IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SAMUEL LEROY MUZNY	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F-2000-1078
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Samuel Leroy Muzny was tried by judge and convicted of Unlawful Cultivation of Marijuana in violation of 63 O.S.Supp.1997, § 2-509, in the District Court of Lincoln County, Case No. CF-98-191. The Honorable Paul M. Vassar sentenced Muzny to fifteen (15) years imprisonment, with eight (8) years suspended, and imposed a $5000 fine. Muzny appeals this conviction and sentence.

Muzny raises seven propositions of error in support of his appeal:

I. The United States Supreme Court has interpreted the Fourth Amendment as affording no constitutional protection whatsoever from warrantless searches of open fields;
II. The State of Oklahoma, though adopting the open fields doctrine, has done so without an expressed examination of the underlying principles thereto;
III. Adoption of the *Oliver v. United States* open fields doctrine would be contrary to Oklahoma constitutional law;
IV. Muzny exhibited a subjective expectation of privacy in the area searched;
V. Warrantless covert video surveillance upon posted private property is so intrusive that a societal expectation to be free of the same is reasonable;
VI. The warrantless seizure of marijuana from the open field violated Muzny's state and federal constitutional rights; and

VII. The trial court abused its discretion in failing to suspend Muzny's sentence in its entirety resulting in an excessive sentence.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find that the search issues raised in Propositions I, II, III, IV, and VI combined require reversal. In these propositions Muzny argues that Oklahoma Bureau of Narcotics agents should not have entered his posted, fenced property without a warrant to search for marijuana. We agree, and do not discuss the remaining propositions[1]. This Court recently discussed the scope of warrantless search and seizure in *Dale v. State*.[2] We rely on *Dale* in reaching our conclusion.

Decision

The Judgment and Sentence of the District Court is **REVERSED and REMANDED**.

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[1] We note that one transcript, of the sentencing hearing, was not provided to this Court. This transcript was not necessary to our resolution of the issues presented.
[2] No. F-2000-681, 2002 OK CR 1.

OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	DISSENT
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR
LILE, J.:	DISSENT

LUMPKIN, PRESIDING JUDGE: DISSENTS

I dissent to the Court's decision to reverse this case and to the Court's rewriting of our well established caselaw on search and seizure. This decision reflects a desire to legislate public policy, rather than adhere to the discipline of applying the doctrine of *stare decisis*.

While I agree with the general statement of law that state courts are free to interpret their constitutional provisions in such a way as to provide more protections than that afforded by the U.S. Constitution, that statement is merely a diversion for the disregard of this Court's jurisprudence. For almost 95 years, this Court has elected not to interpret our state constitutional protections in the area of search and seizure as being any greater than the protections provided by the U.S. Constitution. Therefore, it is not a question of whether a court can make that interpretation, but whether a court should.

If this Court were interpreting our state constitutional provisions in the first instance, no one would disagree that the Court could, in fact, establish the content of our constitutional provisions as meaning something different than the U.S. Constitution. However, that is not the case. Within just a couple of years of statehood this Court began a line of decisions that charted a course that we are bound to follow if we are to preserve the Rule of Law. Disregarding that precedent, this opinion creates the impression the action it seeks to take is just the right thing to do. However, when read in the context of the long

standing jurisprudence of this Court it will be seen as a usurpation of power rather than stewardship of office.

This Court has always interpreted Article II, Section 30, of the Oklahoma Constitution consistent with the Fourth Amendment of the United States Constitution. In *Sanders v. State,* 287 P.2d 458, 463 (Okl.Cr.1955) this Court stated:

> By the provision of Section 30 of Article II of the Constitution of Oklahoma, it is provided that:
>
> 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.'
>
> This provision is almost identical in language with the Fourth Amendment to the Constitution of the United States.

287 P.2d at 463.

In *Long v. State,* 706 P.2d 915, 917 (Okl.Cr.1985) we stated:

> We, however, are not favorably disposed toward setting up a different standard of interpretation for Article II, § 30 of the Oklahoma Constitution. Years ago Oklahoma's Court of Criminal Appeals recognized the close relation of the Oklahoma Constitution's Article II, § 30 and the Fourth Amendment to the United States Constitution when it stated in *DeGraff v. State,* 2 Okl.Cr. 519, 103 P. 538 (1909):
>
> This provision of our Constitution [Article II, Section 30] is almost an exact copy of the fourth amendment of the Constitution of the United States....
> * * *
> * * *
>
> It is true that the language is not in all respects the same in the two provisions; but the substance is identical. For a proper understanding of the question before us, it is important to find out

what construction the United States courts have placed upon this provision.

