IN THE SUPREME COURT OF FLORIDA

MICHAEL A. RILEY, :

Petitioner :

v. : CASE NO. 67,906

STATE OF FLORIDA, :

Respondent, :

_____ :

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of Case as a substantially accurate account of the proceedings below.

STATEMENT OF THE FACTS

Petitioner, Michael A. Riley, was charged with the unlawful possession and manufacture of marijuana. (R.l-) The charges were based on the discovery of numerous marijuana plants on his property.

Michael Riley rented and occupied a parcel of property containing in excess of five acres. (R.41) A portion of this property contained a mobile home, occupied by the Petitioner as a dwelling, and certain out buildings. The property is located in a rural area and contained numerous trees and schrubs. The portion of the property containing Riley's mobile home and out buildings was enclosed or partially enclosed by a net wire fence. Detective Longworth received a tip that there was marijuana growing on this property. (R.19) He and another detective, Detective Gell, went out to investigate the tip.

Detective Kert A. Gell, of the Pasco County Shriff's office, testified that he and Detective Longworth observed what looked to be a greenhouse at the back of Riley's trailer. It appeared as though large plants were growing in the greenhouse. They could not tell what kind of plants they were. The greenhouse was directly behind the trailer, within 10-20 feet. There was a rippled light plastic fiberglass material covering the visible side of the greenhouse. (R.24) The officers then obtained a helicopter and flew over the area. From the air, they could observe the greenhouse at the back of the trailer. Part of the roof was missing from the greenhouse. (R.25)

Further, one side of the greenhouse was not covered. From that position they could observe marijuana growing inside the greenhouse. (R.27) They were flying approximately 400 feet above the greenhouse. (R.27) At this point the deputy felft Riley's property and prepared an affidavit which was the bsis for the issuance of a search warrant.

On August 16, 1984 pursuant to the execution of the search warrant, the evidence suppressed by the trial court was seized. The evidence includes forty-four marijuana plants found growing in the greenhouse.

SUMMARY OF THE ARGUMENT

In the instant case, petitioner had erected a greenhouse partially covered by a roof. Nevertheless, the marijuana was readily visible through the open panels in the greenhouse from the air. Anyone flying over could have readily observed the growing contraband as the officer in the instant case did.

Thus, in accordance with this Court's decision in State v. Rickard, supra, the officer was making a legally permissible pre-intrusion viewing. The question certified to this Court by the Second District should be answered in the affirmative.

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

Petitioner, Michael A. Riley, asserts in his brief that the above question)certified to this Court by the Second District Court of Appeals) must be answered in the negative. To support this position Petitioner relies on several foreign jurisdiction decisions.

Each of these cases resolve the issue by applying the plain view doctrine and determining whether the defendant had exhibited a reasonable expectation of privacy. However, as this Court noted in State v. Rickard, 420 So.2d 303 (1982), there is a distinction between plain view "per se" and the "plain view doctrine" as espoused in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022,29 L.Ed.2d 564 (1971). Confusion was dispelled by this court in Ensor v. State, 403 So.2d 349,352 (Fla.1981) In Ensor this court stated:

> The term "plain view" has been misunderstood and misapplied because courts have made it applicable to three distinct

factual situations. This has resulted in confusion of the elements of the "plain view doctrine." To eliminate this confusion, we believe it appropriate to distinguish the true "plain view doctrine'' as established in Coolidge v. New Hampshire, **403** U.S. **443,** 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), from other situations where officers observe contraband.

The factual situation we identify as a "prior valid intrusion." In this situation, an officer is legally inside, by warrant or warrant exception, a constitutionally protected area and inadvertently observes contraband also in the protected area. It is this situation for which the United States Supreme Court created the "plain view doctrine" in Coolidge and held that an officer could constitutionally seize the contraband in "plain view" from within this protected area. We emphasize that it is critical under this doctrine for the officer to be already within the contitutionally protected area when he inadvertently discovers the contraband.

We identify the second factual situation as a "non-intrusion." This situation occurs when both the officer and the contraband are in a non-constitutionally protected area. Because no protected area is involved, the resulting seizure has no fourth amendment ramifications, and, while the contraband could be defined as in "plain view," it should not be so labeled to prevent any confusion with the Coolidge "plain view doctrine."

The third situation concerns a Pre-intrusion." Here, the officer

> is located outside of a constitutionally protected area and is looking inside that area. If the officer observes contraband in this situation, it only furnishes him probable cause to seize the item. He must either obtain a warrant or have some exception to the warrant requirement before he may enter the protected area and seize the contraband. As with the non-intrusion situation, the term "plain view" should not be employed here to prevent confusion. For clarity, we label an observation in the latter two non-Coolidge situations as a legally permissive "open view."

Here, as in Rickards, the officer was located outside of a constitutionally protected area and looking inside that area. However, unlike the officer in Rickard, the officer in the instant case obtained a warrant before conducting an actual search. Thus, while the subsequent search in Rickard was illegal because Rickard had exhibited an actual expectation of privacy and there was no showing of exigent circumstances, this Court noted that the initial observation did not rise to the level of a search.

