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

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

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

OPINION

MR. JUSTICE CASTILLE [*] **DECIDED: November 20, 2007**

We granted allowance of appeal in the instant case to determine whether, under Article I, Section 8 of the Pennsylvania Constitution, a landowner has a reasonable expectation of privacy against enforcement of Pennsylvania's Game Code in his open fields. Because we conclude that the Fourth Amendment open fields doctrine as enunciated by the United States Supreme Court in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735 (1984) applies equally under the Constitution of this Commonwealth, we affirm, albeit on different grounds, the order of the Commonwealth Court.

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[*] This matter was reassigned to this author.

At 6:45 a.m. on November 25, 2002, nine minutes after the opening of Pennsylvania's bear-hunting season, appellant Joseph Russo, Jr., claimed to have killed a bear near his hunting cabin in Mehoopany Township, Wyoming County. Pursuant to Section 2323(a)(2) of the Game Code,[1] appellant transported the bear to the Game Commission station in Dallas for examination and tagging. Later that day, the Game Commission received a tip that appellant's hunting camp was "baited" in violation of Section 2308(a)(8) of the Game Code.[2] The information was relayed to Wildlife Conservation

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[1] Section 2323(a)(2) of the Game Code provides that, "[i]n any year in which the commission establishes check stations, each person shall, within 24 hours after killing any big game, present the big game for examination and tagging." 34 Pa.C.S. § 2323(a)(2). Section 102 of the Game Code defines "big game" as "includ[ing] the elk, the whitetail deer, the bear and the wild turkey." 34 Pa.C.S. § 102.

[2] Section 2308(a) of the Game Code provides, in pertinent part, as follows:

> **§ 2308. Unlawful devices and methods**
>
> **(a) General rule.--**Except as otherwise provided in this title, it is unlawful for any person to hunt or aid, abet, assist or conspire to hunt any game or wildlife through the use of:
>
> * * * *
>
> (8) Any artificial or natural bait, hay, grain, fruit, nut, salt, chemical, mineral or other food as an enticement for game or wildlife, regardless of kind and quantity, or take advantage of any such area or food or bait prior to 30 days after the removal of such material and its residue. . . .
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> * * * *

34 Pa.C.S. § 2308(a).

Officer (hereinafter "WCO") William Wasserman, who, in turn, directed Deputy WCO William Jeffrey Pierce to go to appellant's camp to investigate.[3]

Upon arriving after dark at approximately 6:00 p.m., WCO Pierce found appellant's camp apparently unoccupied. Appellant's property was clearly posted with "No Trespassing" signs. After parking his truck, Officer Pierce stepped over a cable across the driveway and walked approximately six hundred feet toward appellant's cabin until he observed, in plain view, an eight- by ten-foot pile of "apple mash"[4] located about ninety feet from the cabin. The officer also noticed in the apple mash a large indentation consistent with a bear having lain there, a clearly identifiable bear paw print, and leaves with blood droplets. Officer Pierce called Officer Wasserman and informed him of the bait pile. Pursuant to Officer Wasserman's instructions, Officer Pierce seized the bloody leaves as evidence. Continuing his investigation, Officer Pierce discovered a second pile of apple mash as well as a corn feeder approximately one hundred fifty yards from appellant's cabin. Finally, Officer Pierce returned to his vehicle and drove down a dirt road about four

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[3] Section 901(a)(2) of the Game Code (entitled, "powers and duties of enforcement officers") vests in "[a]ny officer whose duty it is to enforce this title or any officer investigating any alleged violation of this title" the "power and duty" to, *inter alia*, enter "any land or water outside of buildings, posted or otherwise, in the performance of the officer's duties." 34 Pa.C.S. § 901(a)(2).

[4] As Officer Pierce subsequently testified: "It looks like somebody took apples and put them through some type of a crushing machine or a blender or something like that. It's just like mashed potatoes only with a heavier consistency. You can pick them up and like squish them in your hands. They're all mashed up." Notes of Testimony (N.T.), 3/31/04, at 7. The trial court found it "clear from the photographs taken the next day that the 'apple mash' is more correctly identified as pomace -- that which remains after apples have been put through a cider press," *i.e.*, "obviously . . . not a naturally occurring phenomenon." Trial Ct. Op. at 2 n.2.

hundred yards into the woods.[5] After parking his truck, the officer got out and found what he recognized as bear entrails. Although the rest of the body was not at the location, an examination of the entrails revealed that the bear had recently eaten corn and mashed apples. The officer then seized the bear's stomach and its contents as evidence.

