SUPREME COURT OF FLORIDA

JAMES SARANTOPOULOS,
PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT.

Case No. 80,485
District Court of Appeal
2nd District - No. 92-00403

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

Petitioner, James E. Sarantopoulos, is a home owner in the City of Largo, Florida. His house has a six foot high privacy fence (the maximum height permitted under building codes) that completely encircles his backyard. Petitioner had been growing marijuana plants in a few five gallon buckets that were located up against the inside portion of his fence. Police received an anonymous tip that the plants were within Petitioner's backyard and they proceeded to walk on a neighbor's property, uninvited, and peer over the fence in order to see what was within Petitioner's backyard. After seeing what appeared to be marijuana plants, a warrant was applied for and the defendant's property searched. Petitioner was thereafter prosecuted for growing the marijuana plants in question. A Motion to Suppress evidence was filed in the trial court and the following information adduced at that hearing:

Detective Keith Adkinson of the Largo Police Department admitted at the hearing on Petitioner's motion to suppress that the police needed more information than the anonymous tip in order to search the Petitioner's premises (R 162). The detective also stated that he walked through the Petitioner's neighbor's yard in order to get to the Petitioner's fenced in backyard (R 164). The fence itself completely encircled the backyard (R 169). It is a "security privacy fence" which is six foot tall and made of wood (R 177). According to Detective Adkinson, the fence was apparently placed there for privacy purposes to block out the neighbors' view (R 178). The fence "went around the entire rear portion of the defendant's backyard leaving nothing from which an individual could

walk through unless they trespassed by opening a gate or climbing over" (R 178). Detective Adkinson stated that he did not knock on the Petitioner's neighbor's door to get permission to go on the property (R 178). The detective admitted that he walked onto the neighbor's property "in order to gain an advantage to look over the fence without the neighbor's permission" (R 179).

Detective Adkinson testified that the marijuana plants were in five gallon plastic buckets and were as small as two to three inches and as tall as two feet (R 165).

Investigator William Shaw of the Largo Police Department testified that he conducted a search of the Petitioner's property and residence. The authority he was relying on was the search warrant obtained as a result of the affidavit signed by Detective Keith Adkinson (R 190).

The next witness to testify was Steve Weiler. He is the Petitioner's neighbor to the immediate north (R 191). He stands six foot, one inch tall and in order for him to look over the Petitioner's fence, he must step up on the lower rail of the fence (R 192). The witness could only look over the Petitioner's fence by stepping on the rail and not by standing on his "tip toes" (R 192). Mr. Weiler cannot see the area where the marijuana plants were placed by the Petitioner from any vantage point on his (Weiler's) property (R 193). Weiler confirmed that the Petitioner's backyard is completely enclosed "by a stockade board and batten fence" (R 193). He went on to describe the Petitioner as a "very private individual" (R 196). He had never seen the Petitioner have parties or other people gathered in his backyard.

He stated that he had never been invited over to the Petitioner's backyard (R 196). Mr. Weiler testified that he could not see through the Petitioner's fence (R 196). At no time did Mr. Weiler ever give permission to the Largo Police Department to go onto his property as they did in this case (R 197).

The last witness to testify at the suppression hearing was the Petitioner. He testified that from where the marijuana plants were located, that an individual could not see any of his neighbor's windows, nor could any neighbor see the plants (R 201). He went on to state that he held an expectation of privacy in the area where the marijuana plants were found (R 202). He never positioned the plants so any neighbor could see them or know they were there (R 202). The wooden privacy fence that encircles the Petitioner's backyard would be repaired whenever a crack or other opening would appear (R 204). A gate which was kept locked from the inside was the only way to enter into the backyard of the Petitioner's property without going through his house (R 207). When describing the marijuana plants themselves, the Petitioner stated that "no plant extended more than 18 inches from the top rim of the bucket" (R 206). Therefore, the highest any plant would be off the ground would be a total of three feet (R 206).

SUMMARY OF ARGUMENT

The District Court of Appeal ruled that Petitioner exhibited a reasonable expectation of privacy in the backyard of his residence. It ruled, however, that society was not prepared to recognize his expectation as reasonable. As such, the District Court reversed the ruling of the trial court and set aside the suppression of the evidence that was discovered in the search that was conducted. Petitioner maintains that the police may not trespass on another's property in order to position themselves in such a way as to peer over Petitioner's privacy fence. Society should recognize Petitioner's expectation of privacy in such cases.

ARGUMENT

ISSUE

WHETHER THE POLICE MAY INTRUDE ON A NEIGHBOR'S PROPERTY IN ORDER TO POSITION THEMSELVES TO GAIN A VANTAGE POINT TO LOOK INTO A CITIZEN'S BACKYARD WHICH IS PROTECTED BY A SIX FOOT HIGH PRIVACY FENCE EVINCING AN EXPECTATION OF PRIVACY BY THAT CITIZEN?

