiction.

STATEMENT OF THE CASE

The Respondents, ELLIOT and ECKARD, hereby adopt the Statement of the Case filed by the State of Florida in its Brief on Jurisdiction.

STATEMENT OF THE FACTS

Throughout the history of this case and these appeals, the State of Florida has attempted to gloss over several critical points. Its failure to mention these points has risen to the level of a deliberate attempt to mislead this Court. First, while in page two of Petitioner's Brief, the State admits for the first time that the fence the officers cut through was a barbed wire fence, they fail to note that the property in question was also completely surrounded by a large ditch (A). In addition, there was a barbed wire fence around the airstrip itself, which the officers had to penetrate in order to observe any activity (A 62).

More critically, the State notes in its Brief that the gate to BRADY's ranch was locked and secured on the night of the police raid and seizure, but failed to note that prior to any airplane landing on the ranch, the police officers had

already physically broken through the gate by cutting them with bolt cutters (A 43-4). Entry was made right near a "No Trespassing" sign (A 44) two hours prior to the airplane landing (A 46). A second surveillance team apparently broke down the back gate of the BRADY ranch prior to the airplane landing (A 8). The front gate was knocked down with a police vehicle prior to the airplane landing (A 8-11, 12). The record as cited above indicates that the gates were in fact forced and the State has admitted that two of the three "surveillance" teams were on the property prior to any airplane landing. (See Brief of Appellant in their Appeal to the Fourth Circuit at page five.)

The State continually characterizes these acts as a "mere trespass." It is not a "mere trespass," but an armed invasion including the use of force and the destruction of private property without a warrant.

ARGUMENT

POINT I

THE STATE OF FLORIDA DOES NOT HAVE STANDING TO RAISE THE ISSUE OF CONFLICT JURISDICTION IN THE CASE SUB JUDICE.

The elegant argument of the State of Florida in the case sub judice fails to note that the Fourth District Court of Appeal upheld the State's position on this issue and reversed the trial court's determination that simple possession of more than 100 pounds of cannabis was a third degree felony. Respondent

is unable to find any case law supporting the proposition that the prevailing party in a District Court of Appeal opinion is entitled to file and pursue a petition for writ of certiorari before the Supreme Court of Florida. The attempt by the State of Florida here is a sham which is perpetrated by the State in order to buttress its weak claim to conflict under the second point as argued in its Brief. Although it is unlikely that this Court will be deluged with petitions for writ of certiorari by winning parties, the practice should nevertheless be discouraged.

POINT II

THE OPINION RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE IS CONSISTENT WITH THE OTHER DISTRICT COURTS WHO HAVE CONSIDERED SIMILAR ISSUES AND DOES NOT RAISE THE CONFLICT JURISDICTION OF THIS COURT.

It must be understood from the outset that the case sub judice is clearly distinguishable from every case cited by the State. The facts of this case, as cited by the trial court, are as follows:

1. On Friday, April 21, 1978, at approximately 2:30 o'clock p.m., the Martin County Sheriff's Department received information from a wiretap on the telephone of the Defendant, ELLIOT, that two planes would be landing at the BRADY ranch that evening. The information included the numbers of the two planes and a physical description (T 28, 67, 117). The airplanes were allegedly carrying narcotics.

2. The officers involved made no attempt to contact the F.A.A. for more complete descriptions of the airplanes (T 58, 118-119).

3. The officers involved made no attempt to get a legel description of the property known as the BRADY ranch (T 54).

4. The officers made no effort to have a State Attorney available to draw up a warrant (T 41).

5. The officers made no effort to have a magistrate on call or to get a search warrant on April 21 (T 38).

6. The officers made no effort to have a magistrate on call or to get a search warrant on April 22 (T 41).

7. Judicial officers were available throughout this period (T 38, 119-120).

8. On April 22, the officers had only one piece of information at their disposal than they had on April 21 when they refrained from entering the fenced-in property, to-wit: that the airplane would use a radio frequency of 122.95 to turn on the landing strip lights at the BRADY ranch (T 53).

9. Before any planes landed, the officers cut a chain which secured the gates to the ranch and entered (R 44-45).*

10. Before any planes landed, other officers rammed down the other gate to the BRADY Ranch with a truck or a car.

None of the cases cited by the State involve an armed

*The Court is requested to take judicial notice of F.A.A. regulations which reserve frequency 122.95 for exactly that purpose.

invasion by three separate "surveillance teams" who forcibly break onto private property without a warrant in the dark of the night. Some are pre-Katz;[2] such as Boim v. State, 194 So.2d 313 (Fla. 3 D.C.A. 1967) and Phillips v. State, 177 So.2d 243 (Fla. 1 D.C.A. 1965). The rest are plain view or similar situations which are not in conflict with the case sub judice. In the Order in which they are cited in the State's Brief on Jurisdiction, they are as follows:

Phillips v. State, supra., is a pre-Katz decision from the First District. The language is decidedly pre-Katz. Further, the officers in Phillips had no idea where or on whose property the still they were looking for was located. They merely walked across open unfenced fields until they smelled moonshine and found a still. The facts in Phillips do not approach the armed invasion of the case sub judice. Hence, no conflict.

In Boim v. State, another pre-Katz decision, 194 So.2d 313 (Fla. 3 D.C.A. 1967), the Court discussed the "mere trespass" theory. In that case, a police officer was in the yard of the defendant's neighbor when he smelled marijuana enamating from defendant's window. He also saw marijuana plants next to defendant's house. When he went in to arrest the defendant, there was no response to his knock. He thereupon took one plant to a laboratory for analysis. The property was in plain view from a neighbor's yard. Consequently,

[1] Katz v. U.S., 389 U.S. 347 (1967).

there could be no expectation of privacy.

In Cobb v. State, 213 So.2d 492 (Fla. 2 D.C.A. 1968), the Second District ignores the language of Katz once more. But again, the facts are clearly distinguishable. In Cobb the police searched the edge of defendant's unfenced property. Again, no reasonable expectation of privacy, no attempt to insure privacy.

Dinkers v. State, 291 So.2d 122 (Fla. 2 D.C.A. 1974) merely decided that an area under the defendant's two story apartment was constitutionally protected. Any dictum in the case is just that, and cannot be cited as a conflict.

State v. Belcher, 317 So.2d 842 (Fla. 2 D.C.A. 1975) was a plain view case where officers driving by defendant's house saw him handling stolen jewelry from the street as he sat on his front porch. Again, no attempt to insure privacy; no reasonable expectation of privacy.

Finally, State v. Detlafson, 335 So.2d 371 (Fla. 1 D.C.A. 1976) involves, once more, a plain view situation. The facts again are totally distinguishable from the case sub judice. The Court ruled that the defendant did not have a reasonable expectation of privacy on his front porch in plain view of the street.

It is clear that the decision in the case, sub judice, does not conflict with any of the decisions cited by the State of Florida in its Brief on Jurisdiction, and this Court should deny the State's petition.

CONCLUSION

Based on the foregoing argument and authority cited herein, Respondent respectfully requests that this Honorable Court deny the State's petition for certiorari jurisdiction.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Robert L. Bogen, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401; Robert P. Foley, 406 North Dixie Highway, West Palm Beach, Florida 33401; Alan Karten, Esq., 3550 Biscayne Boulevard, Suite 504, Miami, Florida 33137; and Joel S. Fass, Esq., 11601 Biscayne Boulevard, North Miami, Florida 33181 this 29th day of April 1980.

_____
STEVEN M. GREENBERG