Meanwhile, once Officer Pierce had informed him of the bait pile, Officer Wasserman contacted Officer James Jolley, a WCO stationed in Luzerne County, where appellant maintained his residence. Officers Wasserman and Jolley, accompanied by two deputy WCOs, proceeded to appellant's home in Pittston. Upon pulling into appellant's driveway, the officers observed a dead black bear carcass hanging from a piece of construction equipment. When the officers knocked on appellant's door, he answered and invited them in. In response to their questioning, appellant indicated that he was aware of the bait at his camp but asserted that the bear was not shot at either of the bait piles. The officers then seized the bear carcass as evidence and departed.

Officers Pierce and Wasserman returned to appellant's camp the next morning to take photographs and measurements and to gather additional evidence. At the first apple mash pile discovered by Officer Pierce, the officers found and seized a small piece of bear tissue. A forensic DNA analysis subsequently performed by the United States Fish and Wildlife Service established that all the blood and tissue recovered by the officers in the course of their investigation came from the bear whose carcass was seized at appellant's residence. Thereafter, appellant was charged with two summary violations of the Game

[5] There is no indication in the record that appellant owned the woods that Officer Pierce entered. In fact, the only relevant testimony suggests that appellant did not own these woods. See N.T., 3/31/04, at 59, 147. The parties, however, do not raise any issue relating to this fact, and thus it does not affect our disposition of the case.

Code: Unlawful Taking or Possession of Game or Wildlife, 34 Pa.C.S. § 2307;[6] and Unlawful Devices and Methods, 34 Pa.C.S. § 2308, see supra. After being found guilty of both offenses before a district judge, appellant appealed to the Court of Common Pleas of Wyoming County.

Prior to trial *de novo* before President Judge Brendan J. Vanston, appellant filed a motion to suppress the evidence seized by Officers Pierce and Wasserman, challenging the legality of their entry onto and search of his property under Article I, Section 8 of the Pennsylvania Constitution. On March 31, 2004, the trial court held a suppression hearing, which the court consolidated with appellant's trial *de novo*, and denied the motion. Officers Pierce and Wasserman testified for the Commonwealth, describing in detail the course of the investigation they conducted on November 25 and 26, 2002. Appellant's case-in-chief consisted primarily of the testimony of his neighbor to the effect that apple trees were located on land near appellant's property. At the conclusion of the trial, the court convicted appellant of the two offenses and ordered him to pay $1,000 in fines, $2,599.87 in restitution, and the costs of prosecution.

The trial court found "[b]ased on the testimony of the officers and the photographic evidence presented" that "the nearest bait pile is not within the curtilage of [appellant's] cabin." Trial Ct. Op. at 5. Consequently, the court rejected appellant's argument that Article I, Section 8 prohibited the officers' warrantless search of the fields where the bait piles were found. "To rule otherwise," the court reasoned, "would emasculate the enforcement of the Game Code on any privately owned realty, as one would only have to post 'no trespassing' signs to keep out the game wardens." Id. The court stated that such

[6] Section 2307(a) of the Game Code provides that "[i]t is unlawful for any person to aid, abet, attempt or conspire to hunt for or take or possess, use, transport or conceal any game or wildlife unlawfully taken or not properly marked or any part thereof, or to hunt for, trap, take, kill, transport, conceal, possess or use any game or wildlife contrary to the provisions of this title." 34 Pa.C.S. § 2307(a).

a result would be absurd and a result that the constitutional framers surely did not intend. Appellant appealed to the Commonwealth Court, pursuing his suppression claim.

On January 7, 2005, a three-judge panel of the Commonwealth Court unanimously affirmed the order of the trial court. Commonwealth v. Russo, 864 A.2d 1279 (Pa. Cmwlth. 2005). In a published opinion authored by the Honorable Renée Cohn Jubelirer, the court held that, under Article I, Section 8 of the Pennsylvania Constitution, appellant did not have a reasonable expectation of privacy in the property upon which the bait piles were found. The court began and ended its analysis with appellant's argument that the "No Trespassing" signs that he posted created a reasonable expectation of privacy in the property. Thus, the court noted that a person does not commit trespass if he is "licensed or privileged to . . . enter[ ] [the] place as to which notice against trespass is given." Id. at 1284 (quoting 18 Pa.C.S. § 3503(b)(1)(ii) (defining the offense of criminal trespass) (emphasis omitted)). Turning to the Game Code, the court observed that Section 901(a)(2) specifically authorizes a WCO to "go upon any land or water outside of buildings, **posted or otherwise,** in the performance of the officer's duty." Id. (quoting 34 Pa.C.S. § 901(a)(2)). Therefore, the court concluded, "[appellant]'s posting of the signs cannot form the basis of a reasonable expectation of privacy[ ] [because] it would be unreasonable for him to expect that game officers, who are privileged to enter the land, would not do so to assure compliance with the Game Law." Id. at 1285. Indeed, the Commonwealth Court agreed with the trial court's observation that, otherwise, "criminals could very easily carry on illegal enterprises by merely placing 'No Trespassing' signs around the perimeter of their property." Id. Finally, in a footnote, the court noted the Commonwealth's reliance on the open fields doctrine as set forth in Oliver, supra, but determined that it was unnecessary to decide whether the doctrine applied under the Pennsylvania Constitution because of the court's holding in the case. Id. at n.13.

