1-6-81

59,054

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	CASE NO. 59,054
Petitioner,	:	
vs.	:	
FRANK J. BRADY, et al.,	:	
Respondents.	:	
	:	
STATE OF FLORIDA,	:	CASE NO. 59,085
Petitioner,	:	
vs.	:	
VERNON WAYNE BEASLEY,	:	
Respondent.	:	
	:	
STATE OF FLORIDA,	:	CASE NO. 59,097
Petitioner,	:	
vs.	:	
PHILLIP NEAL REINERSMAN,	:	
Respondent.	:	
	:	

FILED

OCT 31 1980

SID J. WHITE
CLERK SUPREME COURT
By _____ Chief Deputy Clerk

BRIEF OF RESPONDENTS, RONALD B. ELLIOTT AND PHILIP M. ECKART

STEVEN M. GREENBERG, ESQ.
PERTNOY AND GREENBERG, P.A.
744 N.W. 12 Avenue
Miami, Florida 33136
Telephone: (305) 545-5700

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PRELIMINARY STATEMENT

Respondents, RONALD B. ELLIOTT and PHILIP M. ECKART, accept and adopt the Preliminary Statement filed by the State of Florida in Petitioner's Brief on the Merits.

STATEMENT OF THE CASE

Respondents, RONALD B. ELLIOTT and PHILIP M. ECKART,

accept and adopt the Statement of the Case filed by the State of Florida in Petitioner's Brief on the Merits with one exception. The Defendant, RONALD B. ELLIOTT, was not arrested at the Brady ranch on April 22, 1978, nor was he identified as being at that location on that date. Mr. ELLIOTT was in fact arrested in Winter Haven on May 25, 1978, pursuant to an arrest warrant issued some time after the April 22nd incident.

STATEMENT OF THE FACTS

Petitioner's Statement of Facts attempts to gloss over several critical points. First, while on page three of its Brief, Petitioner mentions that the Brady property was fenced and posted, it fails to note that this was a barbed wire fence, and that the property in question was completely surrounded by a large ditch as well as by the other devices utilized by the Respondent, BRADY, to insure privacy (T 15).

More critically, the State notes on page three of its Brief that the gate to Brady's ranch was locked and secured on the night of the police raid and seizure, but fails to note that prior to any airplane landing on the ranch, police officers had already physically broken through the gates by cutting them with bolt cutters (T 43-4). Entry was made right near a no trespassing sign (T 44) two hours prior to the airplane landing (T 46). A second surveillance team apparently broke down the back gate of the Brady ranch prior to the airplane landing (T 8). The front gate was knocked

down with a police vehicle prior to the airplane landing (T 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 (AB 5).

Again, on page four of Petitioner's Brief, it states that Captain Dempsey had no information regarding a specific airport in south Florida. But in his testimony, under cross-examination, he admits that they had information regarding the Brady ranch (T 24-5).

The State of Florida attempts a clever bit of deception when it attempts to use the testimony of Detective Frawley to establish a belated "plain view" situation. Thus, the State says (at AB 5):

> "...Detective Frawley observed bales with black plastic covering in plain view in the vehicles (sic) and on the aircraft (T 34, 35). Due to his experience and training, Detective Frawley testified that he knew this packaging to be consistent with marijuana smuggling (T 34). Furthermore, Detective Frawley testified regarding the marijuana odor which he recognized emanating from the vehicles (T 34-35)."

But Detective Frawley didn't arrive at the scene until all suspects on the scene had been arrested by Officer Wetherington (T 34). Wetherington indicated that it was so dark he couldn't even see what was happening at the airstrip with a "sniperscope" from where he was stationed. He could not see any bales unloaded (T 72-72). Since the runway lights had gone off (T 73) before the unloading began,

and the airstrip was 2,000 feet away from any structure (T 16), and since Wetherington couldn't smell the marijuana until he was right outside the truck, about "three or four feet" (T 76), the observations made by Frawley after the arrests are irrelevant.

