

[J-47-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 40 W.D. Appeal Docket 1998
	:	
Appellant,	:	Appeal from the Order of the Superior
	:	Court entered December 24, 1997, at No.
	:	85PGH97, vacating the Judgment of
v.	:	Sentence and Motion to Suppress is
	:	reversed from the Judgment of the Court
	:	of Common Pleas of Erie County, Criminal
GREGORY GINDLESPERGER,	:	in ce the court thoroughly analyzed the
	:	issue that is er
Appellee.	:	
	:	706 A.2d 1216 (Pa. Super. 1997)
	:	
	:	ARGUED: March 9, 1999
	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE

DECIDED: DECEMBER 22, 1999

The majority holds that the use of an infrared thermal imaging device to scan a private residence without a search warrant constitutes an unlawful search in violation of the Fourth Amendment to the United States Constitution, and affirms the decision of the Superior Court. I respectfully dissent and, therefore, would reverse.

In order for the use of a thermal imaging device to constitute an unreasonable search under the Fourth Amendment, appellee must show a legitimate expectation of privacy in heat vented from his home – that is, an actual expectation of privacy that society deems to be reasonable. Katz v. United States, 389 U.S. 347, 361 (1967). The majority

found that appellee has a reasonable expectation of privacy in the heat vented from his home in the instant case. I disagree.

In United States v. Ford, 34 F.3d 992 (11th Cir. 1994), the Eleventh Circuit Court of Appeals upheld the use of a thermal imaging device when it was used to detect the heat vented from a mobile home in which marijuana was grown. Like the scenario in the instant case, a confidential informant provided police with information that the defendant in Ford was growing marijuana in the mobile home, and the police used the thermal imaging device as a further investigative tool to confirm the information obtained from the confidential informant. There, the court stated:

[T]he thermal imagery at issue here appears to be of such low resolution as to render it incapable of revealing the intimacy of detail and activity protected by the Fourth Amendment. A thermal imager operates by detecting differences in the surface temperature of objects; it cannot penetrate walls or windows to reveal conversations or, as used here, human activities. Although the device used by the [police officers] can detect differences as small as half of a degree, as used against Ford it could only describe conditions within the mobile home in gross detail. The [police] operator was able to detect high heat transmission from underneath the mobile home and in one corner wall of the structure, extending up four or five feet from the floor. Such information is neither sensitive nor personal, nor does it reveal the specific activities within the mobile home.

Id. at 996-97. Thus, the court found that the defendant had no actual expectation of privacy.

The Ford court went on to find that precedent from the United States Supreme Court suggests that the defendant's expectation of privacy in vented heat from his mobile home is not one that society is prepared to accept as reasonable. Id. at 997 (citing California v. Greenwood, 486 U.S. 35 (1988)(no reasonable expectation of privacy in garbage left for collection outside the curtilage of a home); Air Pollution Variance Board of Colorado v.

Western Alfalfa Corp., 416 U.S. 861 (1974) (a health inspector may observe smoke plumes emitted from a chimney without a search warrant); United States v. Place, 462 U.S. 696 (1983) (exposure of luggage in a public place to trained canines does not constitute a search under the Fourth Amendment)).

I find the reasoning of the Ford court to be persuasive. The use of a thermal imaging device as an investigative tool is analogous to the use of binoculars – it merely enhances that which can be lawfully observed. Escaping or vented heat from a home is not the type of personal effect protected by the Fourth Amendment or Article 1, Section 8 of the Pennsylvania Constitution. Rather, it is simply another form of waste product emitted from a home that is of the same type that the United States Supreme Court has held is not protected by the Fourth Amendment.

In the instant case, as in Ford, a confidential informant told police appellee was growing marijuana in his home. The majority here overlooks the essential fact that the use of this device was not part of a random scan of the neighborhood for sources of heat that may indicate an illegal marijuana cultivation scheme within a residence. The police only used the thermal imaging device as an investigative tool to confirm the information provided by the confidential informant. Appellee had no reasonable expectation of privacy in the heat vented from his home as a result of his agricultural activity. Thus, I believe that the use of a thermal imaging device to detect the vented heat was not an unlawful search in violation of the Fourth Amendment, and I would reverse the decision of the Superior Court.