Appellant petitioned this Court for allowance of appeal. On November 22, 2005, we granted appellant's petition and directed the parties to address the following issue: "Whether 34 Pa.C.S. § 901(a)(2) is unconstitutional because Article I, Section 8 of the Pennsylvania Constitution provides a landowner with a reasonable expectation of privacy in his posted property." Commonwealth v. Russo, 887 A.2d 1212 (Pa. 2005).

Our standard of review of a trial court's denial of a suppression motion is well established:

> [W]e may consider only the Commonwealth's evidence and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Boczkowski, 846 A.2d 75, 89 (Pa. 2004). An appellate court, of course, is not bound by the suppression court's conclusions of law. Commonwealth v. Duncan, 817 A.2d 455, 459 (Pa. 2003).

The open fields doctrine was first recognized by the U.S. Supreme Court in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445 (1924). In that case, while surveilling the home of Hester's father (where Hester lived), two revenue officers observed Hester exit the house and hand a quart bottle to an individual whom the officers suspected to be attempting to purchase illegal bootleg whiskey. After the officers began pursuing the two men, they fled, Hester discarding a jug and his would-be customer the bottle. Thereafter, the officers recovered the vessels at an undisclosed distance from the house and determined them to contain "moonshine whisky, that is, whisky illicitly distilled." Id. at 58, 44 S.Ct. at 446. Hester claimed that the evidence was inadmissible under the Fourth Amendment because

the officers seized it without a warrant.[7] In a brief opinion for a unanimous court, Justice Oliver Wendell Holmes, Jr., concluded that "[i]t is obvious that even if there had been a trespass, the [evidence] was not obtained by an illegal search or seizure." Id. Citing Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, Justice Holmes held that "the 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 between the latter and the house is as old as the common law." Id. at 59, 44 S.Ct. at 446.

Sixty years later, in a 6-3 decision in Oliver v. United States, supra, the High Court "reaffirm[ed]" the vitality of the open fields doctrine as announced in Hester. Oliver, 466 U.S. at 178, 104 S.Ct. at 1741; id. at 176 n.6, 104 S.Ct. at 1740 n.6 (rejecting the notion that "subsequent cases discredited Hester's reasoning"). Turning its attention initially to the constitutional text, the Oliver Court noted that open fields are not "effects" within the meaning of the Fourth Amendment. Indeed, the Court observed, "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property." Id. at 177 n.7, 104 S.Ct. at 1740 n.7 (citing, as Justice Holmes did, Blackstone's COMMENTARIES, among other sources).

Even assuming one had a subjective expectation of privacy in his open fields, the Oliver Court went on to reason, such an expectation is not one that society would be prepared to recognize as reasonable:

> [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs

[7] The Fourth Amendment exclusionary rule was adopted in 1914. See Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914).

> effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air.

Id. at 178, 104 S.Ct. at 1741-42.

Finally, the Oliver Court explicitly rejected the contention that the reasonableness of one's expectation of privacy in his open fields should be determined on an *ad hoc*, case-by-case basis:

> Under this approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. . . . The lawfulness of a search would turn on a highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions. The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority; it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced.

Id. at 181-82, 104 S.Ct. at 1743 (citations and quotation marks omitted). In this regard, the Court specifically

> reject[ed] the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and "No Trespassing" signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.

Id. at 182-83, 104 S.Ct. at 1743 (footnote omitted).

There can be no question that the search *sub judice* was lawful under the Fourth Amendment, given the open fields doctrine.[8] The issue, however, is whether Pennsylvania has departed, or should depart, from that doctrine when applying Article I, Section 8 of our Constitution. To determine whether the open fields doctrine as enunciated in Oliver is consonant with Article I, Section 8, we will undertake an independent analysis of that provision as guided by our seminal decision in Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). Under Edmunds, a principled consideration of state constitutional doctrine should include an examination of: (1) the text of the provision of our Constitution; (2) the history of the provision, including the caselaw of this Commonwealth; (3) relevant caselaw from other jurisdictions; and (4) policy considerations, "including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." Edmunds, 586 A.2d at 895. Consistently with Edmunds, appellant has dutifully discussed the four factors in his brief, whereas the Commonwealth fails even to cite our decision in that case.[9]

1. Text

We begin our Edmunds analysis with a comparison of the language of Article I, Section 8 to that of the Fourth Amendment. The Fourth Amendment of the U.S. Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

[8] Appellant does not argue that any of the evidence he seeks to suppress was seized within the curtilage of his hunting cabin.

