61,179

IN THE SUPREME COURT OF FLORIDA

FILED

OCT 12 1981

SID J. WHITE
CLERK SUPREME COURT
By _____ Deputy Clerk

DEBRA JAYNE DeMONTMORENCY, :

Petitioner, :

vs. : CASE NO. 61,179

STATE OF FLORIDA, :

Respondent. :

RESPONDENT'S BRIEF ON JURISDICTION

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TOPICAL INDEX

AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and the Statement of the Facts as stated on pages one (1) through four (4) of Petitioner's brief on jurisdiction.

ISSUE PRESENTED

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS NOT IN DIRECT CONFLICT WITH STATE V. MORSMAN, 394 So.2d 408 (Fla. 1981), NORMAN V. STATE, 379 So.2d 643 (Fla. 1980), AND STATE V. BRADY, 379 So.2d 1294 (Fla.4th DCA 1980).

ARGUMENT

Petitioner improvidently argues that the District Court of Appeal's opinion in this case expressly and directly conflicts with this Court's decisions in State v. Morsman, 394 So.2d 408 (Fla. 1981), and Norman v. State, 379 So.2d 643 (Fla. 1980), and the Fourth District Court of Appeal's decision of State v. Brady, 379 So.2d 1294 (Fla.4th DCA 1980).

In regard to Morsman and Norman, the First District Court of Appeal was careful to distinguish its decision. (A-3-6). Neither Morsman nor Norman dealt with the "open fields doctrine," upon which the District Court of Appeal relied in affirming Petitioner's conviction, although in Norman this Court noted that whatever the precise boundaries of the open fields doctrine the doctrine does not extend to a warrantless search of a closed structure on his property. Norman at 647. No structure was pierced by the officers when the fields of marijuana cultivated by Petitioner were secured.

Helpful to this Court's determination of its jurisdiction is Lightfoot v. State, 356 So.2d 331 (Fla.4th DCA 1978), cert.den. 361 So.2d 833 (1978). In Lightfoot, an officer was called by a neighbor to the neighbor's home because the neighbor suspected that the defendant was cultivating marijuana plants in his back yard. Officers arrived, observed three pots containing what the officers believed, based on their training and experience, to be marijuana in the defendant's back yard from the neighbor's back yard, seized the plants and subsequently arrested the defendant. The Fourth District Court of Appeal held that anyone who keeps marijuana plants in open view in his or her back yard in plain view of a neighbor has no reasonable expectation of privacy.

In Morsman the view was from within the defendant's back yard; the record in Morsman did not indicate that the plants were visible from outside the yard. Consequently, Morsman's back yard was constitutionally protected and Lightfoot's was not. Morsman at 409.

Here, Petitioner's open fields were visible from a point on adjoining property other than the place where the two officers crossed the fence. (A-3). Consequently, Petitioner had no expectation of privacy in her open fields of marijuana.

The question before the First District Court of Appeal in this case involved the "open fields" exception to the warrant

requirement, applicable outside Petitioner's curtilage. (A-4). The First District Court of Appeal properly relied upon its decision in Phillips v. State, 177 So.2d 243 (Fla.1st DCA 1965), in determining that Petitioner's open fields of marijuana were not within the curtilage of her mobile home residence (A-5-6).

In regard to State v. Brady, 379 So.2d 1294 (Fla.4th DCA 1980), the First District Court of Appeal properly observed that the "locked gate, the fact that the property was posted, and the forced entry are facts which" distinguish the Brady case from this case. (A-6).

One final point. Even assuming that Petitioner's case conflicts with, say State v. Brady, Petitioner failed to properly develop the facts in order for this Court to determine the parameters of the open fields doctrine. See the District Court of Appeal's comment in footnote 2 of its opinion. There was evidence to indicate that Petitioner's mobile home was surrounded by some type of enclosure within her open fields, which were surrounded merely by a "hog fence."

CONCLUSION

For the foregoing reasons, and for the reasons so clearly stated in the First District Court of Appeal's opinion in this case, Petitioner's cases do not expressly and directly create a conflict that must be resolved by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's brief on jurisdiction has been forwarded to Geoffrey C. Fleck, Esquire, Weiner, Robbins, Tunkey & Ross, P.A., Rivergate Plaza, Suite 700, 444 Brickell Avenue, Miami, Florida 33131, this 12th day of October, 1981.

Of Counsel