

SUPREME COURT OF FLORIDA

FILED

MICHAEL A. RILEY

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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CASE NO. 67,906'  
SECOND DISTRICT COURT  
OF APPEAL NO. 84-2818

BRIEF OF PETITIONER

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
ISSUE	4
WHETHER POLICE OFFICERS , RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PRE-INTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELLING AT 400 FEET <b>ABOVE</b> A BACKYARD AREA IN WHICH <del>AN</del> INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?	
SUMMARY OF ARGUMENT	15
CONCLUSION	17
APPENDIX	

TABLE OF CITATIONS

	<u>Page</u>
<u>Blalock v. State</u> 476 N.E. 2d 091 (IND App. 1 Dist. 1985)	7, 13, 15
<u>Brennan v. State</u> 417 So.2d 1024 (Fla. 2d DCA 1982)	12, 15
<u>Costello v. State</u> 442 So.2d 990 (Fla. 1 DCA 1984)	12, 15
<u>Dow Chemical Company v. United States</u> 749 F. 2d 307 (1984)	11, 13, 16
<u>Fullbright v. United States</u> 392 F. 2d 432, 435 (10th Cir. 1968)	10
<u>Katz v. United States</u> 88 S.Ct. 507 (1967)	7, 9, 10, 11, 16
<u>Murphy v. State</u> 413 So.2d 1268 (Fla. 1 DCA 1982)	12, 15
<u>N.O.R.M.L. v. Mullin</u> 608 F. Supp. 945 (DC DAL 1985)	11
<u>Norman v. State</u> 379 So.2d 643 (Fla. 1980)	5, 12
<u>Oliver v. State</u> 108 S.Ct. 1735 (1984)	6
<u>People v. Ciruolo</u> 208 CAL Rptr. 93 (CAL App. 1 Dist. 1984)	6
<u>Randall v. State</u> 458 So.2d 822 (Fla. 2d DCA 1984)	5, 10, 12, 13, 16
<u>Segura v. United States</u> 104 S.Ct. 3380 (1984)	6
<u>State v. Peakes</u> 440 A. 2d 350 (ME 1982')	10
<u>State v. Rickard</u> 420 So.2d 303 (Fla. 1982)	5, 13, 16
<u>United States v. Bassford</u> 601 F. Supp. (1985)	10, 16

Page

United States v. Broadhurst  
612 F. Supp. 777 (DC CAL 1985)

5, 8, 13, 15

United States v. Van Dyke  
643 F. 2d 992, 993 (4 Cir. 1981)

10

STATEMENT OF THE CASE

**R**-Petitioner, Michael A. Riley, was charged by information on August 16, 1984 with two counts of violating section 893.13 Fla. Stat. (1983) (the unlawful manufacture and possession of marijuana). (R 1-2)

The Petitioner filed a Motion to Suppress evidence found on Petitioner's property. After a hearing on the Motion the trial Court issued its Order suppressing the evidence on December 19, 1984. (R 9) The State of Florida appealed and on October 16, 1985 the District Court of Appeal, Second District,

reversed the trial court, but certified as a question of great public importance the following:

WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PRE-INTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELLING AT 400 FEET ABOVE A BACKYARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY **FROM GROUND AND** AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

Petitioner subsequently invoked the discretionary jurisdiction of the Supreme Court to pass upon the certified question.

STATEMENT OF THE FACTS

Petitioner, Michael A. Riley, was charged with the unlawful possession and manufacture of marijuana.

Petitioner lived on a parcel of property in excess of five (5) acres. (R 41) Located on that property was a mobile home, which was the residence of Petitioner, (R 23) and a greenhouse-type structure located within twenty (20) feet of the residence. (R 3 & 4) Contained within the greenhouse was the marijuana which is the subject of this case. (R 3 & 4)

Because of the mobile home, the sides and-roof of the greenhouse, and shrubbery around the greenhouse, the contents thereof were not visible from the road or adjoining property. (R 3, R 4 & R 23)

Detective Kurt Gell of the Pasco County Sheriff's Department received a tip that marijuana was growing on the property. (R 22) Detective Gell went to the property but from the road could not determine what was growing within the greenhouse. (R 22)

Detective Gell then secured a helicopter and flew over the top of the residence. (R 27) According to Detective Gell, the helicopter flew over the residence at about 400 feet. (R 27) Detective Gell did not know whether the helicopter got lower than 400 feet but stated that when they flew over the property, they were a lot higher than when they circled. (R 27 & 29) Detective Gell took photographs of the greenhouse from the air. (R 3 & 4)

The greenhouse had some panels missing from the roof (R 3 & 4) and after observing what he believed to be marijuana, Detective Gell secured a search warrant. The search warrant was executed and the marijuana was discovered.

