1-6-81

59,054

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, et. al.,

Respondents.

CASE NO. 59,054

FILED

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CLERK SUPREME COURT
By _____ Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

VERNON WAYNE BEASLEY,

Respondent.

CASE NO. 59,085

STATE OF FLORIDA,

Petitioner,

vs.

PHILLIP NEAL REINERSMAN,

Respondent.

CASE NO. 59,097

RESPONDENT DAVID LIST'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondents were Defendants in the trial court and Appellees in the Fourth District Court of Appeal. Petitioner was the prosecution in the trial court and the Appellant in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appear before this Honorable Court, Respondents and Petitioner.

The original record consists of the Record on Appeal in two cases which were consolidated by the Fourth District Court of Appeal for appellate purposes. The following symbols from the original record will be used:

"R I"	Record on Appeal in 4 DCA No. 78-2121;
"R II"	Record on Appeal in 4 DCA No. 78-2771;
"T"	Transcript of Hearing on Motion to Suppress Physical Evidence, held on September 26, 1978.

STATEMENT OF THE CASE

Respondents accept the Statement of the Case as presented by Petitioner in its Brief on the Merits.

STATEMENT OF THE FACTS

The following facts are derived from the Transcript of the Motion to Suppress Physical Evidence Proceedings, held on September 26, 1978.

Respondent, Brady, initially took the stand. On the day in question, he had possession and lived on the ranch in question in Martin County, Florida (T 4). The ranch was totally fenced and posted (T 4-5) and is never opened to the public (T 5). It was nearly all cultivated and totally used for cattle operation and horses (T 6). It consisted of 1,800 acres (T 6). There is an air strip on the property (T 6). On the night in question, the gate to the fence was padlocked and secured (T 7-8). Respondent, Brady, saw officers on the property during the evening hours of the night in question (April 22, 1978), without his permission and without a warrant (T 8). 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).

Mr. Brady's trailer is located approximately 2,000 feet from the end of the airstrip (T 16). The fence is a barbed-wire fence (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 or 10:00 PM. It was dark and he could not see them until they were 30-40 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).

Testimony of Norman C. Dempsey, Capt., Polk County Sheriff's Department

Dempsey testified that agents working for him intercepted information that an aircraft was going to be coming into the South Florida area and it would possibly be loaded with contraband. He was also given information as to the approximate time element and certain radio frequencies which would be used (T 21).

The aircraft was specifically identified as a red and white Cessna Titan, November 5411 Golf (sic). A possible second aircraft, the Cessna Titan, parked at the Bartow Air Base (5411 Golf). This information was relayed to Capt. Frank Fogelman, of the West Palm Beach Sheriffs Office (T 22).

Dempsey knew specifically that the plane would be coming in the neighborhood of 2100 hours, that is 2100 to 2130 hours, the evening of April 22. He never had information that it might be coming in on the 21 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 21 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).

The information they had kept referring to a ranch

and they felt it was Brady's ranch (T 25).

On October 23, 1977, 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 an airstrip at the residence and a hanger (T 26). This surveillance was of the Brady ranch in West Palm Beach County (T 26).

Testimony of Det. Lt. Albert Joseph Frawley, Martin County Sheriffs Department

Frawley first received information concerning the ranch on April 21, 1978 at 2:00 PM (T 28) from Ray Magno, DEA, West Palm Beach office. Magno 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).

Magno told him the contraband would be marijuana and/or cocaine (T 29). Upon Magno's request, Frawley contacted Capt. Fogelman, of the Palm Beach County Sheriffs 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 Sheriffs 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 on to Mr. Brady's property (T 30).

Surveillance continued from 7:00 to 7:30 PM until around 11:00 PM (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 aroun d dusk that frequency would be used to trigger the runway lights. Surveillance was set up for approximately 7:00 PM on the 22nd with various members of the Palm Beach County Sheriffs Office and Martin County Sheriffs Office and the 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 PM (T 33). The plane landed two minutes later at which time Sgt. Murphy and Frawley immediately started toward 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 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, as well as one part time, Circuit judges. The police, on Friday and Saturday made no attempt to obtain warrants (T 38).

