

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
)
v.) Criminal No. 00-28-B
)
)
ANDREW R. DIEHL and)
WILLIAM N. CUMMING,)
)
Defendants)

**RECOMMENDED DECISION ON DEFENDANTS'
MOTION TO SUPPRESS**

This matter is before the Court on the Defendants' joint Motions to Suppress. Defendants seek to suppress a quantity of marijuana and other evidence seized pursuant to the execution of a search warrant. The probable cause giving rise to that warrant was based at least in part upon a warrantless entry onto the property of the Defendants. Defendants contend that entry invaded their curtilage and was conducted in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. I held an evidentiary hearing on September 8, 2000. I now recommend that the Court DENY the Motions to Suppress.

Proposed Findings of Fact

Special Agent Tony Milligan is employed by the State of Maine Department of Public Safety Drug Enforcement Agency ("MDEA") and has been since 1992. Prior to working with the MDEA Milligan worked for five years as an officer with the Rumford Police Department. He is certified to teach drug law enforcement throughout the United States and has taught officers on drug related topics including search warrant preparation

and marijuana detection. Formerly a regional coordinator for the marijuana eradication program in the State of Maine, he has been trained to detect the odor of marijuana and is able to distinguish between the smell of dried marijuana and the more pungent, rich and intense odor of cultivated marijuana as it is growing. His more recent training has also included instruction on the use of thermal imaging devices. In October 1999, he was certified to conduct thermal imaging, a technique that involves pointing a camera-like device at a surface and then identifying the heat emissions coming from that surface.

On February 23, 2000, Special Agent Milligan determined that it would be appropriate to investigate, with the aid of a thermal imaging device, the Defendants' property located in Phillips, Maine. The agent decided that he would conduct a fly-over in a helicopter under cover of darkness. The helicopter did not fly lower than 1,000 feet above the property and with the aid of a zoom device the agent was able to observe the lay of the property. He observed a large storage shed located some distance from the primary dwelling, a camp type residence. The thermal imaging device indicated a significant heat loss from both the storage shed and, less significantly, the camp. Milligan also observed the overall layout of the premises, including the driveway and an open animal pen adjacent to the camp.

The reasons behind Milligan's decision to conduct the flyover were as stated in the Affidavit submitted in support of the search warrant. The Government had learned that in late November, 1999, Massachusetts hunters had reported that "Hispanic looking men" with rifles had exited the storage building and ordered them off the land. A local deputy had investigated the report and discovered the property was owned by Ian Fabrication, a Florida company, and that Defendant William Neville Cumming, one of

the owners of that company, had declined to elaborate when questioned by the town clerk as to the nature of the company's business. When the deputy went to the property to further investigate, Defendant Cumming met him at his vehicle and answered his inquiries, but appeared to behave in a nervous or suspicious manner. The deputy's further investigation revealed that Ian Fabrication had been dissolved by the State of Florida for failing to file corporate reports. Andrew Diehl, one of the named officers of the now defunct corporation, was believed to be living at the Phillips camp with Mr. Cumming and others based upon information garnered at the Phillips, Maine Post Office.

Special Agent Milligan also conducted an investigation of the power consumption for the property in question. That investigation revealed the average monthly power bill for the camp is in the \$400.00 range while the monthly bill for the storage building has been between \$345.00 and \$801.00. Believing the circumstances suspicious, but not satisfied that he had sufficient probable cause to obtain a warrant, Milligan felt that further investigation was needed and he decided to attempt a second thermal imaging of the structure on foot. On February 24, 2000, Milligan and four other law enforcement officers set out at 3:00 a.m. with a hand held thermal imaging device to attempt further imaging of the storage shed and surrounding area.

In order to accomplish his second thermal imaging, Milligan's intent was to proceed on foot cross-country through the woods and encounter the storage shed from that direction. However, the agent quickly discovered that the deep snow made proceeding through the woods without snowshoes extremely difficult and quite noisy. The officers eschewed snowshoes because they believed the snowshoe tracks would reveal their presence and they would therefore not have the benefit of surprise were they

to return the next day with a warrant authorizing a search. Instead they walked down the plowed dirt road (Old Bray Hill Road) and proceeded past the “Keep Out” sign and up the driveway to the area of the Defendants’ camp. There is a discrepancy in the evidence as to how far down the driveway the officers proceeded, but I am satisfied that based upon the video footage and Milligan’s own inconsistent testimony that any dispute should be resolved in favor of the Defendants. That means that Agent Milligan was approximately 82 feet from the dwelling place during the thermal imaging. At that point, the agent detected the pungent odor of growing marijuana emanating from the direction of the storage shed. Milligan ceased his heat detection operation, made note of his surroundings for “tactical” purposes related to the execution of a search warrant and left the area.