## ISSUE

WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PRE-INTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELLING AT 400 FEET ABOVE A BACKYARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

## ARGUMENT

It is the position of the Petitioner, based upon the authorities cited herein, that the question certified by the District Court of Appeal of Florida, Second District, must be answered in the negative.

The following authorities, regardless of whether a specific aerial surveillance was found to be legal or illegal, based their decision specifically on the question of whether the individual involved manifested an expectation of privacy from aerial surveillance and whether society recognized that particular expectation as reasonable. Practically all of these cases indicate that if a particular individual had actually and reasonably manifested such expectation of privacy the aerial surveillance would be impermissible.

The opinion <sup>of</sup> the District Court of Florida, Second District, in the case subjudice seems to concede that the Petitioner has manifested a reasonable expectation of privacy from both ground and air surveillance. It is abundantly demonstrated from the



record on appeal and photographs that the contents of Petitioner's greenhouse were completely obscure from all adjoining property and public or private roadways (R 23-24). The photographs further demonstrate Petitioner had erected a roof upon the greenhouse which would obscure the contents thereof from normal air traffic. Due to a few missing panels in the roof, the police contend that while hovering at approximately 400 feet or less over the greenhouse, marijuana plants were visible therein. It is not necessary that Petitioner have been completely successful in concealing the contents of the greenhouse from observation, United States v. Broadhurst, 612 F. Supp. 777 (DC *CAI*, 1985).

The decision of the District Court of Appeal of Florida, Second District, in the case subjudice, relying on that Court's decision in Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984) holds that regardless of an individual's actual and reasonable expectation of privacy, an aerial surveillance of that area is constitutionally permissible and may form the basis to secure a search warrant to seize contraband observed during the surveillance. As can be seen by the following authorities, this reasoning is a departure from prevailing legal precedent.

The general rule found within the State of Florida specifies where an individual has exhibited an actual expectation of privacy in an area that society recognizes as reasonable, the right to privacy will be recognized Norman v. State, 379 So.2d 643 (Fla. 1980), State v. Rickard, 420 So.2d 303 (Fla. 1982)

The Supreme Court of the United States has held that an unconstitutional search cannot be used as a basis for the issuance of a search warrant Segura v. United States, 104 S.Ct. 3380 (1984), thus an aerial surveillance if viewed to be illegal, cannot be used to justify the issuance of a search warrant to seize contraband observed during that surveillance. People v. Ciruolo, 208 CAL Rptr. 93 (CAL App. 1 Dist. 1984).

Though the question as certified by the District Court of Appeal of Florida, Second District, in the case subjudice, appears to be one of first impression within the State of Florida, cases in other jurisdictions passing upon this question have held that an aerial surveillance is unconstitutional when that surveillance is directed at an area afforded constitutional protection. In People v. Ciruolo (supra), an aerial search very similar to that in the case subjudice was held unconstitutional. The police received an anonymous tip that marijuana was growing in the defendant's backyard. Due to a fence, the police could not observe the marijuana and thus flew over the defendant's yard in a small plane at approximately 1,000 feet. The marijuana was observed without visual aid and a search warrant was issued. A distinction was made by the Court between open fields and the curtilage pursuant to Oliver v. United States, 108 S.Ct. 1735 (1984), which held an individual may not legitimately demand privacy for activities conducted out of doors or in fields, except in the area immediately surrounding the home. The Court, in

Ciraolo (supra), stated:

Defendant's backyard is within the curtilage; the height and existence of the two fences constitute objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard.  
(at page 97)

The Court went on to hold:

Having determined that the area searched was within the defendant's curtilage wherein he could reasonable entertain an expectation of privacy, we must conclude that the warrantless overflight constituted an unreasonable search in violation of the Fourth Amendment. The fruits of that unconstitutional search cannot support a warrant.  
(at page 98)

The Court also noted as significant the fact the aerial surveillance was not routine patrol but undertaken for the specific purpose of observing the items within the curtilage.