POINT INVOLVED

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTIONS TO SUPPRESS

The State of Florida has impaled itself upon the horns of a dilemma. It has done so by attempting to sustain the validity of a search that cannot be justified under the laws of the State of Florida or of the United States of America.

The facts are virtually undisputed and are as stated by the trial court (R 117).

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, ELLIOTT, 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. (R 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. (R 58, 118-119).

3. The officers involved made no attempt to get a legal description of the property known as the Brady ranch. (R 54).

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

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

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

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

8. On April 22, the officers had only one additional 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. (R 53).[1]

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.

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[1]Respondents request the Court to take judicial notice of the fact that 122.95 MH2 is a commonly used frequency assigned by the Federal Communications Commission for the keying of lights at non-tower controlled airstrips.

It is well established in the State of Florida that where a search and seizure was made without a warrant, the burden of proof is on the prosecution.[2] It is also firmly established that the factual determinations of the trial court come before this Court clothed with a presumption of correctness.[3]

It is the warrantless nature of the search which forces the State firmly onto the horns of the dilemma. Although the officers involved felt that they had probable cause to enter onto the property (R 52), the Petitioner realized that an admission by the State that probable cause existed would be disastrous. The reason for this is obvious from the facts as stated above and from the findings of the trial court.

Specifically, the State's problem on the first horn of the dilemma is that if probable cause existed, it existed at 2:30 p.m. on the 21st of April, some thirty-one hours prior to the airplane landing at the Brady ranch (R 31, 40). As Judge Trowbridge states (R 117):

> "This case didn't start when that airplane landed. This case started as far as Martin County is concerned about 2:30 on Friday, thirty-one hours before the airplane landed."

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[2] e.g., United States v. Impson, 482 F.2d 197 (5th Cir. 1933); Mann v. State, 292 So.2d 432 (Fla. 2 DCA 1974).

[3] Jester v. State, 339 So.2d 242 (Fla. 3 DCA 1976).

Detective Frawley apparently believed that he had "some probable cause on Friday and "more" probable cause on Saturday (R 52). Respondents can find absolutely no reference in any case in the State of Florida or any other State to "some" probable cause. Nor can Respondents find any legal basis for the belief expressed by Frawley that there is some distinction between the probable cause needed to obtain a warrant, and the probable cause needed to enter and search private property (R 52-54), and that the standard is lower for a warrantless search than for a search with a warrant. As the Supreme Court has stated:

> "...in a doubtful or marginal case a search under a warrant may be sustainable where one without it would fail."[4]

Petitioner thus forces itself upon the second horn of the dilemma. In order to gain a strategic advantage, it attempts to avoid the obvious difficulties involved with its failure to obtain a warrant after acquiring probable cause thirty-one hours prior to the airplane landing, by "conceding" that the officers did not have probable cause.[5]

First, the State argues that "a search warrant cannot be issued upon probable cause to believe that a crime may take place in the future." (AB 17). In support of this proposition, Petitioner cites Churney v. State, 348 So.2d 395 (Fla. 3 DCA 1977), a case which has absolutely nothing to do

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[4] U.S. v. Ventresca, 380 U.S. 102 (1965).

[5] This, of course, is directly contrary to the testimony of Lt. Frawley. (R 52).

with the issue. Further, there is no evidence to indicate that a magistrate and an Assistant State Attorney could not have been made available to issue a warrant as soon as some activity occurred. Also, while there is some law in the State of Florida regarding anticipatory search warrants, the record reflects that the officers were in constant contact with the Federal Drug Enforcement Agency during the April 21-22 period (R 28, 32) and, in fact, could have obtained a Federal search warrant.[6] As a matter of fact, at least one Federal agent accompanied the officers on the raid. (R 32). It is obvious then that the officers could have avoided the anticipatory warrant problem had they so chosen. Finally, the State, had it so chosen, could have obtained a search warrant or an arrest warrant based on the information received through the ELLIOTT wiretap indicating that a conspiracy to violate Florida laws regulating controlled substances had in fact already occurred and was continuing at that time on the Brady ranch. It should be noted that the officers leading the "invasion forces" made no attempt to contact Captain Dempsey to ascertain what information was contained in the wiretap transcripts and who the speakers were.

