[J-51-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 135 MAP 2005
	:	
Appellee	:	Appeal from the Order of the
	:	Commonwealth Court dated January 7,
	:	2005, at No. 1050 C.D. 2004, affirming the
v.	:	Order of the Court of Common Pleas of
	:	Wyoming County, Criminal Division, exited
	:	April 23, 2004, at No. 2003-445.
JOSEPH RUSSO, JR.,	:	
	:	864 A.2d 1279 (Pa. Cmwlth. 2005)
Appellant	:	
	:	SUBMITTED: April 6, 2006

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: November 20, 2007**

I respectfully and vigorously dissent. By adopting the open fields doctrine, the Majority today holds that a property owner has no constitutionally protected privacy interest in property outside his curtilage, regardless of whether he posted the property in a manner that unmistakably indicates that entry is not permitted. By so holding, the Majority has declined to rule on the precise issue for which we granted allocatur, *i.e.* the constitutionality of Section 901(a)(2) of the Game and Wildlife Code, 34 Pa.C.S. § 901(a)(2), which permits a Pennsylvania Game Commission Wildlife Conservation Officer to enter onto posted private property *without any level of suspicion and without a warrant*. Contrary to the Majority, I believe that application of the open fields doctrine is inconsistent with the protections afforded by Article I, Section 8 of the Pennsylvania Constitution. I would hold that Section 901(a)(2) is unconstitutional to the extent that it authorizes entry onto posted

private property without any level of suspicion of illegal activity. I reach this conclusion because a constitutional rule which permits state agents to enter private land in outright disregard of the property owner's efforts to maintain privacy is one that offends the fundamental rights of Pennsylvania citizens.

As noted by the Majority, the United States Supreme Court reaffirmed the validity of the open fields doctrine and clarified the doctrine's scope and applicability in Oliver v. United States, 466 U.S. 170 (1984). The Oliver Court adopted a *per se* approach, holding that a property owner has no constitutionally protected interest in land outside the curtilage, regardless of the steps taken to assure privacy.[1] A determination of whether Oliver comports with the rights guaranteed Pennsylvania citizens under Article I, Section 8 of the Pennsylvania Constitution requires an examination of the four factors set forth in Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). I shall briefly address each factor.

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[1] Justice Thurgood Marshall filed a strong dissenting opinion in Oliver, which was joined by Justices William Brennan and John Paul Stevens. The Dissent initially disagreed with the literal interpretation of the text of the Fourth Amendment and the conclusion that real property is not included in the list of protected spaces and possessions. Id. at 186. It reasoned that the Majority conceded that the curtilage of the home is protected by the Constitution without such term appearing in the text of the Amendment. Further, the Dissent noted that neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect and yet the Court had granted Fourth Amendment protection over such activity in Katz v. United States, 389 U.S. 347, 353 (1967).

The Oliver dissenters also disagreed with the conclusion that any interest a landowner might have in the privacy of his fields is not one that society is prepared to recognize as reasonable. 466 U.S. at 189. They noted that the positive law recognizes the legitimacy of the landowners' expectation in posted land (id. at 191); that privately owned woods and fields that are not exposed to public view are employed in a variety of ways that society acknowledges deserve privacy (id. at 192); and that the claim to privacy was strengthened by the fact that the landowners took precautions to exclude the public, unlike the circumstances in Hester v. United States, 265 U.S. 57 (1924). Id. at 193.

The first Edmunds factor concerns the text of the two constitutional provisions. Article I, Section 8, of the Pennsylvania Constitution declares that citizens "shall be secure in their persons, houses, papers and *possessions*," while the Fourth Amendment to the United States Constitution secures the right of people to be secure in their "persons, houses, papers and *effects*." The Majority concludes:

> Like the word "effects" in the Fourth Amendment, "possessions" appears as the last among four objects in which the people have a right to be secure, the others being their "persons," "houses," and "papers." Pursuant to the interpretative doctrine of *ejusdem generis*, the term "possessions" should be construed in light of the particular words preceding it, all of which refer to intimate things about one's person. If "possessions" had been intended to refer to everything one owned, such as open fields, then there would have been no need to specify the other three objects. We therefore find persuasive for present purposes the Oliver Court's interpretation of the text of the Fourth Amendment. Nothing in the plain text of Article I, Section 8 suggests that open fields are entitled to the same degree of privacy as one's person, house, papers, and possessions.

