IN THE SUPREME COURT OF FLORIDA

Case Number: 61,179

DEBRA JAYNE DeMONTMORENCY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, IN THE CASE AT BAR, IS 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).

STATEMENT OF THE CASE

The Petitioner was the Defendant at trial and the Appellant on appeal. The Respondent was the prosecution at trial and the Appellee on appeal. The parties will be referred to in this brief as they stand here. Accompanying this brief is an appendix consisting of a copy of the decision of the First District Court of Appeal. The symbol "A" will be used to designate the appendix. All emphasis has been supplied unless otherwise indicated.

The Petitioner, DEBRA JAYNE DeMONTMORENCY, was charged in a two count Information with manufacturing cannabis and with possession of cannabis. Pursuant to plea negotiations, the Petitioner plead guilty to manufacturing cannabis and the State nolle prossed the charge of possession. By the terms of the negotiated plea, the Petitioner specifically reserved the right to appeal the denial of her Motion to Suppress marijuana found growing on a fenced parcel of land which also included her house trailer. Based upon said negotations, the Petitioner was sentenced to serve ninety days in the County Jail and to pay a fine of $5,000.00 prior to her release from custody.

The Petitioner prosecuted a timely appeal to the District Court of Appeal of Florida, First District. On July 10, 1981, that court, in a nine page opinion, affirmed her Judgment and Sentence. [App. A]. The Petitioner filed a Motion for Rehearing and/or Rehearing En Banc which the District Court denied on August 17, 1981. [App. B]. The court, however, granted the

Petitioner a stay of mandate pending certiorari review by this Court.

The Petitioner filed a timely Notice of Certiorari on September 15, 1981. This brief on jurisdiction follows.

STATEMENT OF THE FACTS

The following facts are those relied upon by the District Court of Appeal in reaching its decision and are all reflected in its opinion:

The Petitioner lived in a house trailer within a fenced parcel of land. The fence which surrounded the property was a forty inch hog wire fence topped with two strands of barbed wire. The house trailer itself was protected by three dogs, whose presence made it necessary for the officers to solicit the assistance of the Petitioner in restraining the dogs when the officers later returned to search the trailer (pursuant to a search warrant which the trial court found invalid). The record does not reflect whether there was a second fence enclosing the trailer and its yard, or whether a single enclosure surrounded the entire property, including the marijuana patch. [App. A, pp. 1-2, n. 2].

Acting on a tip that marijuana was being grown on the Petitioner's property, two officers drove through an open gate into a pasture adjacent to the Petitioner's property, parked their car, and crossed over a fence into a rough wooded portion of the Petitioner's property. The only gate in the fence was located in front of the house trailer. Prior to crossing the fence, the police did not see the growing marijuana, but it was seen by them after traveling a distance of some three hundred feet inside the fence. From the point where the growing marijuana was found the officers could not see the Petitioner's house

trailer, which was located within the fenced property approximately 750 to 800 feet distant. The marijuana in question was growing in a cleared patch of ground within a wooded area. [App. A, pp. 2, 6].

After the Petitioner was observed watering the plants she admitted it was her property and she was arrested. At a point on adjoining property other than the place where the two officers crossed the fence it was possible to observe the growing marijuana plants from outside the fenced area. However, the officer who made this observation testified that the marijuana would not have been seen from this vantage point had not the two officers already located the marijuana on the property. Without any attempt to secure a warrant the officers seized the marijuana giving rise to the prosecution and conviction in this case. [App. A, pp. 2-3].

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, IN THE CASE AT BAR, IS 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).

Article V, Section 3(b)(3) of the Florida Constitution confers upon this Court jurisdiction to "review any decision of the District Court of Appeal ... that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law." It is not necessary that a District Court explicitly identify conflicting District Court or Supreme Court decisions in its opinion in order to create an "express" conflict under Section 3(b)(3). See England, Hunter and Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 reform, 32 U.Fla.L.Rev. 147, 188-189 (1980). It is enough to create direct and express conflict that a District Court discuss the legal principles which form the basis of its decision. Ford Motor Company v. Kikis, ____ So.2d ____, 1981 FLW 548 (Fla. 1981). The nine page opinion of the District Court in the case at bar is a direct, express and unique aberration of the law established by this Court and at least one other District Court of Appeal on precisely the same issue.

By its decision, the District Court rejected the Petitioner's claim that the warrantless, nonconsensual search of the fenced

property surrounding her home was unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution. It decided that the warrantless seizure of marijuana by trespassing officers from a parcel of property upon which the Petitioner lived in a house trailer and which was surrounded by a forty inch hog wire fence topped with two strands of barbed wire was not subject to suppression because the "open fields" exception to the warrant requirement vitiated any claim by the Petitioner of a reasonable expectation of privacy. The District Court, while conceding that its "conclusion from [its] examination of the cases is that it is by no means absolutely clear to what extent the open fields doctrine may be applied where property is fenced, particularly where the fence encloses a residence," and while acknowledging that "the presence of a fence manifests an actual (subjective) expectation of privacy to a degree," concluded that the Petitioner's expectation of privacy was nevertheless "not one that [it] would expect society is prepared to recognize as reasonable." [App. A, pp. 8-9]. The decision of the District Court, however, is contrary to all recent precedent.