In *Hughes v. State,* 522 P.2d 1331, 1333 (Okl.Cr.1974) we stated:

> The provisions of Article 2, § 30 of the Oklahoma Constitution relating to search and seizure, and the Fourth Amendment of the Constitution of the United States, are identical.

See also Richardson v. State, 841 P.2d 603, 605 (Okl.Cr.1992) (art. II, § 30 of the Oklahoma Constitution should not be interpreted to require the exclusion, from revocation proceedings, of evidence seized in violation of the Fourth Amendment); *Langham v. State,* 787 P.2d 1279, 1280 (Okl.Cr.1990) (art. II. § 30, interpreted same as the Fourth Amendment for purposes of determining validity of search warrant).[1]

The *Munzy* opinion relies upon *Dale v. State,* 2002 OK CR 1, ___ P.3d ___ (2001). However, this reliance is misplaced. In *Dale,* the Court held the search invalid due to lack of consent.[2] The issue of consent is not present in this case.

The intent of the framers of our constitution is accurately set out in *State v. Thomason,* 538 P.2d 1080 (Okl.Cr.1975) where Judge Bussey carefully analyzed the content of our constitution, specifically Article II, § 21, within the context of when it was drafted to afford us more direct insight into its meaning. *See also Harris v. State,* 773 P.2d 1273, 1275 (Okl.Cr.1989) (Lumpkin,

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[1] I prefer to rely on case law from this Court as to the interpretation of our state constitution. *Turner v. City of Lawton,* 733 P.2d 375 (Okl.1986), concerns only an application of art. II, § 30 in a civil administrative personnel hearing. The Oklahoma Supreme Court did not recognize the prior precedent established by this Court in *DeGraff* or seek to modify that decision. This Court has also previously disregarded its own precedent in order to arrive at a desired result in *Dennis v. State,* 990 P.2d 277, 285 (Okl.Cr.1999). Two wrongs do not make a right.

[2] *See Id,* ___ OK CR ___, ___ P. 3d at ___ (Lumpkin,P.J., dissenting).

J.specially concurring). That same analysis is applicable here. We must remember, Oklahoma became a state in 1907. Significant decisions of the U.S. Supreme Court interpreting the U.S. Constitution had already been promulgated by that time. If the drafters of the Oklahoma Constitution had truly wanted to make a distinction as between the two constitutions, they could have. We all know they took the time to be very specific with certain constitutional provisions, to the extent "President Theodore Roosevelt at the time is said to have called it a 'joke'". See *2001-2002 Oklahoma Almanac*, pg. 22. And, as set out above, even though presented with repeated opportunities to hold otherwise, the Court consistently applied the *DeGraff* analysis to Art. II, § 30, of the Oklahoma Constitution.

In *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed. 214 (1984), the United States Supreme Court stated:

> Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate." 'The premise that property interests control the right of the Government to search and seize has been discredited.' " *Katz*, 389 U.S., at 353, 88 S.Ct., at 512 (quoting *Warden v. Hayden*, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782 (1967)). "[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." *Rakas v. Illinois*, 439 U.S., at 144, n. 12, 99 S.Ct., at 431, n. 12.

104 S.Ct. at 1743-44.

> Since *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of Amendment analysis has been the question whether a person has a "constitutionally protected

> reasonable expectation of privacy." Id., at 360, 88 S.Ct., at 516 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.' " Id., at 361, 88 S.Ct., at 516. See also Smith v. Maryland, 442 U.S. 735, 740-741, 99 S.Ct. 2577, 2580-2581, 61 L.Ed.2d 220 (1979).

Oliver, 104 S.Ct. at 1740-41.

> [O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas.