Slip op. at 11.

I disagree. The Majority's interpretation of "possessions" as encompassing only intimate things about one's person does not comport with our previous case law in which we afforded a broad interpretation of Article I, Section 8. *See e.g.* Commonwealth v. Brion, 652 A.2d 287 (Pa. 1994) (holding that Article I, Section 8 provides a constitutionally recognized expectation of privacy in conversations conducted in one's home); Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989) (recognizing a constitutionally protected privacy interest under Article I, Section 8 in telephone numbers accessible by a telephone company); Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979) (holding that Article I, Section 8 protects a privacy interest in one's banking records). Conversations, telephone numbers, and bank records do not fall under a narrow construction of "persons, houses, papers and possessions," yet we have afforded them protection under certain circumstances pursuant to the text of Article I, Section 8.

I further note that Article I, Section 8 states that no warrant to search "*any* place" or to seize "*any* person or things" shall issue without probable cause. This language, which does not appear in the Fourth Amendment, suggests that a property owner may possess a privacy interest in his land. Thus, I would find that Article I, Section 8 should be interpreted more broadly than the Fourth Amendment to offer greater protection.

Regarding the second factor of the Edmunds analysis, the history of the constitutional provision, the Majority reasons that notwithstanding Article I, Section 8's protection of privacy for over two hundred years, there has never been any suggestion in any Pennsylvania source that suggests a reasonable expectation of privacy in open fields. Slip op. at 15. Such lack of precedent from this Court may arise from the fact that there has never been a case in which the particular issue was presented. Surely the mere passage of time does not affect a citizen's ability to seek constitutional protection of an interest that has not yet been formally recognized as worthy of such protection. More important to the historical analysis is the fact that Article I, Section 8 is meant to embody a strong notion of privacy that has been carefully safeguarded in this Commonwealth for the past two centuries, id., 586 A.2d at 897, whereas the sole purpose for the exclusionary rule under the Fourth Amendment is to deter police misconduct. Id. (citing United States v. Leon, 468 U.S. 897, 916). Considering this rich history, I would interpret Article I, Section 8 as encompassing a right of privacy in property that is posted in a manner as to reasonably indicate that entry is not permitted.[2]

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[2] The Majority's implication that a historical analysis of Article I, Section 8, should only include matters occurring after the United States Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961) is unfounded. The Majority declares that prior to 1961, "there is **no** relevant history to support a broader state constitutional interpretation because there was no point in seeking such an interpretation, at least in a criminal case, since there was no exclusionary remedy available." Slip Op. at 13 (emphasis supplied). I respectfully submit that the fact that there was no exclusionary *remedy* is irrelevant to the historical import of the *right* to privacy as guaranteed by Article I, Section 8.

Turning to the third prong of the Edmunds analysis, related case law from other states, the Majority acknowledges that several jurisdictions have rejected the *per se* rule adopted in Oliver as inconsistent with the protections afforded under their state constitutions. *See* Montana v. Bullock, 901 P.2d 61 (Mo. 1995); People v. Scott, 593 N.E.2d 1328 (N.Y. 1992); Oregon v. Dixson, 766 P.2d 1015 (Or. 1988); State v. Kirchoff, 587 A.2d 988 (Vt. 1991); State v. Johnson, 879 P.2d 984 (Wash. Ct. App. 1994).

I find the decision of Montana v. Bullock to be particularly persuasive because it is based on an interest that Pennsylvania and Montana share -- a high regard for privacy. In Bullock, the Montana Supreme Court examined whether Article II, Section 11 of the Montana Constitution prohibits warrantless searches and seizures on private land that falls outside the curtilage of a dwelling. The court answered this inquiry in the affirmative and declined to adopt the open fields doctrine as set forth in Oliver.