In Blalock v. State, 476 N.E. 2d 901 (IND App. 1 Dist. 1985), the Indiana Court likewise addressed the issue of aerial surveillance. The Court used the two-pronged test of Katz v. United States, 88 S.Ct. 507 (1967) to determine whether or not a search occurred and whether the defendant was entitled to the protection of the Fourth Amendment. In applying the two-pronged test, first the individual claiming the Fourth Amendment violation must establish that he had an actual or subjective expectation of privacy. Second, that claimed expectation must be one that society is prepared to recognize as reasonable. If the criteria of Katz (supra) is met, an aerial surveillance will be considered a search and thus violate the Fourth Amendment. Based upon the defendant covering the roof of

his greenhouse with translucent plastic panelling, the Court determined Blalock demonstrated an expectation of privacy from aerial surveillance. Though the greenhouse was not within the curtilage but was in a secluded rural area and there was no indication that aircraft routinely flew over the greenhouse at altitudes sufficiently low enough to observe the contents within, the Court determined Blalock's expectation of privacy was reasonable. The Court thus held:

We conclude that aerial surveillance violated Blalock's Fourth Amendment rights. It could not, therefore, form the basis for the subsequent issuance of the search warrant.  
(at page 904)

Decisions within the Federal system have also determined that the legality of an aerial search depends upon the actual and reasonable expectation of the individual regarding the area searched.

United States v. Broadhurst, 612 F. Supp. 777 (DC CAL 1985) held the aerial search of a greenhouse located approximately 75 yards from a residence in which that aerial surveillance was conducted at an altitude of approximately 1,000 feet, to be constitutionally impermissible, thus evidence seized pursuant to a warrant based upon that aerial surveillance was suppressed. In reaching its decision the Court stated:

The difficult issue yet to be resolved in this case is whether the officers violated defendant's Fourth Amendment right to be free from unreasonable searches, by flying in 360 degree circles around defendant's greenhouse for the sole purpose of discerning the contents of the interior of the structure. This issue is one of first impression

and one which obviously implicates serious questions of public policy.

(at page 789)

By applying the rationale of Katz v. United States (supra) the Court determined the defendant had manifested a reasonable expectation of privacy in his greenhouse and that the greenhouse fell within the category of places society is prepared to recognize as reasonable. The Court further rejected the argument that the police observed the contraband from a place they had a right to be, noting a difference from an individual who, though in a protected area, takes no precautions to shield his activity from public view as opposed to an individual who attempts to shield those activities from view. The Court reasoned that the plain-view doctrine therefor is merely a necessary concomitant to the factual determination of whether or not a defendant has displayed a reasonable expectation of privacy. In holding the aerial surveillance illegal, the Court stated:

In short the Court is aware of no decisions which would extend the practice of overflight by investigative officers to searches of the interior of residences and other structures. Furthermore such an extension would be this Court's view pose extremely dangerous consequences for future protection of precious Fourth Amendment rights.

(at page 794)

This reasoning is directly in conflict with that of the Second District's in the case subjudice in which the Court would extend the practice of overflights or aerial surveillance to the interiors of residences and other structures such as greenhouses. Federal cases which have held a specific aerial surveillance as legally

permissible would invalidate such a search, if the criteria of Katz v. United States and the aforementioned authorities were met. In United States v. Bassford, 601 F. Supp. (1985), the Court stated:

Although a warrantless search of a home or its curtilage affected by means of a physical intrusion into the curtilage violates the Fourth Amendment absent exigent circumstances, see United States v. Van Dyke, 643 F. 2d 992, 993 (4 Cir. 1981) observations of areas within the curtilage from ground locations outside the curtilage are generally permissible, absent use by the occupant of measures to prevent such observations. See Fullbright v. United States, 392 F. 2d 432, 435 (10th Cir. 1968), State v. Peakes, 440 A. 2d 350, 352-353 (ME 1982)  
(at page 1331)

The reasoning of both the District Court of Appeal of Florida, Second District, in the case subjudice and Randall v. State (supra) would appear to be contrary to these authorities when the location searched by aerial surveillance is within the curtilage and measures had been taken to prevent such observation.

