Touro Law Review

Volume 8 | Number 3 Article 55

1992

# Searches and Seizure

New York City. Since the authorized inspections "do nothing more than enable police to ferret out crime,"[1206] he would have suppressed evidence resulting from these searches. He amply documented New York's "long tradition of interpreting our State Constitution to protect individual rights."[1207] Additionally, he stated his view that the appellate division could engage in constitutional analysis which might expand individual rights under the state constitution. He believes that this is often necessary and should be performed because for most cases in New York, the appellate division becomes the court of last resort for the parties.

*THIRD DEPARTMENT*

People v. Scott[1208]
(decided January 31, 1991)

Just prior to printing, this case was reversed by the New York Court of Appeals[1209] which concluded that the rule in *Oliver v. United States*[1210] "does not adequately protect fundamental constitutional rights."[1211] Under *Oliver*, "in areas outside the curtilage, an owner of 'open fields' enjoys no Fourth Amendment protection."[1212] The court claimed that "under the law of this State the citizens are entitled to more protection,"[1213] and held that "where landowners fence or post 'No Trespassing signs on their private property . . . or . . . indicate unmistakably that entry is not permitted, the expectation that their privacy rights will be respected and . . . free from unwanted intrusions is reasonable."[1214]

A criminal defendant alleged that his right to be protected

1206. *Id.* at 185, 567 N.Y.S.2d at 746 (Harwood, J., dissenting).
1207. *Id.* at 188, 567 N.Y.S.2d at 748 (citing People v. P.J. Video, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986)).
1208. 169 A.D.2d 1023, 565 N.Y.S.2d 576 (3d Dep't 1991), *rev'd*, People v. Scott; People v. Keta, Nos. 6, 27, 1992 WL 62774 (N.Y. Apr. 2, 1992).
1209. People v. Scott; People v. Keta, Nos. 6, 27, 1992 WL 62774 (N.Y. Apr. 2, 1992).
1210. 466 U.S. 170 (1984 ).
1211. People v. Scott, 1992 WL 62774.
1212. *Id.*
1213. *Id.* at 6.
1214. *Id.* at 9.

against illegal searches and seizures under both the state[1215] and federal[1216] constitutions was violated. The defendant argued that the posting of "no trespassing" signs around his property, which consisted of 165 acres of rural fields, evinced a clear expectation of privacy. Thus, the defendant contended that the physical invasion of his property by an informant and a police officer in order to observe the cultivation of marihuana constituted an illegal trespass. Therefore, the defendant argued that the police's subsequent seizure of the marihuana, effected pursuant to a warrant, should have been suppressed.

The court held that the defendant's posting of no trespassing signs about his property did not entitle him to invoke his right to privacy.[1217] The court noted that the "open fields" doctrine[1218] denied the defendant any legitimate expectation of privacy. The court concluded that because the defendant had no legitimate expectation of privacy, "the search warrant was not obtained in violation of the defendant's constitutional right of privacy or of his search and seizure rights."[1219] Therefore, the marihuana seized pursuant to the warrant was properly admitted.

In the fall of 1987, a hunter, Collar, while in pursuit of a wounded deer, came onto defendant's land. Once there, Collar observed what he thought was an area where marihuana was being cultivated. Collar observed, *inter alia*, a pond dug out in a hillside, two plastic 50-gallon drums, camouflage netting, beaten paths and plots of various sizes. Collar also observed no trespassing signs surrounding the property that bore the defendant's name.[1220]

In late July, 1988, Collar again entered upon the defendant's

1215. N.Y. CONST. art. I, § 12.

1216. U.S. CONST. amend. IV.

1217. *Scott*, 169 A.D.2d at 1025, 565 N.Y.S.2d at 577.

1218. The open fields doctrine permits the police to enter a field without a search warrant. *See* Hester v. United States, 265 U.S. 57, 59 (1924) (special protection accorded by fourth amendment not extended to open fields); Oliver v. United States, 466 U.S. 170, 177 (1984) (the Court concluded that the "government's intrusion upon open fields is not one of those 'unreasonable searches' proscribed by the fourth amendment.").

1219. *Scott*, 169 A.D.2d at 1026, 565 N.Y.S.2d at 577.