Petitioner and Respondent agree that the test to be applied in this appeal is found in Katz v United States, 389 U.S. 347 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In that test, the individual, by his conduct, must exhibit an actual subjective expectation of privacy and society must be willing to recognize that expectation as reasonable. Respondent concedes that there is no dispute that the first prong in Katz has been satisfied. It is the second prong that the Respondent argues in its brief.

Respondent states that the boards in the Petitioner's fence were "warped" and were seven years old. Yet, every witness who testified at the hearing on Petitioner's motion to suppress stated that the fence was completely opaque. That is, there were no holes, cracks or any other way to see through the Petitioner's fence other than to position oneself in order to look over it.

Without gaining anyone's permission, Largo Police officer Keith Adkinson walked onto the Petitioner's neighbor's private property in order to position himself in such a way that he could peer over the Petitioner's privacy fence and into the curtilage of his home. Respondent relies on the two Supreme cases of Florida v. Riley, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989), and

California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed 2d 210 (1986) for its stand on this issue. Both cases involved aircraft that were flying in public airspace where an individual looks down and sees contraband on a citizen's property. Those facts are a far cry different from a police officer who trespasses on private property in order to gain a position to look over an obvious privacy fence constructed by an individual who was clearly exercising his right to privacy. If a person decides to sunbathe in the nude in his enclosed backyard, can a police officer come onto a neighbor's yard, uninvited, stand on tip toes and peer over a fence at the sunbather? Petitioner hopes not.

The Petitioner is relying upon the Fourth District Court of Appeal case of West v. State, 588 So.2d 248 (Fla. 4th DCA 1991) for its position in upholding the lower court's order of suppression. In West, the facts were stipulated to. As in this case, an anonymous tip that marijuana plants were growing in the rear of West's, house was also made. The police responded to the tip and went to West's house. They asked permission to look behind a shed in West's backyard. West refused to give his consent. Another officer then obtained permission from West's neighbor in order to use his backyard "to search West's backyard by looking over a dividing fence" (West at 249). The officer who looked over the fence communicated to the other police officer that he saw marijuana plants in the backyard. Additionally, after West was read his Miranda rights, he told a police officer to "go ahead and look behind the shed," but the officer chose not to because the other police officer was already on his way to the neighbor's

backyard (West at 249). West's fence, as in this case, was a solid wooden fence as opposed to one that could be seen through. Therefore, the marijuana plants in question could not be seen by a neighbor standing in his or her yard (West at 249). The question presented in West, as here, is whether a person has a constitutionally protected reasonable expectation of privacy under these facts. The person would.

In quoting Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed. 2d 214 (1984), the court noted that "the curtilage, the land immediately surrounding and associated with the home, is given the same Fourth Amendment protection that attach to the home." The curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life" (West at 250). The court found that the officer's act of climbing a ladder and peering over a dividing fence violated an expectation of privacy that is reasonable. The Ciraolo and Riley cases were specifically discussed in West. There are several differences in the facts of the West decision and those before this court. One such difference is that the officers in West had the legal right to be in the neighbor's yard and had asked permission to be there. In the instant case, the police did not. In quoting criminal procedure, LaFave and J. Israel (1984 & Supp. 1990), the West court noted

> It is no search to observe on that land what a neighbor could readily see, but to resort to extraordinary efforts to overcome the defendant's reasonable attempts to maintain the privacy of his curtilage is a search.

It should also be noted that the police officers were trespassing at the time they positioned themselves in order to look into Petitioner's backyard. In the Handbook of the Law of Torts, by William L. Prosser, Third Edition, West Publishing Co., 1964, at Page 74, Chapter 3, it states

> The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong. But he is a trespasser although he believes that the land is his own, or that he has the consent of the owner, or the legal privilege of entry. At common law the action must be on the case, since there was no forcible invasion; but since the forms of action have been discarded, it is commonly held that there is an actionable trespass.

The Second District Court of Appeal has also certified as conflict the holding in State v. Parker, 399 So.2d 24 (Fla. 3d DCA 1981), review denied 408 So.2d 1095 (Fla. 1981). In Parker, the District Court held that police officers may not stand upon adjoining land and look for contraband or fruits of a crime within the curtilage of a defendant's residence. In Parker, however, it was unclear and unsettled whether the police trespassed onto the adjoining land in order to position themselves to look into the defendant's property. In the Parker decision, Page 27, the court held that in order to establish a zone of privacy upon which the government may not intrude without first obtaining a search warrant, a person must show: (1) an actual expectation of privacy in the area in question, and (2) that the expectation of privacy is in an area that society is prepared to recognize as reasonable. Next the court discussed the requirement for a warrantless seizure of evidence in plain sight. In order for such to be constitutionally permissible, three requirements must be met:

(1) the evidence must be observed in plain sight without the benefit of a search, (2) the police must have a legal right to be where they are at the time of the observation, and (3) the police must have probable cause to believe that the evidence observed constitutes contraband or fruits, instrumentalities, or evidence of crime (Parker at 29). See also Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 202, 29 L.Ed.2d 564 (1971); Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Pomerantz v. State, 372 So.2d 104 (Fla. 3d DCA 1979), cert. denied, app. dism., 386 So.2d 642 (Fla. 1980); Hansen v. State, 385 So.2d 1081 (Fla. 4th DCA 1980).

