IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EDDIE DON MILLIGAN Appellant, v. THE STATE OF OKLAHOMA Appellee.	)	Case No. F-2003-1241

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Eddie Don Milligan was tried by jury and convicted of Unlawful Cultivation of Marijuana in violation of 63 O.S.Supp.2002, § 2-509 in the District Court of Cleveland County, Case No. CF-2002-1735. In accordance with the jury's recommendation the Honorable Gary Snow sentenced Milligan to six (6) years imprisonment. Milligan appeals from this conviction and sentence.

Milligan raises five propositions of error in support of his appeal:

I. Milligan's judgment and sentence must be reversed because of the introduction of evidence obtained from the search of Milligan's property, which was conducted pursuant to a warrant wholly lacking in probable cause in violation of the Fourth Amendment and Article 2, § 30 of the Oklahoma Constitution;

II. The evidence obtained pursuant to the search warrant should have been suppressed because Milligan had a reasonable expectation of privacy protected by the Fourth Amendment that was violated by the aerial observation;

III. Prosecutorial misconduct so infected the trial proceedings with unfairness that Milligan's constitutional rights to due process and a fair trial were violated;

IV. Milligan was deprived of the effective assistance of counsel; and

V. Cumulative errors deprived Milligan of a fair trial and reliable verdict.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that error raised in Proposition II requires relief. On a Monday afternoon Oklahoma Bureau of Narcotics agents, conducting a routine helicopter flight looking for marijuana, experienced engine trouble. On their way back to the airport they flew over Milligan's property, going 75 – 105 miles per hour, and saw what looked like marijuana plants. They did not make any effort to confirm the sighting, but recorded the global positioning system coordinates and returned to the airport. On Tuesday morning agents flew over those coordinates again but saw only ears of corn, no marijuana. Officers got a search warrant for Milligan's property. They found three marijuana leaves, a small stalk and a stem near a smoldering burn pile. There were no items consistent with marijuana cultivation on the property, and nothing consistent with drug use or sales in the house.

In Proposition II Milligan claims the helicopter search of the curtilage of his property violated his reasonable expectation of privacy. All parties agree that flight in public airspace above 500 feet is within FAA regulations and thus legal. The trial court, in denying Milligan's motion to suppress, focused on whether the flight was legal rather than on Milligan's reasonable expectation of privacy. However, as the United States Supreme Court plurality opinion in *Florida v. Riley* noted,[1] the legal altitude of a flight does not determine whether it constitutes a search under the Fourth Amendment. The issue is whether

[1] 488 U.S. 445, 451, 109 S.Ct. 693, 697, 102 L.Ed.2d 835 (1989) (plurality opinion).

Milligan had an expectation of privacy which society is prepared to recognize as reasonable.[2]

In *Riley* the plurality held that a helicopter flight over a greenhouse at 400 feet did not constitute a search. The plurality opinion cited the FAA regulations, which allow helicopters to fly at lower altitudes than other aircraft,[3] and found that (a) anyone could have flown a helicopter over that greenhouse at 400 feet; (b) nothing in the record suggested that helicopter flights at that altitude were rare enough that Riley could reasonably expect privacy; and (c) the record did not show the helicopter's flight created undue noise, wind, dust or threat of injury.[4]

Justice O'Connor provided the deciding vote for the result in *Riley*. Justice O'Connor's concurring opinion recognized that the FAA regulations go to public safety, not the constitutional protection against unlawful search and seizure.[5] With the agreement of four Justices, she emphasized that the issue was Riley's reasonable expectation of privacy, not whether officers were legally in the airspace according to FAA regulations; thus this framework for analysis was agreed on by a majority of the Court.[6] Justice O'Connor noted that low-level observation of curtilage on private property from the air is not analogous to ground-level observation; a person may have a reasonable expectation of privacy against aerial observation that is not present when the observer is

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[2] *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 517, 19 L.Ed.2d 576 (1967).
[3] 488 U.S. at 451, 109 S.Ct. at 697.
[4] 488 U.S. at 451-52, 109 S.Ct. at 697.
[5] 488 U.S. at 452, 109 S.Ct. at 698.

passing by.[7] For example, one may build a fence or plant shrubbery to discourage observation from a public thoroughfare, but cannot block all aerial views of the same property, protected at ground level, "without entirely giving up their enjoyment of those areas. To require individuals to completely cover and enclose their curtilage is to demand more than the 'precautions customarily taken by those seeking privacy.'"[8] Justice O'Connor suggests the relevant inquiry is not whether the helicopter's altitude was legal, but "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that [a defendant's] expectation of privacy from aerial observation was not 'one that society is prepared to recognize as reasonable.'"[9] Applying the *Riley* factors as explained by Justice O'Connor to this case, we conclude Milligan's reasonable expectation of privacy in his property was violated.

Testimony was conflicting as to the helicopter's altitude. Milligan presented evidence that the helicopter was at a lower altitude than that regularly used by other aircraft in the area. Milligan's wife and son testified that, while aircraft flew over the property daily, it was very unusual to see and hear a helicopter this close to the ground. The helicopter appeared to them to be just above the tree line. They testified that this helicopter was very loud and the rotor wind movement disturbed the branches and trees although the day

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[6] 488 U.S. at 454, 109 S.Ct. at 699. The dissenting Justices agreed on this point, for a majority. *Riley*, 488 U.S. at 464-65, 109 S.Ct. at 704 (J. Brennan, dissenting, joined by Marshall, J., and Stevens, J.); 488 U.S. at 467, 109 S.Ct. at 705 (J. Blackmun, dissenting).
[7] 488 U.S. at 453, 109 S.Ct. at 698.
[8] 488 U.S. at 454, 109 S.Ct. at 699 (citation omitted).
[9] 488 U.S. at 454, 109 S.Ct. at 699, *quoting Katz*, 389 U.S. at 361, 88 S.Ct. at 516.

was calm. When Mrs. Milligan opened the door to look outside, the wind from the helicopter pulled on the door. Agent Suto testified she did not know the helicopter's altitude when it was over the Milligan property, but stated the agents always flew over 500 feet.

