o/a 6-8-82

IN THE SUPREME COURT OF FLORIDA

Case No. 61,179

DEBRA JAYNE DeMONTMORENCY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF PETITIONER ON MERITS

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INTRODUCTION

The Petitioner, DEBRA JAYNE DeMONTMORENCY, was the Defendant at trial and the Appellant on appeal. The Respondent, THE STATE OF FLORIDA, was the prosecution at trial and the Appellee on appeal. In this brief, the parties will be referred to as the State and the Defendant. The symbol "A" will be used to designate the appendix consisting of a copy of the decision of the First District Court of Appeal. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE

The Defendant was charged in a two-count information with manufacturing cannabis and with possession of cannabis. Pursuant to plea negotiations, the Defendant plead guilty to manufacturing cannibis and the State nolle prossed the charge of possession. By the terms of the negotiated plea, the Defendant 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 negotiations, the Defendant was sentenced to serve ninety days in the County Jail and to pay a fine of $5,000 prior to her release from custody.

The Defendant 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 Defendant filed a Motion for Rehearing and/or Rehearing en banc which the District Court denied on August 17, 1981. The Court, however, granted the Defendant a stay of mandate pending certiorari review by this Court.

The Defendant filed a timely Notice of Certiorari on September 15, 1981, and briefs on jurisdiction were thereafter filed. By its Order of February 26, 1982, this Court accepted jurisdiction and set oral argument for June 8, 1982. This brief of Petitioner on the merits follows.

STATEMENT OF THE FACTS

The facts are related by the District Court of Appeal in its decision and are not in dispute:

The Defendant lived in a house trailer within a fenced parcel of land. The fence which surrounded the property was a forty-inch hogwire fence topped with two strands of barbed wire. Acting on a tip that marijuana was being grown on the Defendant's property, two officers drove through an open gate into a pasture adjacent to the Defendant's property, parked their car, and crossed over a fence into a rough wooded portion of the Defendant's property. The only gate in the fence was located in front of the Defendant's house trailer. Prior to crossing the fence, the police did not see growing marijuana, but it was seen by them after travelling a distance of some three hundred feet inside the fence.

The Defendant's house trailer itself was protected by three dogs, whose presence made it necessary for the officers to solicit the assistance of the Defendant in restraining the dogs when the officers later returned to the scene. The record does not reflect whether there was a single fence enclosing the trailer and its yard, or whether a single enclosure surrounded the entire property, including the marijuana patch. (App. 1-2 n.2).

From the point where the growing marijuana was found, the officers could not see the Defendant's house trailer, which was located within the fenced property approximately 750 to 800 feet distant. The marijuana in question was growing a cleared patch of ground within a wooded area. (App. A, pp. 2,6).

After the Defendant 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 WARRANTLESS, NON-CONSENSUAL ENTRY ONTO THE DEFENDANT'S BARBED-WIRE-FENCED PROPERTY BY TRESPASSING POLICE OFFICERS ACTING ON A TIP AND THEIR SEARCH FOR AND SEIZURE OF MARIJUANA GROWING IN A SECLUDED AREA SURROUNDED BY WOODS VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I SECTION 12 OF THE FLORIDA CONSTITUTION.

In a distinct and consistent chain of recent decisions, this Court has, in Norman v. State, 379 So.2d 643 (Fla. 1980), State v. Morsman, 394 So.2d 408 (Fla. 1981), and State v. Brady, ___ So.2d ___, 1981 FLW 610 (Fla. October 15, 1981), established the right of the individual to be free from unreasonable warrantless searches and seizures where one has exhibited an actual (subjective) expectation of privacy and that expectation is one that society is prepared to recognize as "reasonable". In its most recent decision on the subject, State v. Brady, supra, this Court adopted and applied just such a two-pronged test as suggested by Justice Harlan in his concurring opinion in Katz v. United States, 389 U.S. 347 (1967). The Defendant here has satisfied both requirements and established her reasonable expectation of privacy in the area of her property searched by the police. Because the search and seizure conducted was warrantless and non-consensual, the trial Court should have granted the Defendant's Motion to Suppress and the District Court of Appeal should have reversed the Defendant's conviction.

This Court's decision in State v. Morsman, supra, established an individual's right to privacy in the backyard of his private residence even where the yard is not fenced in. The

Defendant here, who surrounded her property with a forty inch hogwire fence topped with two strands of barbed-wire (and additionally protected at least her house trailer on the property by three dogs), evidenced a far greater expectation of privacy than did Morsman. The Morsman Court rejected the State's argument that contraband in plain view may be seized without a warrant and reasoned instead that the officer in Morsman had no right to be in the Respondent's backyard in the first place. In this case, the intrusion by the police into the Defendant's property and the violation of the Defendant's right to privacy violated was far greater. 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 from them after travelling a distance of some 300 feet inside the fence. (App. A,p. 2).