[9] The argument section of appellant's brief consists entirely of his Edmunds analysis notwithstanding this Court's direction when granting allowance of appeal that the parties also discuss the constitutionality of 34 Pa.C.S. § 901(a)(2). Because we hold that the officers' actions in this case did not violate appellant's rights under Article I, Section 8, we need not reach the constitutionality of the statute.

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Similarly, Article I, Section 8 of the Pennsylvania Constitution provides as follows:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Given the textual similarity between the two provisions, it is not surprising that appellant fails to make any textually based arguments for departing from the federal open fields doctrine. 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.[10] If "possessions" had

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[10] In his Dissenting Opinion, Mr. Chief Justice Cappy proposes a broader interpretation of "possessions," citing the decisions of this Court in Commonwealth v. Brion, 652 A.2d 287 (Pa. 1994), Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989), and Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979). None of those three decisions, however, included an Edmunds analysis -- Melilli and DeJohn because they preceded Edmunds, and Brion because the 4-3 post-Edmunds majority ignored the Edmunds paradigm. Further, it is notable that, with respect to Article I, Section 8 privacy, Brion, the **only** post-Edmunds case, merely repeated the familiar standard, *i.e.*: "To determine whether one's activities fall within the right of privacy, we must examine: first, whether [the defendant] has exhibited an expectation of privacy: and second, whether that expectation is one that society is prepared to recognize as reasonable." Brion, 652 A.2d at 288-89 (quoting Commonwealth v. Blystone, 549 A.2d 81, 87 (Pa. 1988)). That, of course, is the same test for reasonable expectation of privacy that applies under the Fourth Amendment. See, e.g., Commonwealth v. Millner, 888 A.2d 680, 691-92 (Pa. 2005).

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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.

2. History

Turning to the history prong of the Edmunds analysis, appellant generally observes that in the past decades it has been stated that, unlike the Fourth Amendment, Article I, Section 8 was motivated by a desire to safeguard citizens' privacy. Thus, appellant cites recent decisions in which this Court has accorded greater protection under Article I, Section 8 in certain other, limited contexts. See Appellant's Brief at 11-12 (citing, *inter alia*, Commonwealth v. Shaw, 770 A.2d 295 (Pa. 2001) (requiring warrant for seizure of hospital-administered blood-alcohol content test results under Article I, Section 8 where warrant not required under Fourth Amendment) (lacking Edmunds analysis); Commonwealth v. Matos, 672 A.2d 769 (Pa. 1996) (holding that police pursuit of individual is a "seizure" within meaning of Article I, Section 8 even though it is not under Fourth Amendment) (applying

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Suffice it to say that neither Melilli nor DeJohn contained the sort of searching inquiry contemplated by Edmunds, and we are not disposed, at the present time, to disavow the supervening importance of Edmunds.

It is also notable that Brion involved the sanctity of the home, and in emphasizing that point, the Brion majority invoked Commonwealth v. Shaw, 383 A.2d 496 (Pa. 1978) for the proposition that: "Upon closing the door of one's home to the outside world, a person may legitimately expect the highest degree of privacy known to our society." Brion, 652 A.2d at 289 (quoting Shaw, 383 A.2d at 499). Shaw was a case decided exclusively under the Fourth Amendment, not Article I, Section 8. Brion, then, was an Article I, Section 8 case entirely reliant upon Fourth Amendment principle.

Edmunds); Commonwealth v. White, 669 A.2d 896 (Pa. 1995) (rejecting federal rule allowing warrantless search of vehicle when incident to arrest) (lacking Edmunds analysis and characterizing it as *dicta*). Appellant, however, fails to explain how the instant case implicates the heightened privacy interest recognized in these other contexts, nor does he draw our attention to any case that is remotely analogous to the one at bar. Indeed, a sufficient rebuttal to appellant's argument in this regard would be to point to the many decisions in which this Court has held that Article I, Section 8 does not afford greater protection than the Fourth Amendment. See, e.g., Commonwealth v. Duncan, 817 A.2d 455 (Pa. 2003) (lack of privacy right in one's name and address); Commonwealth v. Glass, 754 A.2d 655 (Pa. 2000) (anticipatory search warrants); Commonwealth v. Cleckley, 738 A.2d 427 (Pa. 1999) (voluntariness of consent to search); Commonwealth v. Waltson, 724 A.2d 289 (Pa. 1998) (particularity requirement for warrants); Commonwealth v. Williams, 692 A.2d 1031 (Pa. 1997) (warrantless parole searches); Commonwealth v. Melendez, 676 A.2d 226 (Pa. 1996) ("stop and frisk" under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)).

