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Aerial Surveillance By Helicopter Not Barred By Fourth Amendment

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A sharply divided United States Supreme Court addressed the issue of whether helicopter surveillance of a backyard greenhouse from an altitude of 400 feet constitutes a "search" within the meaning of the Fourth Amendment of the United States Constitution requiring a search warrant. Justice White, in writing for a four member plurality of the Court, held that no violation of the fourth amendment occurred when, from their vantage in a helicopter, police observed marijuana plants growing in a partially covered greenhouse.

The case, *Florida v. Riley*,[1] originated from a rural area of Pasco County, Florida, which provided the setting for a residential mobile home. The Pasco County Sheriff's Office received an anonymous tip that marijuana plants were growing on the property which was occupied by Michael Riley. Unable to observe any contraband from the road, a deputy flew over the property in a helicopter and circled twice at 400 feet. Construction of the greenhouse permitted the deputy to easily identify marijuana plants inside. The structure, located ten to twenty feet behind the residence, was casually constructed of opaque material. Only two sides of the greenhouse were enclosed. The other two sides were completely open, although not visible from the road or surrounding property. Two full panels, approximately ten percent of the roof area, were open to view from above. A wire fence surrounded the five acres of property and visitors were greeted with a "DO NOT ENTER" sign posted at the entrance. The deputy obtained a search warrant for the greenhouse based upon his visual identification of the marijuana plants, and, upon its execution, forty-four marijuana plants were seized.

Riley moved to suppress the evidence on the ground that the police activity prior to obtaining a search warrant constituted a "search" infringing upon his expectation of privacy in the greenhouse. The trial judge agreed and granted his motion to suppress. The State of Florida was successful in its appeal to the Second District Court of Appeal which reversed the trial court.[2] However, upon subsequent review, the Florida Supreme Court reinstated the trial court's suppression of the evidence.[3] The Florida court found that Riley exhibited a reasonable expectation of privacy entitled to fourth amendment protection and distinguished *Riley* from recent United States Supreme Court decisions dealing with aerial surveillance.

In one of those cases, *California v. Ciraolo*,[4] police flew over a residence in a fixed wing plane at a height of 1,000 feet to confirm an anonymous tip that marijuana was growing in the backyard. The Supreme Court first determined that the backyard was within the curtilage of the residence and then focused upon whether the observation of the curtilage by the police from the aircraft violated the resident's expectation of privacy. The Court decided that any expectation of privacy the occupant might have in his backyard was not reasonable and not one which society was prepared to recognize.[5] The surveillance was acceptable where:

> The observations...took place *within public navigable airspace*...in a physically nonintrusive manner; from this point [the police] were able to observe plants readily discernible to the naked eye as marijuana....*Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.* On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.[6]

In *Dow Chem. Co. v. United States*,[7] the Environmental Protection Agency (EPA) was investigating the Dow Chemical Company for possible violations of the Clean Air Act. After having been denied a request for an on-site inspection, the EPA obtained aerial photographs of the plant from an aircraft flying in public navigable airspace. Dow Chemical alleged that the photographs taken by the EPA amounted to a search without a warrant in violation of the fourth amendment. The Supreme Court refused to extend protection of the fourth amendment to the industrial plant because the plant was not curtilage and the photographs were taken from public navigable airspace, stating:

> We conclude that the open areas of an industrial plant complex...are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in *aircraft lawfully in the public airspace* immediately above or sufficiently near the area for the reach of cameras.[8]

Based upon the facts present in *Riley* and the principles announced in *Ciraolo*, the Florida Supreme Court readily determined that Riley's greenhouse was part of the curtilage. However, the Florida court refused to apply any other principles in *Ciraolo* or *Dow Chemical* to *Riley*. The court distinguished the *Riley* aerial surveillance from that in *Ciraolo* on the grounds that *Riley* involved a helicopter flying at 400 feet rather than a fixed wing aircraft flying at an altitude of 1,000 feet. The court feared that helicopter surveillance presented a greater threat to privacy and was more likely to be subject to abuse. The court reasoned, "Surveillance by helicopter is particularly likely to unreasonably intrude upon private activities...because of a helicopter's virtually unlimited maneuverability and observational capabilities, helicopter surveillance poses a serious risk to privacy."[9]

When presented with the issue of helicopter surveillance in *Riley*, the United States Supreme Court held that their decision in *Ciraolo* was controlling. By knowingly exposing the contents of the greenhouse to public view, Riley waived any fourth amendment protection. Since a portion of the roof and sides of the greenhouse were exposed to public view from the air, the Court held that Riley could not reasonably have expected the contents of the greenhouse to be shielded from view by police who were flying in a helicopter where they had a right to be. That which is knowingly exposed cannot reasonably be expected to remain private.