ON the 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 were contacted regarding the planned raid (T 41) and no judicial officers were asked to be on standby (T 41).

NBC camera people were allowed to enter the Brady ranch after the arrest 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 quarter, by cutting the chain, opening 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 hours on Brady's property after entering a considerable distance on to the ranch (T 46).

Agent Oslieber, DEA, 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 the N number.

Testimony of Mark Eugene Wethington
Narcotic's Agent, Palm Beach County
Sheriff's Agent

Wethington was on one of the surveillance teams (T 60). At 8:30, 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 packaging 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 21 day of April, 1978. 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 the 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 we 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 500 years on to 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 proceeded 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 led to one of the houses near the airstrip itself. After crossing the fence he realized what the bales might possibly be, contraband (T 75). He could not smell the marijuana until he was right outside the truck (T 75). That is three or four feet away (T 76).

ARGUMENT

POINT I

THE "OPEN FIELDS DOCTRINE" HAS NO CONTINUING VITALITY, AND DOES NOT CONSTITUTE AN EXCEPTION TO THE WARRANT REQUIREMENT UNDER THE FACTS OF THE INSTANT CASE.

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 distinction between open fields, curtilage and residences, as annunciated in Hester v. United States, 265 U.S. 57, 44 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. 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 the 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 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 in the assumption that if they search long enough and far enough, they will find some evidence of some crime.

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). Cases cited by Petitioner are all clearly distinguishable on the facts and the State's arguments that observations of the activities, which are the subject of this appeal, could have been observed by helicopter or high powered binoculars misses the threshold question. 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 Respondents, 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 United States v. 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. v. Hirsh, 464 F.2d (9th Cir. 1972); See Patler v. 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 dayling. 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 United States v. Miller, 521 F.2d 859 (1975), rehearing en banc 525 F.2d 1364 (1976), affirmed en banc on this issue at 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 United States v. 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 barbed wire fenced (T 16, 62). [No police could see allgged bales or smell marijuana until they entered the area of the second fense (T 62-3).] The police could not see the airstrip from outside the perimeter of the ranch.

The instant case differs from all other "open fields" decisions in that the officers who arrested the defendants did not see or smell 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 v. 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 secuee a warrant, although they had probable cause (T 119). No attempt to contact the State Attorney nor judges were 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 the Hon. C. Pfeiffer Trowbridge stated, "the police behavior was reminiscent of Nazi Germany."

The State of Florida has cited the case of Air Pollution Variance Board v. Western Alfalfa Corp., 40 L.Ed.2d 607 (1974) for the premises that the United States Supreme Court has validated the continuing legitimacy of the open fields doctrine. The most relevant aspect of that case is Mr. Justice Douglas' comment after mentioning Hester that "The field inspector was on Respondent's property but we are not adivsed that he was on premises from which the public was excluded."

The State consistently has misunderstood the issue. In United States v. Basile, 569 F.2d 1053 (9th Cir. 1978) the officers followed footprints near the Mexican border and suspected drug smuggling. The intrustion upon the private property in question was the ducking under an old railroad right of way fence. The property was abandoned. The question in Basile was to determine

whether the intrusion was an unreasonable search based upon the actual subjective expectation of privacy manifested by the property owner and whether that expectation was objectively reasonable. P. 1056.

The question of whether there was a trespass or not is irrelevant to the issue before the Court.

Further cases cited by the State all reflect that the possessor of property manifested minimal expectations of privacy in and about their land.

Further, in State v. Belcher, 317 So.2d 475 (Fla. 4 DCA 1975), cited by the State, the Court traces a history of Hester up until the Katz decision and states. In the Belcher case, officers had the ability to make observations from the street and therefore the Court did not feel that the defendant's expectation of privacy, if any, was reasonable.