1220. *Id.* at 1024, 565 N.Y.S.2d at 576.

land. This time he observed approximately fifty marihuana plants, some of which had a plastic hose running to them from the pond. Collar also observed a man nearby who had a gun strapped to his shoulder. Shortly thereafter, Collar relayed this information to the state police. The police requested that Collar return to the defendant's field and obtain a leaf from a marihuana plant.[1221]

On August 22, 1988, Collar gave *in camera* testimony in county court regarding his observations. Later that same day, state police investigator Hyman accompanied Collar to the defendant's property and entered the land and observed the marihuana. The next day Hyman applied to the county court for a search warrant.[1222] The warrant was issued and executed later that afternoon. The police recovered approximately 200 portable mari-

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1221. The court rejected the defendant's claim that Collar was acting as a police agent when he reentered the property at the direction of the police. *Id.* The court stated that the point was irrelevant because the open fields doctrine denied the defendant an expectation of privacy. *See also* People v. Abbott, 105 A.D.2d 1029, 1031, 483 N.Y.S.2d 452, 453 (3d Dep't 1984) ("whether the police officers were technically guilty of trespass is inconsequential").

In United States v. Miller, 688 F.2d 652 (9th Cir. 1982), the court listed two critical factors to consider when analyzing whether a person was acting as an 'instrument or agent' of the police: "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends." *Miller*, 688 F.2d at 657. In United States v. Bazan, 807 F.2d 1200 (5th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987), the court applied these factors and concluded that the record failed to establish whether an individual who trespassed on his neighbor's property looking for illicit drug activities was an agent. *Bazan*, 807 F.2d at 1203. However, the court intimated that had the police "kn[own] of or acquiesced in the intrusive conduct," the individual would have been considered a police agent. *Bazan*, 807 F.2d at 1203. However, even if the individual is found to be a police agent, *Oliver* intimates that this would not cause a fourth amendment problem. The *Oliver* Court stated that "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relation to the applicability of the Fourth Amendment." *Oliver*, 466 U.S. at 183-84.

1222. Hyman's application was based on the following: Collar's *in camera* testimony; an anonymous telephone call to the sheriff's department; Hyman's personal observations; and tax maps which showed the defendant as the owner of the property in question. *Scott*, 169 A.D.2d at 1025, 565 N.Y.S.2d at 577.

huana plants and other items related to its cultivation.

The defendant was arrested and pleaded guilty to criminal possession of marihuana in the first degree. At the time of his arrest, and after being advised of his rights, the defendant admitted that he owned the land and grew the marihuana plants. Furthermore, the defendant claimed to have resided in a rundown mobile home on the property[1223] for the past fifteen months. A storage shed was the only other structure on the property.[1224]

The third department, in a unanimous decision, affirmed the judgment against the defendant. The court noted that the United States Supreme Court addressed this same issue in *Oliver v. United States*.[1225] In *Oliver*, the defendant planted marihuana on his secluded land and erected fences and no trespassing signs around it.[1226] The Court concluded that "[n]either of these suppositions demonstrate[d] . . . that the expectation of privacy was *legitimate* in the sense required by the Fourth Amendment."[1227] The *Oliver* court stated that the proper "inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment[,]"[1228] and "not whether the individual chooses to conceal assertedly 'private' activity."[1229]

The *Scott* court stated that the open fields doctrine enunciated in *Oliver* is followed in New York.[1230] In applying the doctrine

1223. The marihuana grown in the open field was not within the "curtilage" of the mobile home. *Id.* Curtilage is described as "the land or grounds surrounding the dwelling, which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." BLACKS LAW DICTIONARY 348 (6th ed. 1990). At common law, this area is considered part of the home itself for fourth amendment purposes. *See Oliver*, 466 U.S. at 180. The *Oliver* Court noted that the common law distinguished "open fields" from "curtilage" and concluded that "th[is] distinction implies that *only* the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home." *Id.*

1224. *Scott*, 169 A.D.2d at 1024, 565 N.Y.S.2d at 577.

1225. 466 U.S. 170 (1984).

1226. *Id.* at 182.

1227. *Id.*

1228. *Id.* at 182-83.