Taking a broader and more fundamental historical examination, it is worth noting that, at the time the U.S. Supreme Court determined that the Fourth Amendment and the then-recent federal exclusionary rule did not apply to open fields, the unbroken, prevailing interpretation of Article I, Section 8 by the Pennsylvania courts was that that provision offered no exclusionary remedy whatsoever. Indeed, notwithstanding that the federal exclusionary rule had been in existence since the 1914 decision in Weeks, supra, this Court, and the Superior Court enforcing our decisions, repeatedly refused to find a similar remedy encompassed in Article I, Section 8. Instead, this Court's historical interpretation of Article I, Section 8 always followed "the fundamental principle of the common law that the admissibility of evidence is not affected by the illegality of the means by which it was obtained." Commonwealth v. Chaitt, 112 A.2d 379, 381 & n.1 (Pa. 1955) (collecting cases);

Commonwealth v. Agoston, 72 A.2d 575, 585 (Pa. 1950); Commonwealth v. Hunsinger, 138 A. 683 (Pa. 1927); Commonwealth v. Dabbierio, 138 A. 679, 681 (Pa. 1927); Commonwealth v. Montanero, 96 A.2d 178 (Pa. Super. 1953); Commonwealth v. Dugan, 18 A.2d 84 (Pa. Super. 1941). The exclusionary rule itself, then, was not an organic part of Article I, Section 8; it was a federal imposition, made applicable against the states for Fourth Amendment purposes by Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). Thus, any historical survey respecting open fields and privacy under Article I, Section 8, like examination of **any** suppression case under the Pennsylvania charter, hits a brick wall in 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.

Matters changed after Mapp, of course, and Pennsylvania courts, having become familiar by necessity with the command and operation of the federal exclusionary rule, began to entertain equivalent claims under the guise of Article I, Section 8. The progression was not consciously announced or explained, and indeed, in many instances, such disclosure was unimportant because this Court, while citing both the Fourth Amendment and Article I, Section 8, employed a coterminous approach. See, e.g., Commonwealth v. Bosurgi, 190 A.2d 304 (Pa. 1963); Commonwealth v. Eazer, 312 A.2d 398 (Pa. 1973); Commonwealth v. White, 327 A.2d 40 (Pa. 1974); Commonwealth v. Brooks, 364 A.2d 652 (Pa. 1976); Commonwealth v. Holzer, 389 A.2d 101 (Pa. 1978). Eventually, however, exclusionary decisions arose that were rendered exclusively under Article I, Section 8, and other decisions were so rendered while recognizing that the course taken represented a break from U.S. Supreme Court authority, and an embrace of a greater protection of privacy rights than that which was commanded under the Fourth Amendment and Mapp. See, e.g., Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979); Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983); Edmunds, supra. Even this development

was not entirely clear, for **no** decision of this Court has squarely purported to examine and disapprove of the long and unbroken line of pre-Mapp decisions holding that, far from recognizing greater exclusionary-rule-related privacy rights, Article I, Section 8 contained no exclusionary remedy whatsoever.

Our decisional task in this case, however, does not require us to explain and synthesize this Court's pre- and post-Mapp expressions concerning Article I, Section 8. The reality is that, in the past few decades, a substantial body of cases has arisen under Article I, Section 8, all involving the exclusionary remedy. Some holdings have been explained with an Edmunds analysis, see, e.g., Edmunds, while others contain holdings that are unexplained in Edmunds terms, see, e.g., Commonwealth v. Shaw, 770 A.2d 295 (Pa. 2001); Commonwealth v. White, 669 A.2d 896 (Pa. 1995); Commonwealth v. Mason, 637 A.2d 251 (Pa. 1993); Commonwealth v. Hess, 617 A.2d 307 (Pa. 1992).[11] What is

[11] The Dissenting Opinion of the Chief Justice recognizes the mandatory nature of the analysis set forth in Edmunds. See Slip Op. at 2 ("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).") (emphasis added). We agree that state constitutional decisions are more secure when they proceed from a searching inquiry.

Madame Justice Baldwin's Dissenting Opinion posits that Edmunds exists solely to encourage litigants to provide Edmunds information in briefing, does not require that the Court's thought processes in rendering a state constitutional holding be made explicit, and places a burden upon litigants, not on the courts.