The area where Milligan stood when he detected the odor of growing marijuana was in front of a utility pole, which is approximately 90 feet from the dwelling and close to 400 feet from the head of the driveway. The telephone pole itself is approximately 40 feet away from a “Keep Out” sign which is posted at the top of driveway, close to the point where the clearing surrounding the cabin begins. There is no gate, fence or other barrier across the driveway, either at the head of the drive or at the point where the clearing begins, but the area was well posted with “Keep Out” and “No Trespassing” signs on February 24, 2000. As one walks down the driveway, there is a marked difference between the dense woods and the opening or clearing surrounding the camp. Before the utility pole the area noticeably opens, in winter providing a wide plowed area. There is also space for vehicle parking within this clearing. Continuing directly past the camp, the driveway proceeds into the woods again to the storage barn. Although

Milligan walked down the driveway for the purpose of conducting thermal imaging of the storage barn, he never proceeded to that location nor did he ever conduct any thermal imaging other than a limited overview designed primarily as screening for the execution of a search warrant. Milligan was satisfied that the odor of growing marijuana provided all of the probable cause he needed and, for that reason, did not seriously pursue the thermal imaging. Later that morning, the agent prepared an affidavit in support of the application for a search warrant. Agent Milligan informed the judge that he stood "on the dirt road away from the curtilage of the camp" when he detected the odor of marijuana. That description was not entirely accurate based upon the testimony presented at the hearing, as the officer was clearly in the private driveway of the residence.

The Cumming/Diehl 17 acre parcel consists of 16.5 acres of heavily wooded land with a cleared area of less than one-half acre. The parcel is located on the Old Bray Hill Road, a discontinued and sparsely populated county road, now maintained by various camp owners. To access the camp and ultimately the storage barn it is necessary to travel 700 feet up the Old Bray Hill Road and then turn left and travel 500 feet down the driveway. There is a "Keep Out" sign posted at the head of the driveway and at the entrance to the clearing. Agent Milligan was aware of the signs as he had been told of their existence by the deputy sheriff who previously visited the property. The driveway is heavily wooded and at approximately the halfway point there is a dogleg turn that serves to insure that people on the Old Bray Hill Road are not able to see the camp or the yard adjoining it.

Cumming, Diehl, and Diehl's wife were the full-time residents of the camp and had lived there since June 8, 1999. In the summer months they used the area outside their

residence for various activities associated with day to day life, including private conversations, gardening, and other personal activity. In the winter the area amounted to little more than a driveway into a plowed clearing where vehicles were parked. During the time period from June until February, three uninvited guests visited the property, the tax assessor, the prior owner, and the first deputy sheriff who came in response to the report of the Massachusetts hunters. George McCormick, the closest neighbor, owns a camp one-third mile from the defendants' camp. Prior to the execution of the search warrant he had never been to the camp, but he had met Mr. Cumming and he understood from that meeting that the residents valued their privacy and that if he wanted to visit he should call first. Mr. McCormick observed that privacy was not an uncommon desire among all rural camp owners even when engaged in legal activities. I find that Mr. McCormick's observation was a reasonable one.

Discussion

As an initial matter it is important to note that this case is *not* about the invasion of privacy associated with the use of a thermal imaging device, an issue that is currently the subject of legal debate and discussion. *See U.S. v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), *cert. granted*, 2000 WL 267066 (U.S. Sep 26, 2000) (No. 99-8508). Nor is this a case where Defendants are challenging the facial existence of probable cause in the warrant.¹ Both Defendants and the Government are in agreement that the odor of marijuana emanating from a structure provides sufficient probable cause, coupled with the other facts recited in the affidavit, to justify the issuance of the search warrant. The

¹ Defendants initially challenged other facts in the affidavit as deliberately false and misleading, particularly as to statements attributed to a local postmistress. (Aff. ¶ 9). They also suggested at one point that the "night-time/no-knock" provision was being challenged as facially insufficient. Neither of these issues have been pursued. I note that the statement attributed to the postmistress is immaterial to the finding of probable cause.

single issue of this case is whether Agent Milligan stood within the curtilage of the camp when he detected the scent of cultivated marijuana. If he was, the parties concede, that testimony would be stricken from the affidavit and probable cause would not exist for the issuance of the search warrant.² I conclude that the agent was not standing within the "curtilage" of the home when he detected the odor of marijuana and that the warrant was not tainted with any evidence obtained through an unwarranted search of the Defendants' home. I therefore recommend that the Court DENY the Defendants' motions.

The Fourth Amendment's restrictions on governmental searches and seizures are triggered when the government invades an individual's privacy. *See Oliver v. United States*, 466 U.S. 170, 177-78 (1984). Where a premises search is involved, the determination of a citizen's reasonable expectation of privacy may hinge on the nature of the place or area that is searched. Thus, it is engrained in our "societal understanding that certain [private] areas deserve the most scrupulous protection from government invasion." *Id.*, 466 U.S. at 178. The home is one such "sanctified" place. Indeed, "physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). On the other hand, even the most private activities will not be protected from government invasion or observation when they transpire in the open fields. *See Oliver*, 466 U.S. at 178; *Hester v. United States*, 265 U.S. 57, 59 (1924). This fact reflects an equally held societal understanding. As a practical matter, wide open fields and wild lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure are not.

² The Government does not argue that Agent Milligan's affidavit would have contained sufficient probable cause in the absence of the marijuana odor.

