IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

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

Appellees.

CASE NO. 59,054

STATE OF FLORIDA,

Appellant,

v.

HERMOGENES MANUEL and DAVID LIST,

Appellees.

INITIAL BRIEF ON JURISDICTION

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TABLE OF CONTENTS

		PAGE
TABLE OF CITATIONS		ii, iii
PRELIMINARY STATEMENT		1
STATEMENT OF THE CASE		1-2
STATEMENT OF THE FACTS		2-3
POINTS ON APPEAL		4
ARGUMENT -		5-11
I	THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE EXPRESSLY CONFLICTS WITH AYLIN v. STATE, 362 So.2d 435 (Fla. 1DCA 1978), AND VARIOUS OTHER OPINIONS OUT OF THE SECOND DISTRICT COURT OF APPEAL.	5-6
II	THE OPINION RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE CONFLICTS WITH VARIOUS OPINIONS RENDERED BY OTHER DISTRICT COURTS OF APPEAL INASMUCH AS THE FOURTH DISTRICT COURT OF APPEAL APPLIED A RULE OF LAW WHICH CONFLICTS WITH THAT ANNOUNCED BY THE OTHER OPINIONS.	7-11
CONCLUSION		12
CERTIFICATE OF SERVICE		12

TABLE OF CITATIONS

	PAGE
CASES:	
Aylin v. State, 362 So.2d 435 (Fla. 1DCA 1978)	5
Beasley v. State, 2DCA No. 79-286, Opinion filed 3/14/80	5
Boim v. State, 194 So.2d 313 (Fla. 3DCA 1967)	8
Cobb v. State, 213 So.2d 492 (Fla. 2DCA 1968)	8
Dinkens v. State, 291 So.2d 122 (Fla. 2DCA 1974)	9
Hester v. United States, 44 S.Ct. 445 (1924)	10,11
Katz v. United States, 389 U.S. 347 (1967)	9,10,11
Mancini v. State, 312 So.2d 732 (Fla. 1975)	5,7
Norman v. State, F.S.C. No. 55,172, Opinion rendered 1/24/80	10
Phillips v. State, 177 So.2d 243 (Fla. 1DCA 1965)	7,9
Reinersman v. State, 2DCA 79-518, Opinion filed 3/21/80	6
Spivey v. Battaglia, 258 So.2d 815 (Fla. 1972)	7
State v. Belcher, 317 So.2d 842 (Fla. 2DCA 1975)	9
State v. Coffey, 212 So.2d 632 (Fla. 1968)	7
State v. Davis, 243 So.2d 587 (Fla. 1971)	7
State v. Detlafson, 335 So.2d 371 (Fla. 1DCA 1976)	9

Table of Citations (continued) PAGE

OTHER AUTHORITIES:

Fla. Stat. §777.04(4)(d) (1977) 5

PRELIMINARY STATEMENT

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

References to those portions of the Fourth District Court of Appeal record which are filed as the appendix herein will be referred to by utilization of the letter "A" followed by the appropriate appendix page number. All emphasis in this brief will be supplied by Petitioner, unless otherwise indicated.

STATEMENT OF THE CASE

Respondents Brady, Elliot, and Eckard were charged with various drug related counts (A 1-4). Respondents List and Manuel were also charged with attempted possession of a controlled substance (A 5). All Respondents filed motions to suppress evidence, the trial court's granting of which Petitioner sought review in the Fourth District Court of Appeal (A 6).

During the pendency of that appeal, Respondents List and Manuel filed in the trial court a motion for speedy trial discharge, the granting of which was the subject of Petitioner's second notice of appeal (A 7). By order of the Fourth District Court of Appeal, the two appeals commenced by the filing of a notice of appeal from the trial court order granting the motion

to suppress and from the trial court order granting the motion for discharge were consolidated (A 8).

Following the submission of briefs, and oral argument, the Fourth District Court of Appeal filed its opinion (A 9-15). Following Petitioner's motion for rehearing and/or suggestion for certification (A 16-20), to which Respondents filed no response, the Fourth District Court of Appeal denied said motion on 3-19-80 (A 21).

Notice of discretionary jurisdiction was thereafter timely filed on or about 4-3-80 (A 22-23).

STATEMENT OF THE FACTS

The following facts are derived from the Fourth District Court of Appeal's opinion in the case sub judice, and various other relevant portions of the record proper which the Fourth District Court of Appeal failed to include in its opinion. The record proper that will be referred to consists, not of the report of trial testimony for there was no trial, but of testimony taken at the motion to suppress hearing. As such, it is properly before this Court on the jurisdictional question. Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965).

Respondents had 1,800 acres of land, fenced, locked, and posted (A 9). The fence was a barbed wire fence (A 25), and the land had an airstrip and a trailer on it (A 24, 25). The arrest occurred upon law enforcement officers observing a planeload of marijuana land on the airstrip (A 26-27). The law enforcement officers gained entry onto the land by cutting

the chain lock on a gate (A 10). On these facts, the Fourth District Court of Appeal upheld the trial court's order granting Respondents' motions to suppress.