It should be noted that in Footnote 4 on Page 29 of Parker, supra, it is stated that the officers were no longer in hot pursuit when they went into the neighbor's yard and therefore had no greater right than a ordinary citizen who would be considered a trespasser if there without consent of the owner. It was unknown in Parker whether the police obtained consent before going onto the neighbor's yard. It is significant as to whether the police were considered trespassers when they went onto the Petitioner's neighbor's yard in order to look over Petitioner's privacy fence. If they were indeed trespassers, then it is Respondent's position that the police had no legal right to be where they were at the time they were gathering their probable cause for a search warrant. In the Riley and Ciraolo cases, supra, the United States Supreme Court noted that the aircraft in flying over the defendant's property were not violating any laws or navigational regulations.

In essence, they had the right to be where they were when they found themselves in a position to view the defendant's property and what was in it. Had they not been in a legal position to look onto a citizen's property, then a contrary decision would have been made. That is, if aircraft fly too low and thereby violate navigational laws and rules, then in that case society would be willing to recognize the citizen's expectation of privacy as indeed reasonable.

Article I, Section 23 (Right of Privacy) of the Florida Constitution guarantees that "every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." This constitutional guarantee is found in the Constitution of the State of Florida, although it is absent from the United States Constitution. Therefore, citizens of the State of Florida have an additional constitutional freedom that is not found in our nation's Constitution. Petitioner understands that the above state constitutional right does not apply to Fourth Amendment issues. However, it is significant when deciding what society is prepared to accept as reasonable in the context of a "reasonable expectation of privacy." It only makes sense that when a citizen erects a large opaque privacy fence in order to keep everyone from looking inside, that a reasonable expectation of privacy which is recognized as reasonable by society is present. In rendering his opinion, the trial court judge made the following finding of fact in his order dated January 10, 1992 (R 80): the court finds law enforcement engaged in "extraordinary efforts" to overcome the

defendant's reasonable attempts to maintain the privacy of his curtilage. This factual finding was based on not only the testimony taken before the court, but also the photographs admitted into evidence that showed the trial court judge the expectation of privacy that the Petitioner was maintaining as well as the "vantage point" necessary in order to peer over the Petitioner's fence and thereby conduct a search of his property.

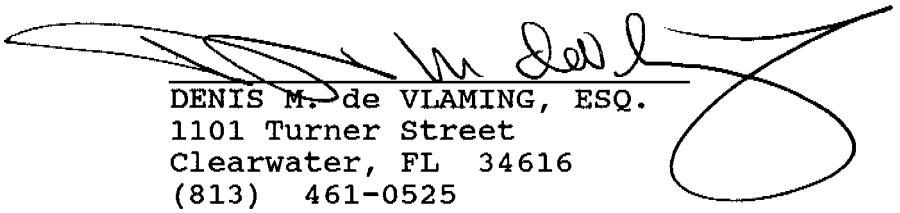
The search warrant that was applied for in this case did not contain the officer's statement that he went onto the neighbor's property and gained a vantage point in order to look into the Petitioner's backyard. This material omission, when considered, failed to support the search warrant. See State v. Panzino, 583 So.2d 1059 (Fla. 5th DCA 1991). Since the only reason for the police being in the Petitioner's home or on his property was the search warrant in question, all evidence derived from the search must be suppressed.

CONCLUSION

After taking testimony and viewing physical evidence at Petitioner's motion to suppress, the trial court judge correctly ruled that the Petitioner exhibited an actual subjective expectation of privacy and society would be willing to recognize that expectation as reasonable.

For the reasons and law cited above, the District Court of Appeal's opinion should be reversed and the trial court's order affirmed.

Respectfully submitted,



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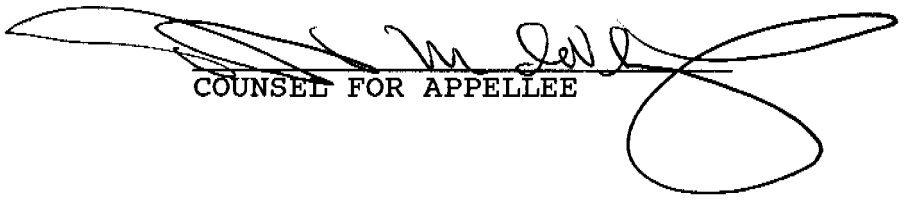
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Elaine L. Thompson, Asst. Attorney General, 4000 Hollywood Blvd., Suite 505S, Hollywood, FL 33021, this 28th day of October, 1992.



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