Lastly, Petitioner contends that the fact that the State agents physically destroyed personal property to gain entry upon the land and that their actions constituted a criminal trespass, has nothing to do with the Respondent's expectation of privacy. Those facts in and of themselves reveal the tremendous subjective expectation of privacy manifested by Respondents.

ISSUE II

WHETHER AN INFORMATION CHARGING ATTEMPTED POSSESSION OF MORE THAN 100 LBS. OF CANNABIS CONSTITUTES A THIRD DEGREE FELONY UNDER SECTION 893.13(1)(a)(2) OF THE FLORIDA STATUTES OR A FIRST DEGREE MISDEMEANOR UNDER SECTION 893.13 (1)(e).

The question before the Court is rather simple. The Court either accepts the reasoning of the First District Court of Appeal as stated in Aylin v. State, 362 So.2d 435 (Fla. 1st DCA 1978) or accepts the reasoning of the Fourth District Court of Appeal in State v. Brady, DCA Case No. 78-2121, Opinion Filed 1-16-80. Respondent urges this Court that the reasoning under the Aylin is correct. Aylin points out that the 100 lb. provision was placed under 893.13(1)(a), Florida Statutes, 1977, which discusses sale, manufacture or delivery or possession with intent to sell, manufacture or deliver a controlled substance. The Aylin position is that the Legislature deliberately subsumed the 100 lb. quantity element under Subsection (1)(a). The Court, feeling that the Legislative intent by putting it under the (1)(a) Subsection , was to include the words "with intent to sell manufacture or deliver."

The Brady court uses circular logic. That Court acknowledges the fact that the Legislature deliberately placed the provision under the (1)(a) Subsection. Wearing blinders, the Court states that possession means possession and does not address the issue of how that provision was placed in the (1)(a) Subsection. The Court goes on to assume the following:

1. That since possession of any amount of cannabis over 5 grams is a third degree felony under 893.13(1)(e),

then it is obvious that the Legislature intended to make simple possession of over 100 lbs. of cannabis a second degree felony.

The Court states:

> "This being so, why go to the trouble of enacting a new provision under 893.13(1)(a)(2) declaring it to be a second degree felony to possess over 100 pounds, if the Legislature really did not mean to do so and intended to restate that the possession of in excess of 100 pounds of cannabis remained a third degree felony as it already was in any event? Such an enactment would be utterly without reason and cannot have been intended."

This rhetorical question may be answered by the simple statement that the Legislature, in fact, intended to make possession with intent to sell, manufacture or deliver as evidenced by its placing the new provision in Subsection (1)(a), a second degree felony.

The Brady Court acknowledges the fact that at the time of the enactment the sale manufacture or delivery or possession with intent to sell manufacture or deliver cannabis was also a felony of the third degree. Certainly the Legislature could not have intended that the simple possession of over 100 lbs. be a second degree felony and make sale of a million pounds of cannabis a third degree felony.

Since possession is a lesser included offense of possession with intent to sell manufacture or deliver, it is therefore logical that the Legislature intended that possession with intent to sell manufacture or deliver cannabis have a greater penalty than simple possession.

CONCLUSION

Based on the foregoing arguments and authorities of law, Respondent respectfully prays that this Court dismiss the jurisdiction or in the alternative affirm the ruling of the Fourth District Court of Appeal as it applies to search and seizure and reverse the Fourth District Court of Appeal as it applies to the Aylin issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was this 31st day of October, 1980, mailed to Robert L. Bogen, Assistant Attorney General, 111 Georgia Ave., Rm 204, West Palm Beach, FL 33401, Steven M. Greenberg, 744 NW 12 Avenue, Miami, FL 33136; Bruce H. Fleisher, 370 Minorca Avenue, Suite 15, Coral Gables, FL and to Joel S. Fass, 11601 Biscayne Boulevard, Suite 202, North Miami, FL 33181.

BY
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