Similarly, the initial aerial viewing in the instant case did not rise to the level of a search for the purposes of the fourth amendment.

It is undisputed that observations made from a place where officers have a legal right to be do not rise to the level of an impermissible search. United States, v. Orozco, 590 F.2d 789, 792 (9th Cir.), cert. denied, 442 U.S. 920, 99 S.Ct. 2845, 61 L.Ed.2d 288 (1979); United

States v. Coplen, 541 F.2d 211,214 (9th Cir. 1976), cert. denied, 429 U.S. 1073,97 S.Ct. 810, 50 L.Ed.2d 791 (1977).

In the instant case, petitioner had erected a greenhouse partially covered by a roof. Nevertheless, the marijuana was readily visible through the open panels in the greenhouse from the air. Anyone flying over could have readily observed the growing contraband as the officer in the instant case did.

Thus, in accordance with this Court's decision in State v. Rickard, supra, the officer was making a legally permissible pre-intrusion viewing.

Our District Courts have applied this reasoning and reach this same conclusion in numerous cases. The Second District in Randall v. State, 458 So.2d 822 476 So. 2d 1354 (Fla. 2 DCA 1985) stated:

> While the efforts undertaken by police officers in order to gain a view into a constitutionally protected area undoubtedly must be considered in determining the degree of governmental intrusion, we do not deem aerial observation alone to be unreasonably intrusive under the circumstances presented. Society appears willing to accept aerial surviellance as a reasonable and necessary investigative tool in effective modern law enforcement. Furthermore, we do not believe that requiring police to procure a warrant before executing a general aerial overflight such as that conducted in the instant case would significantly advance the protection of legitimate privacy interests. See Oliver v. United States, _____ U.S. _____, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (addressing, peripherally, aerial

> surveillance of an open field). In short, we conclude that the non-harassing surveillance conducted in the instant case struck an acceptable balance between society's interest in effective modern law enforcement and the individual's interest in the values protected by the fourth amendment.

In Clark v. State, 469 So.2d 167 (Fla. 1st DCA 1985) the first district reviewed a similar case and stated:

> Observations made from a place where officers have a legal right to be do not rise to the level of an impermissible search, Randall v. State: 458 So.2d 822 (Fla. 2d DCA 1984), since when contraband is clearly visible from an area not constitutionally protected, no reasonable expectation of privacy exists therein. Costello v. State, 442 So.2d 990 (Fla. 1st DCA 1983); See also State v. Rickard, 420 So. 2d 303 (Fla. 1982). Here, the officer was "located outside of a constitutionally protected area and [was] looking inside that area," a "preintrusion" observation. Ensor v. State, 403 So.2d 349 (Fla. 1981). While it would have been improper to enter the property and seize the evidence without a warrant, since such an observation can do no more than furnish probable cause for seizure, Ensor at 352, here the officer properlyobtained a warrant before executing the search. See also Diehl v. State, 461 So.2d 157 (Fla. 1st DCA 1984).

Finally, it should be noted that Blalock v. State, 476 N.E. 2d 901, relied upon by petitioner in his brief, has been vacated by the Indiana Supreme Court in Blacock v. State, 483 N.E.2d 439 (1985). In the more recent

decision the court held that the police overflights of remote rural acreage and airborne observations of a greenhouse on the property were not searches within the meaning of the Fourth Amendment. Nevertheless, Blalock was decided on the basis of whether the defendant had manifested a reasonable expectation: of privacy. Having found that he had not, the court did not reach the question of whether the officer's viewings from a place where he was legally permitted would have been impermissible.

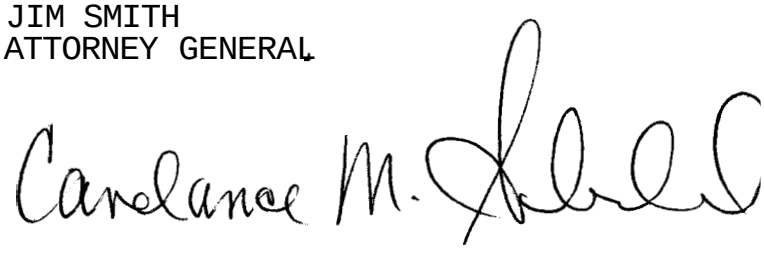
Clearly, in light of the analysis in Rickard, it would have been. Likewise, the question certified to this Court by the Second District should be answered in the affirmative.

CONCLUSION

Based on the foregoing argument and citations of authority, the Respondent submits that the question certified to this Court by the Second District should be answered in the affirmative.

Respectfully submitted

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular mail to Marc Salton, Esq., 4911 C.R. 54, New Port Richey, Florida 33552 on this 13th day of January, 1986.

Of Counsel for Respondent