1229. *Id.* at 182.

1230. *Scott*, 169 A.D.2d at 1025, 565 N.Y.S.2d at 577; *see also* People v.

to the facts at bar, the court concluded that the defendant had no legitimate expectation of privacy as "[t]he marihuana in question here was clearly grown in an open, uncultivated field away from the curtilage of any residential structure . . . ."[1231]

The court also rejected the defendant's argument that Collar was acting as an agent of the police when he reentered the defendant's land at their direction and that "this constituted an illegal trespass by the police."[1232] Because the defendant had no expectation of privacy, the court reasoned that the "search warrant was not obtained in violation of the defendant's constitutional right[s]."[1233] Thus, it was "irrelevant whether Collar was acting as a police agent."[1234]

The United States Supreme Court first addressed the open fields doctrine in *Hester v. United States*.[1235] In *Hester*, the Court stated that "[t]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction be-

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Reynolds, 71 N.Y.2d 552, 556, 523 N.E.2d 291, 292, 528 N.Y.S.2d 15, 16 (1988) ("[N]either the erection of fences nor the posting of 'No Trespassing' signs on otherwise open land will establish a legitimate expectation of privacy in the sense required by the Fourth Amendment."); People v. Joeger, 111 A.D.2d 944, 945, 490 N.Y.S.2d 41, 42-43 (3d Dep't 1985) ("The *Oliver* ruling was recently followed by this court in a case factually similar to the instant matter . . . [and] [w]e see no reason to alter that holding here."); People v. Fillhart, 93 Misc. 2d 911, 913, 403 N.Y.S.2d 642, 643 (County Ct. Jefferson County 1978) ("[T]he Fourth Amendment . . . does not extend . . . protection to the individual when he grows a prohibited product in an open field.").

1231. *Scott*, 169 A.D.2d at 1025, 565 N.Y.S. at 577.

1232. *Id.*

1233. *Id.* at 1026, 565 N.Y.S.2d at 557. *See also Reynolds*, 71 N.Y.2d at 557, 523 N.E.2d at 293, 528 N.Y.S.2d at 17 ("[C]onduct and activity which is readily open to public view is not protected . . . . Consequently, the warrantless observations of marihuana on defendant's property provided probable cause for the issuance of [a] search warrant.").

1234. *Scott*, 169 A.D.2d at 1026, 565 N.Y.S.2d at 578. *See also Abbott*, 105 A.D.2d at 1031, 483 N.Y.S.2d at 453 ("Whether the police officers were technically guilty of a trespass is inconsequential.")

1235. 265 U.S. 57 (1924), *overruled by* Katz v. United States 389 U.S. 347 (1967).

tween the latter and the house is as old as the common law."[1236] The Court distinguished the open fields from the curtilage[1237] and stated that no legitimate expectation of privacy attached to open fields.[1238] Therefore, the Court concluded that the government's intrusion upon the open fields did not violate the Fourth Amendment.[1239]

The Supreme Court reaffirmed the holding of *Hester* in *United States v. Oliver*.[1240] In *Oliver*, the Court stated that "open fields do not provide a setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance."[1241] The majority concluded that "the text of the Fourth Amendment and . . . the historical and contemporary . . . understanding of its purposes, . . . [does not create a] legitimate expectation that open fields will remain free from warrantless intrusion by government officers."[1242]

*FOURTH DEPARTMENT*

People v. Caruso[1243]
(decided June 7, 1991)

A criminal defendant alleged that his right to be protected against unreasonable searches and seizures under the state[1244] and federal[1245] constitutions was violated when police officers,

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1236. *Id.* at 59.

1237. In defining the extent of the home's curtilage, the Court looks at four factors:

> [T]he proximity of the area claimed to be curtilage 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.

United States v. Dunn, 480 U.S. 294, 301 (1987).

1238. *See Hester*, 265 U.S. at 258.

1239. *Id.* at 259.

1240. 466 U.S. 170, 178 (1984).

1241. *Id.* at 179.

1242. *Id.* at 181.

1243. 572 N.Y.S.2d 216 (4th Dep't 1991).

1244. N.Y. CONST. art. I, § 12.

1245. U.S. CONST. amend. IV.