Without permission or a search warrant, the law enforcement officers in Bullock entered a gate onto private property which had been posted with "No Trespassing" signs. The officers observed an elk hanging near the cabin and charged the defendants with game violations. In ruling that the lower court erred by failing to grant the defendants' motion to suppress, the court initially found that the Oliver decision improperly returned to the concepts discredited in Katz v. United States, 389 U.S. 347 (1967). The court examined the decisions in Dixon, Scott, and Johnson, supra, and was convinced that Montana, like Oregon, New York, and Washington, had a strong tradition of respect for the right to individual privacy. 901 P.2d at 75. As evidence of such privacy interest, the Bullock court cited an additional provision contained in the Montana Constitution that states "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. Art. II, § 10.

The Majority finds Bullock unpersuasive based on this additional constitutional provision. Slip Op. at 18. The Majority fails to recognize that the issue in Bullock, however,

was the interpretation of Article II, Section 11 of the Montana Constitution, which contains language nearly identical to the Fourth Amendment. The Bullock court cited Article II, Section 10 of its constitution merely as an additional ground to demonstrate Montana's strong tradition for respect of individual privacy. The Bullock court stated:

> We conclude that in Montana a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable, and that where that expectation is evidenced by fencing, "No Trespassing," or similar signs, or "by some other means [which] indicates unmistakably that entry is not permitted," entry by law enforcement officers requires permission or a warrant. As in our prior decisions, however, this requirement does not apply to observations of private land from public property.

901 P.2d at 75-6 (citations omitted).

This Commonwealth's respect of privacy is equally well-established as we have held that Article I, Section 8 embodies a strong notion of privacy that has been carefully safeguarded in this Commonwealth for centuries. Edmunds, 586 A.2d at 896. Accordingly, I am persuaded by the reasoning in Bullock and the decisions from those jurisdictions which have held that their state constitutions provide greater protection of citizens' privacy interests than that provided by the Fourth Amendment.

Finally, I believe that the last factor in the Edmunds analysis -- policy considerations -- weighs in favor of Appellant. Appellant contends, *inter alia*, that recognizing a privacy interest in property that is clearly posted as private supports the policy behind the use of search warrants, which is to protect citizens against unreasonable searches and seizures and to protect the right to be left alone. Appellant argues that recognizing such privacy interest would not handicap law enforcement because officers could still search property that is not posted or fenced, could observe evidence of violations of the Game Code in plain view, or could obtain a warrant to search citizens' private property upon receipt of information that a violation of the Game Code has occurred. The Majority finds that this argument "falls short of the kind of searching inquiry required to determine that public policy

considerations unique to Pennsylvania suggest that the federal open fields doctrine is inconsistent with Article I, Section 8 of our Constitution." Slip op. at 20. I cannot agree as I find Appellant's proffered policy considerations to be paramount. I appreciate the Game Officers' obligation to protect and preserve the game or wildlife of this Commonwealth, but I would nevertheless find that the delicate balance of competing interests falls on the side of protecting Pennsylvania citizens' privacy interests.

In summary, upon examination of the Edmunds factors, I conclude that the text of Article I, Section 8, its history in this Commonwealth, the related case law of other states, and the relevant policy considerations support constitutional protection of a Pennsylvania landowner's right to privacy when he or she has posted the property in a manner that indicates that entry is not permitted. Accordingly, I would hold that a citizen may claim privacy in an open field under Article I, Section 8 of the Pennsylvania Constitution when indicia would lead a reasonable person to conclude that the area is private. I would therefore find Section 901(a)(2) unconstitutional to the extent that it authorizes entry onto posted private property without any level of suspicion of illegal activity.

I am not convinced, however, that such conclusion entirely disposes of this case because the Game Officers possessed *some* level of suspicion when they entered Appellant's property as they received an anonymous tip that the property was baited and recognized that Appellant shot a bear within minutes of the opening of bear hunting season. Because the lower courts did not examine whether the Game Officers, as any other law enforcement officer, had authority, *independent of the statute at issue*, to approach the door of Appellant's cabin to investigate allegations that the property was baited and to seize evidence obtained in plain view, I would remand the matter to the trial court to afford the parties a full and fair opportunity to address such issue.

Mr. Justice Baer and Madame Justice Baldwin join this dissenting opinion.