In its analysis of various federal authorities, the Court in Bassford (supra) stated:

The thrust of the message in all of the aforementioned cases is that aerial surveillance is constitutionally permissible except where it intrudes upon an actual and reasonable expectation of privacy.  
(at page 1331)

The Court further stated:

Thus the inquiry is appropriately limited to whether there existed a reasonable expectation of privacy from aerial surveillance of an area,

whether curtilage or noncurtilage.

(at page 1331)

This same line of reasoning is seen in Dow Chemical Company v. United States, 749 F. 2d 307 (1984) in which the United States Court of Appeal, Sixth Circuit, upheld aerial surveillance of the Dow Chemical Plant. The decision of the Court again turned on the question whether there was a reasonable and actual expectation of privacy in the area under surveillance as opposed to the question of whether aerial surveillance are permissible in and of themselves. The Court stated the issue as follows:

In the instant case we must determine whether the Government's aerial photograph of Dow's Midland Plant intruded upon Dow's actual and reasonable expectation of privacy in the spaces between its buildings or in the words of the District Court, in its interior regions of its plant.

(at page 312)

The Court also applied the two-pronged test of Katz v. United States (supra) in determining the validity of the aerial surveillance. The Court held that Dow Chemical did not show an actual expectation of privacy from the air and further, the nature and size of the plant and its buildings along with its location in an urban area near an airport would make such an expectation unreasonable. The Court distinguished the Dow Plant from that of the curtilage of a residence and seemed to indicate that an area such as the curtilage would have been protected from such aerial surveillance.

This same reasoning is seen in N.O.R.M.L. v. Mullin, 608 F. Supp. 945 (DC CAL 1985) wherein the Court stated:

After Oliver there is little question that C.A.M.P. can use aircraft to locate marijuana gardens in open fields, and then secure a warrant to enter those gardens. When C.A.M.P. uses its air power to pry into or enter private homes or their cutilege, however the Fourth Amendment comes into play.

(at page 957)

The majority of Florida cases passing upon the legality of aerial searches likewise have focused the decision upon the question of whether the defendant manifested an expectation of privacy and whether society deemed that expectation as reasonable. Murphy v. State, 413 So.2d 1968 (Fla. 1 DCA 1982) and Costello v. State, 442 So.2d 990 (Fla. 1 DCA 1984) upheld aerial searches based upon the fact that the defendant did not have a reasonable expectation of privacy in marijuana fields 300 to 450 feet from the defendant's residence or where marijuana plants were readily visible from the air. Likewise, in Brennan v. State, 417 So.2d 1024 (Fla. 2 DCA 1982), an aerial search was upheld applying the open fields doctrine to a marijuana patch 105 yards from the defendant's home.

To depart from the line of reasoning as set forth in the foregoing cases as was done in Randall v. State (supra) and the case subjudice is unwarranted and without sufficient precedent. The reliance by the Court of Appeal of Florida, Second District, on State v. Rickard (supra) is misplaced. Though this Court, in State v. Rickard (supra) held the particular observation by the police of the defendant's marijuana patch as proper, based upon the theory of a "pre-intrusion", the Court's reasoning was



consistent with that set forth in United States v. Broadhurst (supra), United States v. Bassford (supra).and Dow Chemical Company v. United States (supra), which indicate observations into a constitutionally protected area from outside that area are permissible absent any measures to prevent that observation. In State v. Rickard (supra) the defendant made no attempt to prevent the observation of the marijuana plants in his backyard from the privately-owned orange grove adjacent to the back of the defendant's property. Consequently, since the defendant made no attempt to prevent that observation, the police officers viewing of the marijuana from the orange grove was permissible under the rationale of the foregoing authorities. State v. Rickard (supra) thus did not involve a situation where the defendant manifested an expectation of privacy from the specific observation involved. Likewise, in Randall v. State (supra), the defendant made no attempt to prevent the observation of his marijuana from aerial surveillance and thus did not manifest an expectation of privacy from aerial observation. Thus the result of Randall (supra) is consistent with the foregoing authorities though the reasoning of the Court is not. The fact that Petitioner in the case subjudice placed a roof on his greenhouse thus manifesting a specific expectation of privacy from aerial viewing, the Second District determined that to be an irrelevant distinction. This is likewise contrary to the aforementioned authority specifically Blalock v. State (supra) and United States v. Broadhurst (supra) in which the

erection of a roof over the greenhouse or structure was significant.