Second, the State argues that all the information

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[6] U.S. v. Outland, 476 F.2d 581 (6th Cir. 1973); U.S. v. Feldman, 366 F. Supp. 356 (D. Hawaii 1973)

the officers had was that one, possibly two, airplanes would land in the south Florida area. The State concedes that the call numbers of the planes were known, but denies knowing the exact landing site. This would seem to be a deliberate misrepresentation of the facts. Lt. Frawley testified as follows: (R28-29)

"Q When did you first receive information regarding the Brady Ranch?

A Approximately 2 P.M. on Friday, April 21st 1978.

Q From whom did you receive this information?

A Originally from Ray Magno who is in charge of the DEA Office, West Palm Beach.

Q And what was this information that you received?

A Essentially that one or two planes or possibly both planes would be --

MR. GREENBERG: Again, we're going to object on the grounds of hearsay.

THE COURT: Hearsay can be used to show probable cause, but this of course is not an actual trial before the jury so I'll overrule the objection.

THE WITNESS: Basically Mr. Magno told me that he received information that two planes possibly two planes would be landing at the Brady Ranch. And at that time he gave the numbers of the two planes.

BY MR. LYNCH:

Q All right, did you have a physical description of either or both planes?

A Possibly twin engines and possibly Cessnas.

Q Did you know what they would be carrying?

A He indicated contraband which I would assume to be marijuana.

Q Did he specifically tell you marijuana?

A I believe he said marijuana and/or cocaine."

Thus, the information the State had was far more extensive than it would like to admit. Furthermore, a simple telephone call to the F.A.A. in Oklahoma would have secured a complete description of the subject aircraft. Petitioner's contention (AB 18) that "...the law enforcement officers herein could not have known with any certitude exactly where, when, and how the contraband would arrive,..." is belied by the facts. The officers knew where (R 28), and when (R 28-29, 31), and how (R 28-29).

If we concede for the sake of argument, and in opposition to the findings of the trial court judge (R 120) that there was not probable cause, then we are left with an attempt by the Petitioner to justify behavior that cannot be condoned in a democratic society.

The State of Florida argued in the trial court that a "mere trespass" will not invalidate evidence which is in plain sight. In support of this proposition, they cite several cases which we will analyze.

In Boim v. State, 194 So.2d 313 (Fla. 3 DCA 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 emanating 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.

Boim is best characterized as an "open view" situation closely analogous and inherently dependent on the "plain view" doctrine. It is hardly analagous to the facts of the case sub judice.

In Miranda v. State, 354 So.2d 411 (Fla. 3 DCA 1978), marine patrol officers lawfully boarded a boat to inspect its registration and crawfish permit. It was not a trespass case. Further, the court states (at 414):

> "In the absence of probable cause or some other recognized exception to the search warrant rule, such warrantless searches are clearly unreasonable."

In Norman v. State, 362 So.2d 444 (Fla. 1 DCA 1978), a sheriff went onto what he knew to be uninhabited farmland by climbing a fence. He then looked into a barn and saw what he believed to be marijuana. Subsequently, he left the property and set up surveillance. He seized nothing. Later he questioned the defendant, who gave him permission to search the property. The court specifically stated (at 446):

> "We might take a different view if the farm had been an occupied residence, but the sheriff knew that it was not occupied."

It is ironic that Petitioner has argued that no warrant could be obtained in this case because it would be anticipatory in nature. For the State's position is that without a warrant, and without probable cause, and with full knowledge that nothing illegal was occurring on the Brady ranch at the time, they were justified in trespassing on the property.