In addition to the testimony that the helicopter caused noise and wind, this case differs factually from *Riley*. In *Riley*, an officer, acting on a tip that marijuana was growing on Riley's property, first tried to look into a greenhouse from the ground. When he could not, he deliberately flew over the property twice at a low altitude, specifically looking in the greenhouse to see whether he could identify marijuana plants. After getting a warrant based on his observations, officers found marijuana growing in the greenhouse. Here, OBN agents had been on a routine observation flight over other properties and were on their way back to the airport due to engine trouble. They had received no information regarding Milligan's property and merely happened to fly over it. Glancing down, agents thought they saw marijuana but did not circle the property or otherwise try to confirm that sighting. Agents saw no marijuana plants growing when they flew over the next day, or when they searched the property pursuant to the warrant.

Milligan had a reasonable expectation of privacy which was violated when OBN agents observed his curtilage from the helicopter. The evidence from the subsequent search of his property, which was based on the helicopter observation, should have been suppressed. The case is reversed and

remanded. Given our resolution of Proposition II, we do not reach Milligan's remaining propositions of error.

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	DISSENT
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	DISSENT
LEWIS, J.:	CONCUR

LUMPKIN, VICE PRESIDING JUDGE: DISSENTS

The suppression of evidence is a judicial question and this Court "will not reverse the trial court upon a question of fact where there is a conflict of evidence, and there is competent evidence reasonably tending to support the judge's finding." *Battiest v. State*, 1988 OK CR 95, ¶ 6, 755 P.2d 688, 690. There was sufficient competent evidence supporting the trial court's denial of the motion to suppress as the aerial search of Appellant's property did not violate his Fourth Amendment expectation of privacy. Therefore, I dissent to the reversal of this case.

The record in this case shows Appellant did not have a reasonable expectation of privacy in the property under the principles enunciated in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) and *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (plurality opinion). Although evidence in this case was conflicting, the trial court's ruling is supported by evidence that Appellant did not manifest a subjective intent to maintain his privacy. This evidence included the location of the "growth area" of marijuana at the rear of Appellant's backyard, surrounded by trees, but not fenced or ever tilled.

Further, any expectation of privacy Appellant might have had was one that society is not prepared to accept as reasonable. The helicopter was flying at an FAA approved altitude of above 500 feet. Mrs. Milligan and her son testified that in living near Tinker Air Force Base, they were accustomed to

aircraft, including helicopters, flying overhead on a regular basis. There is nothing in the record to suggest the helicopter interfered with Appellant's use of the property or presented a threat of injury. Nor is there anything in the record to indicate helicopters flying above 500 feet were such a rarity that a person could not reasonably expect the "growth area" to be observed from such a vantage point.

Based upon this record, Appellant has failed to establish that he had a legitimate expectation of privacy as he has not shown an actual subjective expectation of privacy in the "growth area" and has not established a reasonable expectation of privacy given the helicopter was flying in public airspace in an undisputedly heavy air traffic area. Accordingly, I find the trial court did not abuse its discretion in denying Appellant's motion to suppress as this case involves a classic application of the well established "open fields" doctrine. See *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924); *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *Dow Chemical Company v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986); *California v. Cirado*, 476 U.S. 207, 106 S.Ct. 1809; 90 L.Ed.2d. 210 (1986); *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d. 835 (1989). In each of these cases, the U.S. Supreme Court has held arial observation of an open field was not a search. This Court should follow those well-reasoned opinions and hold the same in this case, thus affirming the judgment and sentence. Therefore, I must dissent to the Court's disregard of the law in this case.

A. JOHNSON, JUDGE, DISSENTING:

I dissent.

The Fourth Amendment protects privacy on which a person justifiably relies. The majority applies this settled principle so clearly enunciated in *Katz v. United States*,[1] but reaches the wrong result. The determination whether the agents' conduct here violated the Fourth Amendment requires a two-part inquiry: Did Milligan have an actual subjective expectation of privacy in the property, and was that expectation one "which society is prepared to recognize as reasonable."[2]

It is the second part of the test which Milligan cannot overcome.

The Milligan property was near an airport. Planes and helicopters taking off and landing routinely flew over it. Indeed, the OBN agents aboard the helicopter on the day in question here had no intent to fly over this property in particular. The helicopter had engine trouble and for that reason was returning to base early when agents observed the plants on Milligan's land.

Milligan, under these facts, had no reasonable expectation that his property and its plantings would not be observed from the air.

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. As a general proposition, the police may see what may be seen "from a public vantage point where [they have] a right to be." Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the

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[1] 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[2] Slip op. at p. 3 referencing *Katz*, 389 U.S. at 361, 88 S.Ct. at 517.

> vantage point of an aircraft flying in the navigable airspace as this plane was. (Citations omitted.)

Florida v. Riley, 488 U.S. 445, 449-50, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989).

The initial observation of the plants in question was not a search. The agents' subsequent conduct in verifying the sighting and obtaining a search warrant from a magistrate was appropriate, and the court below did not err in refusing to suppress the evidence obtained.