In the case subjudice Petitioner manifested an actual expectation of privacy from both the ground and the air. Florida Courts have held that greenhouses within 40 feet of a dwelling were entitled to constitutional protection either under the theory of curtilage or reasonable expectation of privacy. Huffer v. State, 344 So.2d 1332 (Fla. 2 DCA 1977).

To hold as permissible a warrantless aerial search of an area in which an individual has a reasonable expectation of privacy and has manifested that expectation of privacy to specifically include aerial surveillance, constitutes a dangerous eroding of the Fourth Amendment protection from unreasonable search and seizures. The question of what type of surveillance and intrusion would be permissible if such aerial surveillance is upheld would become both difficult and confusing. Would a helicopter hovering 400 feet over the backyard of a residence be acceptable and one hovering at 100 feet be unacceptable? Would the use of sophisticated equipment enhancing the ability to see and hear inside structures or residences be allowed, and, if so, what equipment would be legal and what equipment would be illegal? Would the use of extremely high-powered lenses be allowed to view into windows where those windows were obscured from the ground. Once the focus of the Courts depart from the actual and reasonable expectation of privacy, the rights of citizens to be free from unreasonable search and seizures departs with it.

SUMMARY OF ARGUMENT

The question certified by the District Court of Florida, Second District, to-wit:

WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PRE-INSTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELLING AT 400 FEET ABOVE A BACKYARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

must be answered in the negative based upon the authorities cited herein. Though the specific question appears to be one of first impression in the State of Florida, the vast majority of cases dealing with the legality of aerial surveillance in this State have determined the question on whether or not the defendant manifested an actual and reasonable expectation of privacy in the area subject to the surveillance Murphy v. State, 413 So. 2d 1268 (Fla. 1 DCA 1982, Costello v. State, 442 So.2d 990 (Fla. 1 DCA 1984), Brennan v. State, 417 So.2d 1024 (Fla. 2 DCA 1982). Authorities in foreign jurisdictions have invalidated aerial searches when an individual has manifested an expectation of privacy from aerial viewing and society was willing to recognize that expectation as reasonable. People v. Ciruolo, 208 CAL Rptr. 93 (CAL App. 1 Dist. 1984), Blalock v. State, 476 N.E. 2d 901 (IND App. 1 Dist. 1985), United States v. Broadhurst, 612 F. Supp. 777 (DC CAL 1985) Courts that have upheld aerial surveillance

have done so on the basis that the defendant did not have an actual or reasonable expectation of privacy in the area searched. The authorities further indicate an observation into a protected area from outside that area is permissible as long as there has been no attempt to obstruct that observation United States v. Bassford, 601 F. Supp. (1985, Dow Chemical Company v. United States, 749 F. 2d 307 (1984). The decision of the District Court of Appeal of Florida, Second District, in Randall v. State (supra) is an unwarranted and dangerous departure from the aforementioned authorities. The decision of the Court in Randall (supra) that regardless of a reasonable manifestation of privacy, surveillance from outside the protected area into that area is permissible, appears to rely on State v. Rickard, 420 So.2d 303 (Fla. 1982). This reliance is misplaced. In Rickard (supra), the defendant did not manifest an expectation of privacy from surveillance from the adjacent orange grove. An individual must establish an actual expectation of privacy from a particular type of intrusion. Dow Chemical Company (supra), Katz v. United States, 88 S.Ct. 507 (1967). Consistent with the cited authorities, Petitioner, in the case subjudice, manifested an expectation of privacy from both ground and air surveillance in an area that society has deemed entitled to that expectation of privacy. Consequently, any surveillance of that area, be it from the ground or the air, is a search subject to Fourth Amendment limitations. The subsequent warrant based upon the illegal observation of the defendant's greenhouse is thus invalid as predicated upon an illegal search.

CONCLUSION

Based upon the foregoing authorities and argument, Petitioner requests this Honorable Court reverse the decision of the District Court of Appeal of Florida, Second District, and affirm the decision of the trial court suppressing the evidence which is the subject of this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Jim Smith, Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, FL 33602 by United States Mail, this 21st day of December, 1985.



MARC H. SALTON  
Attorney for Petitioner