The intrusion into the Defendant's property by two officers for a distance of 300 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. at 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 pre-

sented to a detached Magistrate to decide if the hearsay information is 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, supra, 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 250 yards from the entrance to the farm. In Norman, a Sheriff climbed a fence after having found the gate locked. In the case at bar, while the police 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 a fence to intrude into the Defendant'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 Defendant intended to foreclose entry by uninvited trespassers such as the police here were. Moreover, the fact that the Defendant's marijuana was growing in a clearing surrounded by a heavily wooded area evidences no less a reasonable expectation of privacy than did Norman in the contents of his barn. Just like the barn in Norman, the trees here surrounding the Defendant's marijuana patch acted to protect her crop from warrantless, visual, Governmental intrusion.

The Fourth District Court of Appeals' decision in State v. Brady, 379 So.2d 1294 (Fla. 4th DCA 1980), which this Court recently approved, held 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 the Defendant was entitled to the protections of the Fourth Amendment even on his fenced 1800 acre track of land. The District Court decision 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 Defendant 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. The conclusion is compelled, therefore, that in light of the circumstances of this case, the Defendant has irrefutably fulfilled the first part of the Katz-Norman test. She evidenced a subjective expectation of privacy by growing her marijuana deep within a wooded portion of her property, surrounding the entirety of her property by a barbed-wire-fence, and keeping three dogs on the property to keep intruders out.

It is equally clear, particularly in light of this Court's recent opinion in State v. Brady, supra, that the Defendant fulfilled the second prong of the Katz-Norman test and the subjective expectation of privacy she entertained was a reasonable one. The reliance of the State and the District Court upon the "open fields" doctrine as enunciated in Hester v. United States, 265 U.S. 57 (1924), is misplaced. As this Court stated in Brady:

> Activities carried on in a truly open field, or in any area which one normally exposes to the public, are not subject to Fourth Amendment protections. There can be no reasonable expectation of privacy in a field open, visible, and easily accessible to others. That, however, was not the case here. (1981 FLW at 612).

Precisely the same conclusion is compelled here. The marijuana patch on the Defendant's property was neither open, visible, nor easily accesssible to others. This Court addressed exactly this issue in Brady in its discussion of the decision of the Fifth Circuit in United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), in which the Government had argued that the owners of a shed which had been searched had no reasonble expectation of privacy because there were no fences surrounding any part of property (which was quite remote), no "No Trespassing" signs were posted, nor was there any sign of a special effort having been made to conceal the marijuana from any "passerby". The Fifth Circuit rejected the Government's claim and the Court, quoting Holmes, noted the critical distinction between rural and urban property:

> The Government would have us ignore the character of the Moody property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the census of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that Government agents will be crawling through the underbrush by putting up signs warning the Government to keep away. (1981 FLW at 611).

Thus, the testimony in this case of one of the officers that the Defendant's marijuana was visible from a certain vantage point outside her fence is without import. First, the officer

admitted that were it not for the trespass and observations of the other officers who discovered the marijuana, he would never have looked for or found this particular vantage point. (R122). Second, there is no testimony in the record whatsoever to indicate that this vantage point through the woods was one that anyone other than a police officer looking for marijuana would ever find. There exists, therefore, no basis upon which to find the Defendant's expectation of privacy unreasonable. As the Katz Court held and as this Court has enumerable times opined, absolute invisibility or seclusion of the object of one's privacy interest is not essential to the invocation of the Fourth Amendment's protections:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve is private, even in an area accessible to the public, may be constitutionally protected. [Citations omitted; emphasis added; at 350-52].

In the case at bar, the Defendant enjoyed a clear expectation of privacy in the marijuana she grew within the secluded confines of her fenced rural property. Her expectation of privacy was undeniably reasonable in light of the rural nature of the property, its heavily wooded character, its remoteness, and its inaccessibility to all persons but trespassers who invaded her property for the purpose of uncovering evidence of a crime. This Court's decisions in Norman, Morsman, and Brady, mandate the suppression of the evidence seized illegally from her and the reversal of her criminal conviction.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the Defendant submits that the District Court's decision should be disapproved, her conviction should be reversed, and this case should be remanded to the trial court with directions to grant her Motion to Suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Merits was furnished to David P. Gauldin, Esquire, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301, on this the 17th day of March, 1982.

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