The second portion of the Fourth District Court of Appeal's opinion dealt with the fact that Respondents List and Manuel were charged with attempted possession of cannabis in excess of 100 pounds. The trial court had considered this charge to be a misdemeanor, and therefore granted Respondents' motion for discharge when they were not tried within 90 days. The Fourth District Court of Appeal expressly disapproved of Aylin v. State, 362 So.2d 435 (Fla. 1DCA 1978), and held that attempted possession of marijuana in excess of 100 pounds is a third degree felony. As such, the trial court's order granting Respondents List and Manuel's motion for discharge was reversed.

POINTS ON APPEAL

POINT I

WHETHER THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE EXPRESSLY CONFLICTS WITH AYLIN v. STATE, 362 SO.2D 435 (FLA. 1DCA 1978), AND VARIOUS OTHER OPINIONS OUT OF THE SECOND DISTRICT COURT OF APPEAL?

POINT II

WHETHER THE OPINION RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE CONFLICTS WITH VARIOUS OPINIONS RENDERED BY OTHER DISTRICT COURTS OF APPEAL INASMUCH AS THE FOURTH DISTRICT COURT OF APPEAL APPLIED A RULE OF LAW WHICH CONFLICTS WITH THAT ANNOUNCED BY THE OTHER OPINIONS?

ARGUMENT

POINT I

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE EXPRESSLY CONFLICTS WITH AYLIN v. STATE, 362 SO.2D 435 (FLA. 1DCA 1978), AND VARIOUS OTHER OPINIONS OUT OF THE SECOND DISTRICT COURT OF APPEAL.

In Mancini v. State, 312 So.2d 732 (Fla. 1975), this Honorable Court stated that jurisdiction premised upon a conflict of decisions is invoked by the announcement of a rule of law which conflicts with a rule previously announced by this Court or another district court of appeal. In Aylin v. State, 362 So.2d 435 (Fla. 1DCA 1978), the First District Court of Appeal held as a matter of statutory construction that simple possession of more than 100 pounds of cannabis is not a second degree felony, but is a third degree felony. As such, were the Fourth District Court of Appeal in the case sub judice to follow Aylin, of necessity, that court would have had to find that attempted possession of marijuana in excess of 100 pounds was a first degree misdemeanor. Section 777.04(4)(d), Fla. Stat. (1977). However, the Fourth District Court of Appeal expressly disapproved of Aylin, supra, and held that possession of marijuana in excess of 100 pounds is a second degree felony, thereby making the attempted possession thereof a third degree felony (A 20). Therefore, there is no doubt that the opinion rendered by the Fourth District Court of Appeal expressly and directly conflicts with Aylin, supra.

On the same basis, the opinion of the Fourth District Court of Appeal expressly and directly conflicts with Beasley v.

State, 2DCA No. 79-286, opinion filed 3-14-80, and Reinersman v. State, 2DCA No. 79-518, opinion filed 3-21-80. In the latter two cases, the Second District Court of Appeal certified the instant question for review by this Honorable Court. Therefore, inasmuch as direct and irreconcilable conflict has been recognized to exist by the Fourth District Court of Appeal in the opinion sub judice, and by the Second District Court of Appeal in Beasley, supra, and Reinersman, supra, this Honorable Court should accept jurisdiction of the instant cause, and allow Beasley, Reinersman, and the instant opinion to travel together.

POINT II

THE OPINION RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE CONFLICTS WITH VARIOUS OPINIONS RENDERED BY OTHER DISTRICT COURTS OF APPEAL INASMUCH AS THE FOURTH DISTRICT COURT OF APPEAL APPLIED A RULE OF LAW WHICH CONFLICTS WITH THAT ANNOUNCED BY THE OTHER OPINIONS.

As previously stated, the announcement of a rule of law which conflicts with a rule previously announced by this Honorable Court or another district court of appeal is sufficient to invoke the certiorari jurisdiction of the Florida Supreme Court. Mancini, supra. See also, Spivey v. Battaglia, 258 So.2d 815 (Fla. 1972). Further, in State v. Davis, 243 So.2d 587 (Fla. 1971), this Honorable Court accepted jurisdiction, stating that there appeared to be at least some conflict in the decision sought to be reviewed and statements of general principles of law in prior decisions of the Florida Supreme Court. Finally, in State v. Coffey, 212 So.2d 632 (Fla. 1968), this Honorable Court accepted certiorari jurisdiction, stating that the appellate court misconstrued the effect of prior cases insofar as the controlling point of law was concerned. Petitioner herein would submit that the opinion of the Fourth District Court of Appeal sub judice either misconstrued the effect of previously announced rules of law, and/or announced statements of general principles which conflict with previously announced rules of law.