Edmunds noted the reason that it is important for litigants to brief the factors announced in that decision is to facilitate the requirement that Pennsylvania courts "make a 'plain statement' of the adequate and independent state grounds upon which we rely, in order to avoid any doubt that we have rested our decision squarely upon Pennsylvania jurisprudence." Edmunds, 586 A.2d at 895. Edmunds having been the case where the four-part inquiry was established, the Court did not have the benefit of such briefing from the parties. Nevertheless, the Court did not simply announce its Article I, Section 8 holding there; rather, it engaged in the searching inquiry the four-part test contemplated.

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(…continued)
Although it is true that the Court has rendered decisions since Edmunds which were not accompanied by an Edmunds analysis, and even in cases where the parties failed to brief Edmunds, there also are numerous, careful state constitutional decisions where **this Court** has engaged in the responsible, searching inquiry Edmunds outlined. See Commonwealth v. Glass, 754 A.2d 655, 661 (Pa. 2000) (challenge to anticipatory search warrant) (characterizing Edmunds as "the four-part methodology to aid in evaluating state constitutional claims"); Commonwealth v. Cleckley, 738 A.2d 427, 430 (Pa. 1999) (applying Edmunds to assess validity of consent search under Pennsylvania Constitution); Commonwealth v. Waltson, 724 A.2d 289, 291 (Pa. 1998) (challenge that warrant was overbroad) ("In Commonwealth v. Edmunds, this court proffered a methodology for analyzing issues which arise pursuant to the Pennsylvania Constitution.") (citation omitted); Commonwealth v. Hawkins, 718 A.2d 265, 266, 268 (Pa. 1998) (applying Edmunds analysis to Article I, Section 8 claim that criminal defendants "should be able to vicariously assert privacy interests belonging to others in order to challenge allegedly intrusive police conduct") ("When asked to decide whether our state Constitution provides greater privileges and protections than the United States Constitution, we evaluate the request in light of the [four Edmunds factors]."); Commonwealth v. Williams, 692 A.2d 1031, 1038 (Pa. 1997) (parolee search) ("When determining whether the Pennsylvania Constitution provides greater protection than its counterpart in the federal constitution, this Court considers the [four Edmunds factors.]"); Commonwealth v. Matos, 672 A.2d 769, 772 n.3 (Pa. 1996) (applying Edmunds in determining scope of seizure under Article I, Section 8; declining to follow California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991)) ("In Edmunds, this Court created a four-pronged methodology to aid in the analysis of state constitutional claims. This methodology, while not mandatory, highlights important touchstones that should be considered whenever this Court weighs the impact of United States Constitutional decisions upon state constitutional claims."); accord Commonwealth v. Cass, 709 A.2d 350, 358 (Pa. 1998) (Opinion Announcing Judgment of Court) (school searches) (noting that "we developed in [Edmunds] a four pronged methodology that we will follow in addressing the applicability of [U.S. Supreme Court Fourth Amendment authority] to the constitutionality of school searches in Pennsylvania").

Moreover, this Court has applied the Edmunds methodology in considering state constitutional claims under provisions other than Article I, Section 8. See, e.g., Pap's A.M. v. City of Erie, 812 A.2d 591, 603 (Pa. 2002) (freedom of expression under Article I, Section 7 of Pennsylvania Constitution) ("We also agree with the parties that it is helpful to conduct our Pennsylvania constitutional analysis, to the extent possible, consistently with the model suggested by Edmunds.") (noting also that, although Edmunds involved Article I, Section 8, the decision "spoke to the appropriate analysis of Pennsylvania constitutional claims as a class"); Commonwealth v. Means, 773 A.2d 143, 147 (Pa. 2001) (Opinion Announcing Judgment of Court) (applying Edmunds to multi-faceted state constitutional claim challenging statute permitting admission of victim impact testimony at penalty phase of capital trial); Commonwealth v. Swinehart, 664 A.2d 957, 958 (Pa. 1995) (evaluating whether use and derivative use immunity provided in 42 Pa.C.S. § 5947 was consistent
(continued…)

most important for present purposes, however, is that our own unique history and caselaw simply do not reflect any "societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." Oliver, 466 U.S. at 179, 104 S.Ct. at 1741. As the Oliver Court observed, a notation with which we agree, these lands are, as a practical matter, readily accessible to the public and to law enforcement. Id. Thus, in Pennsylvania, as in almost every other state, open fields do not provide the setting for the kinds of intimate activities with respect to which citizens would reasonably expect to be free from governmental surveillance. Article I, Section 8's protection of privacy has been in existence for over two hundred years, and yet, there has never been any suggestion, in any Pennsylvania source, that would militate a contrary conclusion. In fact, the decisions of the courts of this Commonwealth that are most analogous reflect a recognition of the distinction between the home and open fields when determining the legitimacy of one's expectation of privacy under Article I, Section 8. See Commonwealth v. Rood, 686 A.2d 442, 450 (Pa. Cmwlth. 1996) (*en banc*), alloc. denied, 699 A.2d 736 (Pa. 1997) (holding that landowner had no reasonable expectation of privacy under Article I, Section 8 in outdoor wooded area beyond curtilage of his home); Commonwealth v. Treftz, 351 A.2d 265, 270 (Pa. 1976) (noting, in holding that defendant lacked standing to challenge seizure of corpse of murder victim under Article I, Section 8, that corpse was found in backwoods area accessible to hunters); see also Commonwealth v. Bender, 811 A.2d 1016, 1023 (Pa. Super. 2002)