A plurality of the Court based their decision on the fact that the helicopter was not violating any law or regulation by flying at an altitude of 400 feet over Riley's property. The Court relied heavily upon federal rules and regulations which require that aircraft must at all times maintain an altitude which allows for emergency landing without undue hazard to persons or property on the surface in the event of a power failure.[10] The regulations further establish certain minimum altitudes for fixed winged aircraft of 1,000 feet above the highest ground obstacle in congested areas,[11] or in other than congested areas, an altitude of 500 feet above the surface, except over water or sparsely populated areas.[12] Helicopters are exempt from either of the two federally regulated minimum flight altitudes that must be maintained by fixed winged aircraft.[13] Given the unique characteristic of a helicopter to perform "autorotation" to safely land the aircraft in the event of a power failure, such maneuver can be accomplished at almost any altitude without danger to persons or property below, provided the aircraft has sufficient forward air speed.[14]

The extent of the *Riley* decision is not unlimited. The Court cautioned that:

> We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft. Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more. This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the fourth amendment simply because the plane is within the navigable airspace specified by law.[15]

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The decision is tempered by the facts that the helicopter was not violating the law, that helicopter flight at 400 feet is not a rare occurrence, that there is no evidence that the helicopter interfered with the normal use of the residence or greenhouse, and that there was no undue noise, wind, dust, or threat of injury. A case involving any of these factors could result in a finding of a constitutional infringement of a person's expectation of privacy.

Justice O'Connor, who concurred in the judgment reversing the Florida Supreme Court, wrote a separate opinion and specifically observed that "the plurality's approach rests the scope of fourth amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety not to protect '(t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' (U.S. Const. amend. IV)."[16] Justice O'Connor expanded on her reasoning to the extent that merely "[b]ecause the FAA has decided that helicopters can lawfully operate at virtually any altitude so long as they pose no safety hazard, it does not follow that the expectations of privacy society is prepared to recognize as 'reasonable' simply mirror the FAA's safety concerns."[17]

Both the plurality Court and Justice O'Connor appeared to have left open the door to review future cases involving helicopter observation. Justice O'Connor noted, "[t]he fact that a helicopter could conceivably observe the curtilage at virtually any altitude or angle, without violating FAA regulation, does not in itself mean that an individual has no reasonable expectation of privacy from such observation."[18]

Justice O'Connor's final expression of concern regarding the holding in this case was based on a recognition that a person's expectation of curtilage protection from naked eye aerial observation was not unreasonable, per se. In "sufficiently rare" cases police surveillance from helicopters from lower altitudes could violate a reasonable expectation of privacy despite compliance with FAA air safety regulations.

The dissenters in this case, Justices Brennan, Marshall, Stevens, and Blackmun (in a separate dissenting opinion) appeared to express near disbelief in the legal analysis of the plurality Court on the helicopter observation issue. The dissenting Justices summed up their concerns regarding the majority decision with a comparison to George Orwell's dread version of life in the 1980's:

> The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said....In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again, with a curving flight. It was the Police Patrol, snooping into people's windows.[19]

1984 has come and passed. The surveillance conducted in *Riley* is hardly the "snooping" feared by Orwell. The dissent leaves unanswered a simple but critical question posed to law enforcement: What,

if anything, should police do if confronted head-on by evidence of a crime when they are in a place where they have as much right to be as any other citizen? The majority recognizes that police need not ignore what they see from the public realm.

CONCLUSION

The impact of the *Riley* decision is bound to be far-reaching. It authorizes law enforcement officers to gather and utilize information gained through advanced technological surveillance techniques without the necessity of a search warrant. However, that ability is limited to the police gaining the information from a public vantage point where they have a right to be and gathering evidence in a nonintrusive manner. But, as Justice O'Connor remarked, "[p]ublic roads, even those less traveled by, are clearly demarked public thoroughfares."[20] And now, aerial surveillance by helicopter, if conducted from a public thoroughfare, is permissible even though it is still the road less traveled.

NOTES

[1] 44 Crim. L. Rep. (BNA) 3079 (January 23, 1989).

State v. Riley, 476 So. 2d 1354 (Fla. Dist. Ct. App. 1985).

[3] *Riley v. State*, 511 So. 2d 272 (Fla. 1987).

[4] *Ciraolo*, 476 U.S. 207 (1986)

[5] The Court applied the two-pronged test announced in *Katz v. United States*, 389 U.S. 347, (1967), to determine whether governmental activity infringes upon the constitutional expectation of privacy. First, an individual must exhibit, by his conduct, an actual subjective expectation of privacy; and secondly, society must be willing to recognize that expectation as reasonable.

[6] *Ciraolo*, 476 U.S. at 213-14.

[7] *Dow, Chem. Co.*, 476 U.S. 227 (1986).

[8] *Id.* at 229.

[9] 511 So. 2d at 287.

[10] 14 CFR §91.79(a).

[11] 14 CFR §91.79(b).

[12] 14 CFR §91.79(c).

[13] 14 CFR §91.79(d).

[14] Hughes Tool Co., Aircraft Div., "Owners' Manual for U.S. Army Primary Trainer-Hughes Model TH55A," 3-5d, figure 3-3 (Height Velocity Diagram). The Hughes TH55 A is the type aircraft used by the Pasco County, Florida Sheriff's Office in the instant case. To insure operational safety and to be able to perform a successful autorotation in an emergency, varying airspeed/altitude combinations are required, e.g., 20 kn/400', 40 kn/300', 50 kn/250'.

[15] 44 Crim. L. Rep. (BNA) at 3081.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 3085 (quoting G. Orwell, *Nineteen Eighty-Four* (1949)).

[20] *Id.* at 3085.

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