Even before Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507 (1967), the prevailing line of case dealt with situations wherein an officer trespassed on a property because he had information that a crime was being committed therein. In the case sub judice, the State's position seems to be that even though they did not have knowledge of any kind that a crime was occurring on the Brady ranch, they nevertheless could mount a massive "search and destroy" mission on the property. If their justification for not obtaining a warrant was that no crime was in progress, how can they justify a trespass?

The Katz case established the "reasonable expectation of privacy" test. The court stated (389 U.S. 347, at 351):

> "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."

The State of Florida in its Brief to the Court (page nine) cites the cases of Air Pollution Variance Board

v. Western Alfalfa Corporation, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed. 2d 607 (1974); Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). None of the three cases support the State's position. Air Pollution Variance Board clearly indicates (at 94 S.Ct. 2116) that the outcome of the case would have been different if the trespasser acting on behalf of the State Health Department had been on premises from which the public was excluded. In the case sub judice it is clear that the public was totally excluded from the area trespassed on.

In the other two cases mentioned above, the fact patterns revolved around automobile searches. Said cases have absolutely nothing to do with the issues raised by the State of Florida in this case.

A more difficult problem is raised by the case of United States vs. Gustavo Diaz-Segovia, 457 F.Supp. 260 (1978) wherein the Court stated:

> "The rule of law that the court draws from the above cases is that agents are allowed to trespass upon individual's property as long as they do not search the house or curtilage and do not physically enter or peer into enclosed buildings, vehicles, or the like. An agent may observe activity from a vantage point which may be upon a defendant's property, if such observation is made across "open fields" from an area sufficiently removed from the dwelling to prevent unauthorized surveillance inside the house. If the agent, through his observations, develops probable cause to believe that a crime

> is being committed, he may further enter the property in order to effect an arrest. However, he must obtain a search warrant in order to enter and search any building, vehicle, etc., which hides items sheltered from public view." (457 F. Supp. at 270)

Again, however, the Gustavo Diaz-Segovia case does not involve the kind of destructive, violent trespass which is the hallmark of the case sub judice. Further, it must be noted that the Court in that case upheld the suppression of evidence seized in a warrantless search of a residence which involved breaking into a fence to enter the property where the house was located (at 267). The Court did not rule on the validity of the entry to the property. The Court indicates (at 273) that:

> "Once Agent Lodge arrived at Chincoteague and viewed the property, however, it is clear that the corroboration of the informant's tip was complete, and a warrant could have been obtained. Consequently, the correct procedure would have been to surround and stake out the Shelly residence (which was covered by heavy undergrowth), and send one of the agents to obtain a warrant. It appears that it would not have been difficult to obtain a search warrant by dispatching a DEA agent along with a Virginia State trooper, since a Virginia court was located only minutes away. Moreover, once the house was surrounded no exigencies required a warrantless entry."

The "open fields" doctrine was, in essence, an extension of the "plain view" doctrine. Case after case has language in it such as:

> ...it has been held that a mere trespass will not invalidate evidence which is discovered in plain sight during such trespass.[7]

[7] Boim supra at 315-6

But what was in plain sight here? After travelling several hundred yards into Appellee's property, the officers could see nothing of an incriminating nature. (R 72). They couldn't even see whether the airplane that landed had the same tail number as the craft they were looking for. In fact, even when Officer Wetherington got within twenty feet of the airplane, he didn't see any bales. Nevertheless, he ordered the subjects to raise their hands and to walk toward him. (R 62-63). It is interesting to note that the airstrip itself was surrounded by a second barbed wire fence (R 62). It wasn't until the subjects had been ordered to walk forward with raised hands that Officer Wetherington crossed the second barbed wire fence and observed the bales of suspected marijuana. (R 63).