In Phillips v. State, 177 So.2d 243 (Fla. 1DCA 1965), the First District Court of Appeal upheld a trial court's order denying the defendant's motion to suppress evidence. Law

enforcement officers had trespassed on property and discovered a moonshine still, in the open, 50 to 60 yards behind a dwelling house. The First District Court of Appeal held that the still was not a part of the curtilage of the dwelling. The court stated that protection of the curtilage against unreasonable searches and seizures should not be so expanded as to make it a refuge for criminals. The court further stated that to extend the concept of immunity from unreasonable search and seizure so as to prohibit the search of any property included in a fenced area in which a dwelling may be located without having first obtained a search warrant, would extend the protection afforded by the Constitution to an absurdity. Finally, the court held that, though technically trespassers, the action of the law enforcement officers in making the search of the area without benefit of a search warrant and as a result of confidential information received by them was not in any sense reprehensible or illegal.

In Boim v. State, 194 So.2d 313 (Fla. 3DCA 1967), the Third District Court of Appeal held that a mere trespass will not invalidate evidence which is discovered in plain sight during such trespass.

In Cobb v. State, 213 So.2d 492 (Fla. 2DCA 1968), the Second District Court of Appeal held that the protection afforded the people against unreasonable searches and seizures does not extend to grounds of the property even though the searching authority is a trespasser (it is to be noted that the Second District Court of Appeal cited cases which indicated that there should be no distinction as to whether or not the

grounds or open fields around the houses are enclosed or unenclosed). In Dinkens v. State, 291 So.2d 122 (Fla. 2DCA 1974), the Second District Court of Appeal again held that the fact that a searching authority may be trespassing will not necessarily invalidate a search and seizure (the Second District Court of Appeal held that the search therein was indeed unreasonable, for the searching authorities did invade the curtilage of the defendant's home while conducting their search).

In State v. Belcher, 317 So.2d 842 (Fla. 2DCA 1975), the Second District Court of Appeal once again held that a mere trespass to land does not invalidate an otherwise valid search or seizure (the court did note, however, that the trespass doctrine is not necessarily controlling, inferring that said doctrine may be given weight, however, as to what constitutes a "reasonable expectation of privacy").

Finally, in State v. Detlafson, 335 So.2d 371 (Fla. 1DCA 1976), the First District Court of Appeal plainly indicated that a trespass will not, in and of itself violate an otherwise valid search and seizure (depending upon whether or not the defendant harbored a reasonable expectation of privacy).

All of the aforementioned cases involved a seizure of evidence which was located in the open. At least one of the aforementioned cases [Cobb, which was post-Katz v. United States, 389 U.S. 347 (1967)] stated that there is no distinction as to whether the open grounds are enclosed or unenclosed. Phillips, supra, clearly indicated that the protection against unreasonable searches and seizures should not be so expanded as to make the open fields a refuge for criminals, or to prohibit the search

of any property which may be included in a fenced area in which a dwelling may be located (without having first obtained a search warrant).

These principles of law were not followed by the Fourth District Court of Appeal in the case sub judice. Eighteen hundred acres of open air property were involved in the case sub judice. While it may be true that the 1,800 acres were fenced by barbed wire, posted, and locked, all the officers did was trespass. There was certainly no trespass of curtilage. Inasmuch as Katz, supra, did not overrule Hester v. United States, 44 S.Ct. 445 (1924), a trespass in open fields cannot be said to violate an accused's reasonable expectation of privacy. Yet, the Fourth District Court of Appeal did indeed hold that a trespass in open fields does violate an accused's reasonable expectation of privacy, where the fields are fenced, posted, and locked.

It is to be noted that this Honorable Court did not reach the issue in Norman v. State, F.S.C. No. 55,172, opinion rendered 1-24-80, for it was the search of the barn (an enclosed structure) on the defendant's leased property which violated the Fourth Amendment, and not the trespass through the fenced area.

Premised upon the conflict of opinions above demonstrated, Petitioner would submit that this Honorable Court should accept jurisdiction of the above-styled matter to entertain the question of whether a trespass in open fields can constitute such an invasion of privacy as to invoke the protections of the Fourth Amendment. The Florida courts have previously held that such a trespass is not sufficient to

invoke the protections of the Fourth Amendment, and there is nothing in Katz, supra, which would have the effect of changing the law as espoused in those Florida opinions (inasmuch as Hester, supra, is still the law of the land). Yet, the Fourth District Court of Appeal in the case sub judice did indeed state that a trespass in open fields which are surrounded by a fence, locked and posted, will render a subsequent seizure violative of the Fourth Amendment. The opinion of the Fourth District Court of Appeal therefore is directly and irreconcilably in conflict with the prior opinions of the Florida courts (both pre- and post- Katz, supra).

CONCLUSION

Wherefore, based upon the foregoing argument, supported by the circumstances and authorities cited therein, Petitioner would respectfully request that this Honorable Court grant certiorari jurisdiction in the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed to Steven M. Greenberg, Esq., 744 N.W. 12th Avenue, Miami, Florida 33136; Robert P. Foley, Esq., 406 North Dixie Highway, West Palm Beach, Florida 33401; Alan Karten, Esq., 3550 Biscayne Boulevard, Suite 504, Miami, Florida 33137; Bruce H. Fleisher, Esq., 370 Minorca Avenue, Suite 15, Coral Gables, Florida; and to Joel S. Fass, Esq., 11601 Biscayne Boulevard, Suite 202, North Miami, Florida 33181, this 14th day of April, 1980.

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