This Court's recent decision in State v. Morsman, 394 So.2d 408 (Fla. 1981), established an individual's right to privacy in the backyard of his private residence even where the yard is not fenced in. The Petitioner here, who surrounded her property with a forty inch hog wire fence topped with two strands of barbed wire (and additionally protected at least her house trailer by

three dogs) evidenced a far greater expectation of privacy then did even Morsman. The Morsman Court rejected the State's argument that contraband in plain view may be seized without a warrant because the officer in Morsman had no right to be in the Respondent's backyard. By the facts found by the District Court in this case:

> ... two officers drove through an open gate into a pasture adjacent to appellant's property, parked their car, and crossed over the fence into a rough wooded portion of appellant's property. Prior to crossing the fence they did not see the growing marijuana, but it was seen by them after traveling a distance of some three hundred feet inside the fence. [App. A, p. 2].

The intrusion into the Petitioner's property by two officers for a distance of three hundred feet inside the barbed wire fence is irrefutably a greater intrusion than that committed by the single officer in Morsman who simply "walked around the house and saw the marijuana plants growing in the backyard."

In addition, as in Morsman, the officers in this case acted "on a tip that marijuana was being grown on Appellant's property." [App. A, p. 2]. Squarely on point, as this Court held in Morsman, is the rule that "when hearsay makes the basis of a complaint, the warrant clause requires that the evidence be presented to a detached Magistrate to decide if the hearsay information gives probable cause to conduct a search." This Court continued:

> It is exactly this type of situation which mandates the protection of the

Fourth Amendment. [394 So.2d at 409].

Similarly, this Court in Norman v. State, 379 So.2d 643 (Fla. 1980), held that the owner of a barn on his fenced property enjoyed a reasonable expectation of privacy in that barn even though the barn was two hundred and fifty yards from the entrance to the farm. The District Court strained to distinguish the facts of Norman on the basis that:

> Entry in that case was accomplished by a Sheriff who climbed a fence, after he found the gate locked, and observed marijuana inside a tobacco barn by peering through a window with the aid of a flashlight. There is no evidence in the present case of a gate, locked or otherwise, except for a gate located in front of the house trailer itself, and the marijuana in question was growing in a cleared patch of ground in a wooded area, not concealed in a closed building. [App. A, p. 6].

The material distinctions, if any, between Norman and the case at bar re-enforce rather than diminish the clear conflict between them. While the police here may not have climbed over the fence after finding a locked gate, they instead failed even to attempt to locate a gate before they climbed the fence to intrude into the Petitioner's property. If anything, the fact that the portion of property entered by the police was surrounded by a barbed wire fence having no gate at all compels the conclusion that the Petitioner intended to foreclose entry by uninvited trespassers altogether. Moreover, the fact that the Petitioner's marijuana

was growing in a clearing surrounded by a heavily wooded area evidences a particularly great expectation of privacy. Like the barn in Norman, the trees here also acted to protect her crop from warrantless visual governmental intrusion.

In addition, State v. Brady, 379 so.2d 1294 (Fla. 4th DCA 1980), holds that one's reasonable expectation of privacy is not diminished merely because one's property is large. Under facts materially indistinguishable from those of the case at bar, the Brady Court rejected the State's contention that one's reasonable expectation of privacy somehow lessened as the size of one's property increased and held instead that a Defendant was entitled to the protections of the Fourth Amendment even on his fenced eighteen hundred acre tract of land. While the Court in the case at bar found that the marijuana was separated from the Petitioner's dwelling by a distance equal to more than two football fields, certainly the area involved is tremendously smaller than Brady's eighteen hundred acre tract of land. The Brady Court correctly concluded that a determination of one's reasonable right to privacy depended, not on the mere size of one's property, but on "whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out." Applying that test here, the Petitioner undoubtedly enjoyed a reasonable expectation of privacy which was irrefutably violated by the warrantless entry of two police officers who entered her property on a mere tip.

Even the District Court here admitted that State v. Brady, supra, "obviously represents a rather firm view that enclosed

occupied (perhaps even unoccupied) land cannot lawfully be subjected to search by trespassing officers." [App. A, p. 6]. Thus, direct and express conflict is shown by the District Court's opinion in this case. Indeed, this case represents a direct departure from the law established by this Court and the Fourth District Court of Appeal up to now. Certiorari should and must be granted to authoritatively resolve the issue presented here and to resolve the irreconcilable conflict which the decision in this Court represents. The issue is crucial, recurring, and in need of immediate authoritative resolution. This Court's certiorari jurisdiction is properly invoked.

CONCLUSION

Based upon the foregoing reasons and authorities, the Petitioner urges this Honorable Court to grant a Writ of Certiorari quashing the decision of the District Court of Appeal of Florida, First District, in the case at bar, and granting such other and further relief as shall seem right and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 22d day of September, 1981, to the Office of the Attorney General, New Capitol Building, Tallahassee, Florida, 32304.

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