Existing somewhere between the home and the open fields surrounding it is the "curtilage" of the home,³ that area harboring the "intimate activity associated with the 'sanctity of a [person's] home and the privacies of life.'" *Oliver*, 466 U.S. at 180 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). When it comes to the Fourth Amendment, such areas are considered to be "so intimately tied to the home itself that [they are] placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987). The Supreme Court has outlined four "analytical tools" to assist the courts in evaluating whether a given area constitutes or lies within this umbrella: "the proximity of the area . . . to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* These four factors are not necessarily exclusive and should not be applied mechanically. See *United States v. Reilly*, 76 F.3d 1271, 1275 (2d Cir. 1996).

Although the object of Agent Milligan's investigation in the early morning hours of February 24 was the cabin structure, the uses to which the Defendants put the cabin and their expectations of privacy in it are irrelevant to my determination. My concern is only whether, when he detected the odor of marijuana, the agent was standing within an area that the Defendants reasonably could have expected would be treated the same as the home itself. See *Dunn*, 480 U.S. at 300. Before addressing the four *Dunn* factors that guide the resolution of this issue, I note that the agent's presence in the clearing may have

³ Agent Milligan's description of his location "on a dirt road away from the curtilage of the camp" at the time he detected the odor of marijuana is troubling because his description, while ultimately accepted by me as legally accurate, did little to assist the issuing magistrate. "Curtilage" is a legal conclusion based upon the analysis of the unique factual circumstances of each case. The agent's mere labeling of an area as outside the curtilage cannot defeat a valid Fourth Amendment claim. See *United States v. Arboleda*, 633 F.2d 985, 992 (2d Cir. 1980) ("Terming a particular area curtilage expresses a conclusion: it does not advance Fourth Amendment analysis.")

constituted a trespass at common law. This fact does not automatically render his activity a search for purposes of the Fourth Amendment. *See Oliver*, 466 U.S. at 183.

Furthermore, it is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. *See id.*

Proximity to the home. As already noted, I find that the agent stood approximately 82 feet from the camp when he detected the smell of marijuana. From this vantage point, Milligan stood within the clearing surrounding the camp, although he remained on the driveway and advanced only eight feet beyond the utility pole. I do not consider this physical distance to be so great or so insignificant as to weigh either in favor of or against the motion. Although the agent had proceeded more than 400 feet down a private, wooded driveway into a clearing concealed from the road, on at least three prior occasions uninvited visitors had advanced at least as far down the driveway as Agent Milligan stood. Furthermore, the presence of the public utility pole within the clearing and Agent Milligan's proximity to it weigh, if only slightly, in favor of the government. Although the Defendants certainly did not welcome unannounced visitors who wandered this far down the driveway, I believe that such limited intrusions, albeit rare, were reasonably to be expected.

Enclosure. The forest surrounding the clearing is densely wooded. However, other than the trees, there exist no artificial enclosures that might assist the curtilage analysis. Clearly, trees can constitute a protective barrier. Individuals living deep within wooded areas have, understandably, heightened expectations of privacy. On the other hand, forests can also constitute "open fields" for purposes of the Fourth Amendment. *See Oliver*, 466 U.S. at 179 n.10. In this case, it is not controverted that the forest

surrounding the Defendants' clearing is not within the "curtilage" of the camp. The question then becomes whether the trees clearly delineate the outer boundary of the camp's curtilage so that the agent's entry beyond them amounted to an unwarranted invasion or search. Although this may be the case at certain points around the wooded perimeter, I conclude that the tree line is not so close to the camp at the head of the driveway that entering into the clearing via the driveway immediately places a person within the curtilage of the home.

Nature of use and effort to conceal. Based on his testimony, I conclude that Agent Milligan was aware of the fact that, should he advance significantly further than the utility pole, he would have intruded into the curtilage of the home. However, there was no objective basis for Agent Milligan to conclude that the Defendants used the location in which he stood for the intimate activities of the home. Additionally, although the Defendants obviously chose the property on which their operations were located in order to conceal illegal activity, it was unreasonable for them to expect that no visitors would ever wander up the driveway or through the woods to stand within the perimeter of the clearing or in the vicinity of the utility pole.

In the final analysis, the fact that the Defendants' operation was uncovered by Agent Milligan is primarily a consequence of the fact that it produced an odor that could be carried on the wind beyond the curtilage of the home. It is not my intention to imply that the Defendants did not deeply desire that no one should turn into their driveway uninvited, let alone enter the forest clearing unannounced. Nor do I wish to suggest that the Defendants' desire was unreasonable, given the nature of their activities. The fact that Agent Milligan's entry onto the Defendants' land did not extend beyond those boundaries

that, for example, an errant visitor would clearly recognize as delineating intimate space, reassures me that the smell of marijuana was not detected by means of a constitutional violation.

Conclusion

Accordingly, I conclude that this testimony need not be stricken from the agent's affidavit and that the warrant was supported by ample probable cause. I therefore recommend that the District Court DENY the Defendants' motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1993) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated: October 19, 2000

Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CJACNS

CRIMINAL DOCKET FOR CASE #: 00-CR-28-ALL

USA v. DIEHL
05/17/00

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