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with Article 1, Section 9's privilege against compelled self-incrimination) ("We find that the four-pronged method of analysis established in Edmunds to be the most thorough manner of accomplishing our task.") (applying Edmunds where challenger failed to provide Edmunds analysis); United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 615 (Pa. 1993) (applying Edmunds to state constitutional claim sounding in Takings Clause of Article I, Section 10).

We reiterate that we believe that state constitutional decisions are more secure when they are supported by the searching inquiry contemplated by Edmunds.

(rejecting Article I, Section 8 challenge to admissibility of tape recording made "not . . . inside of [defendant's] home[but] [r]ather, . . . at some location outside the four walls of [defendant's] residence and then continu[ing] exclusively within . . . vehicle" parked on defendant's property).

Appellant ably summarizes this Court's general observations in Edmunds regarding the unique history of Article I, Section 8. Missing from appellant's analysis, however, is an attempt to relate that unique history to the specific question of the reasonableness of an expectation of privacy in one's open fields. Compare with Edmunds, 586 A.2d at 899 (addressing propriety of "good-faith" exception to exclusionary rule in light of unique history of Article I, Section 8). The mere fact that this Court has, under certain circumstances, accorded greater protections to the citizens of this Commonwealth under Article I, Section 8 "does not command a reflexive finding in favor of any new right or interpretation asserted. To the contrary, we should apply the prevailing standard where our own independent state analysis does not suggest a distinct standard." Commonwealth v. Glass, 754 A.2d 655, 660 (Pa. 2000) (citation and internal quotation marks omitted). Appellant fails to suggest any aspect of the unique history of Article I, Section 8 that would put the lie to the "old as the common law" distinction between house and open fields that Justice Holmes invoked in Hester, an observation that, as author of the classic, THE COMMON LAW, Justice Holmes was supremely well positioned to make. Pennsylvania history, in short, weighs strongly against any notion that open fields are entitled to the same heightened privacy as one's person or home.

3. Other jurisdictions

Consistently with guidance from Edmunds, we next consider relevant caselaw from other jurisdictions. In his brief, appellant discusses four decisions from our sister states that have refused to adopt the federal open fields doctrine for purposes of their constitutions.

First, appellant cites People v. Scott, 593 N.E.2d 1328 (N.Y. 1992), in which the Court of Appeals of New York held that a landowner had a protectable privacy interest in land beyond the curtilage of his home under Article I, Section 12 of the New York constitution. As appellant notes, the text of the New York constitutional provision is substantially similar to that of Article I, Section 8 of our Constitution. See N.Y. CONST. art. I, § 12 (protecting "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures"). Nevertheless, the Scott court expressly disavowed "the Oliver majority's . . . literal textual analysis," instead preferring to focus on the compatibility of the federal open fields doctrine with New York caselaw. Scott, 593 N.E.2d at 1335. Appellant fails to suggest that any of the New York decisions cited in Scott is consistent with the Article I, Section 8 jurisprudence of this Commonwealth. In fact, the New York decisions' emphasis on state trespass statutes is, if anything, contrary to Pennsylvania caselaw. Compare People v. Gleeson, 330 N.E.2d 72, 72 (N.Y. 1975), cited in Scott, 593 N.E.2d at 1336 (suppressing information obtained as a result of a "trespass" by sheriff) with Rood, 686 A.2d at 450 (noting that officer "was specifically authorized and, in fact, required by law to investigate the field and wooded area located on Rood's property" (citing former Section 741(2), now Section 901(a)(2), of the Game Code)).

Appellant next cites State v. Johnson, 879 P.2d 984 (Wash. Ct. App. 1994) and State v. Kirchoff, 587 A.2d 988 (Vt. 1991), in which the Court of Appeals of Washington and the Supreme Court of Vermont each determined that the federal open fields doctrine was incompatible with the respective provisions of those states' constitutions. Both the Johnson and Kirchoff courts noted, however, that the relevant general inquiry under their respective constitutions was not, as under the Fourth Amendment, the reasonableness of one's privacy expectation. See Johnson, 879 P.2d at 990 ("Unlike the inquiry into subjective and reasonable expectations of privacy that must be made when the Fourth Amendment is implicated, the critical inquiry under the Washington State Constitution focuses on . . .

