IN THE SUPREME COURT OF FLORIDA.

STATE OF FLORIDA, Petitioner

vs.

FRANK J. BRADY, et al.,
Respondent

CASE NO. 59,054

REPLY BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The present case is before the Court on a Petition for Certiorari filed by the State of Florida seeking review of the decision of the District Court of Appeals, Fourth District in Brady, et al. v. State of Florida 379 So.2d 1294 (Fla. App. 4th 1980).

The parties will be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and Facts as contained in the briefs of the Petitioner filed herein, except where the Statement of Facts is based on the testimony taken at the hearing on the Motion to Suppress. The testimony taken at the hearing on the Motion to Suppress is not part of the record proper, and thus should not be considered by this Court with respect to the issue of juridiction.

POINTS ON APPEAL

POINT ONE ARGUMENT

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. 1 DCA 1978), AND VARIOUS OTHER OPINIONS OUT OF THE SECOND DISTRICT COURT OF APPEAL.

POINT TWO ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEALS, FOURTH DISTRICT IN THE PRESENT CASE IS NOT IN CONFLICT WITH THE DECISIONS OF THE FLORIDA SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL OF FLORIDA.

POINT ONE

ARGUMENT

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. 1 DCA 1978), AND VARIOUS OTHER OPINIONS OUT OF THE SECOND DISTRICT COURT OF APPEAL.

The argument set forth under Point I of the Brief of Petitioner does not directly affect the Respondent. That is, the Respondent never sought discharge pursuant to F.R.Cr.P. 3.191 under the authority of Aylin v. State 362 So.2d 435 (Fla. App. 1st 1978).

The Respondent is concerned by the apparent attempt of the Petitioner to persuade this Court to grant review in the present case by demonstrating conflict between the decision of the court in Aylin and the decision in the present case and thereby obtain review of the Petitioner's other unrelated point. Specifically, it is difficult to understand why the Petitioner would seek review of that portion of the decision in the present case concerning Aylin. The simple fact is the trial court followed Aylin and ruled against the Petitioner. The Petitioner then sought review of the trial court's order in the District Court of Appeals, Fourth District and prevailed. That is, the District Court reversed the order of the trial court granting discharge. Simply stated there is no further

relief that this Court could provide to the Petitioner in this regard.

The law is clear that only an aggrieved party can seek review of a judgment, order or decision. King v. Brown 55 So.2d 187 (Fla. 1951). Thus, where the relief obtained by the Petitioner in the District Court was precisely the relief requested by the Petitioner, he is not an aggrieved party and therefore has no standing to seek review of the decision by this Court. King v. Brown, supra.

POINT TWO

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEALS, FOURTH DISTRICT IN THE PRESENT CASE IS NOT IN CONFLICT WITH THE DECISIONS OF THE FLORIDA SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL OF FLORIDA.

The Petitioner seeks to demonstrate conflict between the decision of the present case and other decisions by pointing out that other courts have permitted a "trespass" of "open fields".

The Petitioner fails to understand that the fields in the present case were not "open". Rather, the property was "well fenced, locked and posted." (379 So.2d at 1295). The fields became open only after officers opened one gate with a bolt cutter and opened a second gate by running over it with a truck.

On a more fundamental level, the analysis is not advanced by characterizing the officers' conduct as a "trespass". It is a fact that any unauthorized intrusion by officers, regardless of how outrageous, is nothing more than a trespass under the principals of property law.

Nor is it sufficient simply to characterize the area searched as "open fields". The District Court recognized this and correctly rejected the Petitioner's simplistic analysis of the issues. Rather, the District Court correctly focused its

attention on whether the property owner had a reasonable expectation of privacy.

As this Court stated in Norman v. State 379 So.2d 643 (Fla. 1980),

> "Katz v. United States [389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576 (1967)] teaches that the capacity to claim the protection of the Fourth Amendment depends upon whether a person has a 'legitimate' expectation of privacy in the invaded area. That expectation will be recognized as legitimate if a person has exhibited an actual (subjective) expectation of privacy, and the expectation is one that society is prepared to recognize as reasonable." (page 647).

The decision of the District Court in the present case is not that officers may never search fenced fields without a warrant (as contended by the Petitioner). Rather, the District Court held that under the facts of this case, the Respondent had a reasonable expectation of privacy, and thus, the officers could not enter the property without a warrant. As stated by the court,

> "Suffice it to say that although the closer one is to the actual curtilage the more sacrosanct the reasonable right to privacy becomes, it is equally plain that the total encirclement of property by a fence obviously designed to keep people out, together with signs telling them to do so, evinces an unmistakable desire and expectation on the part of the occupant that no one enter. From out of the language of the sum of the foregoing cases we choose to interpret the right of privacy as reasonable under the facts of this case." (at 1296).

In light of the precise holding of the District Court in the present case it can be seen that no conflict exist

between the decision in the present case and the cases cited by the Petitioner. Specifically, in each case the court held that under the particular facts and circumstances of the case the officers did not enter an area where the property owner had a reasonable expectation of privacy.

In State v. Detlefson 335 So.2d 371 (Fla. App. 1st 1976) an officer entered the front yard of a residence after observing a suspected marijuana plant while standing on the street. The court stated,

> "It can not be said the defendant had a reasonable expectation of privacy in the front porch of his home where, presumably, delivery men and others were free to observe the plants thereon." (page 372).

In State v. Belcher 317 So.2d 842 (Fla. App. 2d 1975) officers observed the defendants sitting on a porch and approached them. While talking to the defendants the officers observed jewelry which the officers suspected was recently stolen. In holding that the officers' conduct was not unlawful, the court stated,

> "In the case sub judice two alert police officers observed suspicious activity on the well-lit porch of a residence. These observations were made from the street. The officers then walked to the front porch to investigate and there observed the jewelry which the trial court ordered suppressed. Under these circumstances we do not feel defendants' expectation of privacy, if any, was 'reasonable'". (page 846) (original emphasis).

Boim v. State 194 So.2d 313 (Fla. App. 3d 1967) cited by the petitioner, is similiar in its facts and holding to

Detlefson and Belcher.

Cobb v. State 213 So.2d 492 (Fla. App. 2d 1968) and Phillips v. State 177 So.2d 243 (Fla. App. 1st 1965), both cited by the Petitioner, both involve intrustions by law enforcement officers onto land. Yet, here the similiarity with the present case ends. Specifically, in neither case did the property owner make any effort to "exhibit an actual (subjective) expectation of privacy." Norman v. State, supra. That is there is no evidence that the property owner had fenced the property, locked the property, posted signs around the perimeter of the property or any other indication that the owner desired to exclude members of the general public from the property.

It is clear from the opinion of the District Court that the Court made an exhaustive search for decisions factually similiar to the present case. It is significant that none of the cases cited by the Petitioner in this brief are even mentioned in the opinion of the District Court. Indeed, as the Court succinctly stated,

> "Nowhere have we discovered a case where warrantless searches have been allowed based on a necessary breaking down of a fence, lock or gate to get on a property, absent exigencies which are not present in the case before us." (page 1296).

The Respondent submits that the Petitioner has failed to demonstrate the decision of the District Court of Appeals, Fourth District in the present case is in conflict with any

prior decision of this Court or the decision from any District Court of Appeal. As such, the Petition for Certiorari should be denied.