Finally, according to the State's analysis, we have probable cause!! (AB 20). Do the officers then go and obtain a warrant to search the airplane and the jeep...no, they do not. They seize the evidence. It might be argued that probable cause arose when the airplane landed. Certainly they did not expect the evidence to be removed. They had the airstrip surrounded by three surveillance teams, and expected the evidence to be off-loaded from the airplane. (R 64). Raffield v. State, 351 So.2d 945 (Fla. 1977), would seem to dictate that with the advance notice they had, they should have had a magistrate standing by at this point. It is clear that they made no attempt to do so.

We are down to the last point of the State of Florida, to-wit: the Respondents had no reasonable expectation of privacy against a "mere trespass." The Brady ranch was in a rural area, surrounded by a drainage ditch, barbed wire fencing adorned with, "Posted, No Trespassing" signs. It was never open to the public, and the only two gates to the property were locked and secured. (R 4-5). The airplane landed at night, in total darkness, in an airstrip which was not visible from the road (R 40) and which was surrounded by barbed wire. It is difficult to imagine what else Brady could have done to insure privacy. It would seem that even an inordinately modest person would have felt extremely shielded from prying eyes if he decided to run around that area with no clothes. He would have a "reasonable expectation of privacy." So did Mr. Brady.

Lastly, we get to the final tortured bit of reasoning by the State of Florida. It is a frightening, horrible, thing when law enforcement and judicial officers of the State of Florida can describe what happened at the Brady ranch on the night of April 22, 1978, on a "mere trespass."

Judge Trowbridge described the actions of the officers in this way: (R 121-122)

> "So, we're sort of left with the fact that these officers 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 right should nevertheless be admissible."

Although Respondents are in agreement with the Court's position, it would be more descriptive to say that the officers acted like storm troopers.

The information they had was received by Polk County Sheriff's Department officers, who told Captain Dempsey (Polk County), who told Magno (DEA), who told Vogleman (Palm Beach County), who told Frawley (Martin County), that a crime was to be committed. Prior to any criminal activity taking place,they took their weapons and their sniperscopes, surrounded the Brady ranch, cut through a chain and padlock securing the front gate, rammed down the back gate with a car (or truck), surrounded his airstrip, and waited two and one-half hours on private property for something to happen. Then, when an airplane whose number they could not identify landed, they charged the strip like little boys with real guns and "detained" three persons at gunpoint without even seeing any contraband.

This the State of Florida calls a "mere trespass." It is not. It is an outrage perpetrated under the color of authority. It is, as Judge Trowbridge said, Nazi Germany or Communist Russia. (R 114). If we adopt the position of the State, we surrender our freedom. Democracy will survive marijuana; it will not survive tyranny.

CONCLUSION

For the reasons and authorities cited herein, the

Respondents, RONALD B. ELLIOTT and PHILIP M. ECKART, submit that the trial judge properly granted a Motion to Suppress and that the affirmation of that Order by the Fourth District Court of Appeal was proper and should be affirmed.

POINT II

The Respondents, RONALD B. ELLIOTT and PHILIP M. ECKART, decline to present argument on the second point raised by the State of Florida in its Petition for Writ of Certiorari since the outcome of that issue will not affect the rights of said Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondents has been mailed to Robert P. Foley, Esq., 315 3rd Street, Suite 316, West Palm Beach, Florida 33401; Alan Karten, Esq., 3550 Biscayne Blvd., Suite 504, Miami, Florida 33137; Bruce H. Fleisher, Esq., 370 Minorca Avenue, Suite 15, Coral Gables, Florida; Joel S. Fass, Esq., 11601 Biscayne Boulevard, Suite 202, North Miami, Florida 33181; and Robert L. Bogen, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401 this 29th day of October, 1980.

PERTNOY AND GREENBERG, P.A.
Attorneys for Respondents ELLIOTT and ECKART
744 Northwest 12 Avenue
Miami, Florida 33136
Telephone: (305) 545-5700

By Steven M. Greenberg
STEVEN M. GREENBERG