104 S.Ct. at 1741.

> The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

104 S.Ct. at 1743.

This Court has specifically adopted this analysis in *Fite v. State*, 873 P.2d 293, 296 (Okl.Cr.1993) (Chapel opinion) ("[c]learly, the open fields doctrine permitted the police to cross Fite's property, look in his fields, and then look in the well house to determine whether marijuana was growing inside the building. *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987); *Grider v. State*, 743 P.2d 678 (Okl.Cr.1987)."

The open fields in this case were pastureland surrounded by a barbed wire fence. Agents crossed the initial fence, walked through pasture, came upon another barbed wire fence, crossed it and entered a wooded area. On the other side of the wooded area was a clearing containing the marijuana patch (surrounded by another barbed wire fence). Appellant's residence was approximately a half mile away. Despite the possible uses for this secluded parcel of land, and the trespassing signs posted on the outer perimeter fences, Appellant did not have a constitutionally protected reasonable expectation of privacy in his rural property outside his residence and accompanying curtilage. Accordingly, the agents, acting on a tip concerning the existence of the marijuana patch, legally crossed over the fence onto Appellant's land. The U.S. Supreme Court has not limited the open fields doctrine to sights seen from the road or the air. To limit the doctrine in a state such as Oklahoma with many rural areas in which marijuana is grown would unduly hamper law enforcement's efforts to eradicate the illegal substance.

Under the facts of this case, the search was proper. Our judicial system is based upon the doctrine of *stare decisis*. It is the cornerstone of the foundation of the Rule of Law. Under this doctrine, once a court has laid down a principle of law, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. *Black's Law Dictionary* (5th ed. 1979). The doctrine is one of policy, grounded on the theory that security and certainty in the law requires that accepted and established principles be recognized and followed. It is through this Rule of Law that we provide a stable

government, legal system, and society. It is through this discipline of ourselves to follow the Rule of Law that we empower attorneys to render effective assistance of counsel in that they can advise clients as to the realities and prospects of their situation. This inherent consistency ensures trial judges and practioners follow rules that ensure fair trials. To disregard the discipline of the Rule of Law is to digress into the rule of individual judges.[3] That is not the principle upon which our system of justice has been built. By abandoning the application of *stare decisis* the court creates an illegitimacy in the law which future judges will have to determine if they will compound the error or correct it. In this case, the majority have disregarded this basic rule of law and in so doing have eviscerated the very principles for which it stands.

The Honorable Ed Parks served for many years with distinction as a member of this Court. He and I often disagreed on issues before the Court. However, I have always had great respect for Judge Parks' adherence to the Rule of Law and the application of *stare decisis* even in those cases where he might personally, even adamantly, disagree with the law which was required to be applied. It was not unusual for Judge Parks to add a footnote either in his opinion, or as a part of a separate writing, that while he disagreed with the principle of law, he would apply it as required by *stare decisis*. In his office hung two separate framed quotes. The first quote was from President Theodore Roosevelt and addressed "the man in the arena." Truly, Judge Parks

[3] As I have previously noted, the Court's attempts to substitute equity for law creates a futile ground for inconsistency, and not the logical progression of the development of the law as

exemplified the man in the arena at many times during the course of his long and storied career in the law. The second quote was relatively short. It merely said, "you may hate the sin, but never the sinner". Each of those quotes embodied the personal and professional principles to which Judge Parks adhered.

Principles enable us to stand up for what we view as being right. *Stare decisis* is one of those principles of the law, which creates the concept, and reality of the Rule of Law. It is in that spirit that I have addressed what I view as the inappropriate act committed in this opinion. My discussion of this principle has in no way been intended to impinge the philosophy, motivation, or abilities of my colleagues who have the right to differ in their views. Yet, it is appropriate that, even when philosophies differ, both philosophies have the right to be voiced in such a way as to allow those who come after to determine which is correct for the preservation of the Rule of Law.

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contemplated through the Rule of Law. *See Hain v. State*, 852 P.2d 744, 753-756 (Okl.Cr.1993) (Lumpkin, P.J., concur in part/dissent in part).

LILE, JUDGE: DISSENTS

Dale turned on the question of consent. There is no consent issue in this case and reliance on *Dale* is misplaced. The generalized statement that officers needed a warrant in this case provides no guidance for future police procedure. I suspect that defense counsel will have as much difficulty explaining this result to their client as the prosecutor will have explaining to the officers what they did wrong. I dissent to the Court's action today.