[whether] the law enforcement officers unreasonably intrude[d] into the defendant's 'private affairs[.]'");[12] Kirchoff, 587 A.2d at 995 (expressing "reluctan[ce] to use the phrase 'reasonable expectation of privacy'"). Conversely, "[i]n determining the scope of protection afforded under Article I, Section 8, this Court employs the same two-part test employed by the United States Supreme Court to determine the sweep of the Fourth Amendment of the U.S. Constitution." Commonwealth v. Duncan, 817 A.2d 455, 463 (Pa. 2003). That test requires a person to demonstrate: (1) a subjective expectation of privacy; and (2) that the expectation is one "that society is prepared to recognize as reasonable and legitimate." Id. (quoting Commonwealth v. Gordon, 683 A.2d 253, 256 (Pa. 1996)).

Finally, appellant cites State v. Bullock, 901 P.2d 61 (Mont. 1995), in which the Supreme Court of Montana rejected the open fields doctrine for purposes of that state's constitution. In so holding, the Bullock court emphasized that the Montana constitution includes, in addition to its own counterpart to the Fourth Amendment, an additional provision not found in the federal Constitution. Id. at 75. Indeed, Article II, Section 10 of the Montana Constitution provides that "[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." Given the absence of any such provision in the Pennsylvania Constitution, we find Bullock unpersuasive in determining the compatibility of the federal open fields doctrine with Article I, Section 8.

As appellant responsibly notes, other states have adopted the federal open fields doctrine for purposes of their respective constitutional guarantees against unreasonable

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[12] The Johnson court explained the Washington courts' rejection of the federal standard as owing to the unique language of that state constitution's counterpart to the Fourth Amendment: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 1, § 7. The absence of such language in Article I, Section 8 of the Pennsylvania Constitution further detracts from appellant's reliance on Johnson as persuasive support in his Edmunds analysis.

searches and seizures. The wording of the constitutional provisions of these states, unlike Montana and Washington, is substantially similar to that of Article I, Section 8 of our Constitution. See, e.g., State v. Pinder, 514 A.2d 1241, 1246 (N.H. 1986) (adopting federal open fields doctrine under N.H. CONST. part I, art. 19); State v. Havlat, 385 N.W.2d 436, 440 (Neb. 1986) (NEB. CONST. art. I, § 7); Williams v. State, 166 N.E. 663 (Ind. 1929) (IND. CONST. art. I, § 11); Wolf v. State, 9 S.W.2d 350 (Tex. Crim. App. 1928) (TEX. CONST. art. I, § 9); State v. Zugras, 267 S.W. 804, 806 (Mo. 1924) (MO. CONST. art. II, § 11); Ratzell v. State, 228 P. 166, 168 (Okla. Crim. App. 1924) (OKLA. CONST. Bill of Rights § 30); Brent v. Commonwealth, 240 S.W. 45, 48 (Ky. 1922) (KY. CONST. § 10); State v. Gates, 703 A.2d 696, 701 (N.J. Super. L. 1997) (N.J. CONST. art. I, ¶ 7); Betchart v. Dep't of Fish & Game, 205 Cal. Rptr. 135 (Cal. Ct. App. 1984) (CAL. CONST. art. I, § 13). For this reason, we find the decisions from these states more persuasive than the decisions from the four states upon which appellant relies.

4. Policy considerations

Appellant concludes his Edmunds analysis by referencing five policy considerations that he claims support his position. According to appellant, the guarantees of Article I, Section 8 should extend to open fields in order: (1) to prevent "overly zealous police officers" from conducting "fishing expeditions"; (2) to "protect [ ] the right of privacy"; (3) to prevent WCOs from "treat[ing] the property of others as their own"; (4) to avoid confrontations between WCOs and landowners; and (5) to encourage WCOs to apply for search warrants. Appellant's Brief at 17-18.

In a recent scholarly article, our learned colleague Mr. Justice Thomas Saylor explained why "[i]mplementation of a state constitutional value . . . necessarily entails a searching, evaluative inquiry" into genuinely "unique state sources, content, and context as bases for independent interpretation." Thomas G. Saylor, *Prophylaxis in Modern State*

Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule, 59 N.Y.U. ANN. SURV. AM. L. 283, 309-13 (2003). Indeed, were it otherwise, the tag-line "policy" could metamorphose into cover for a transient majority's implementation of its own personal value system as if it were an organic command. As support for his policy arguments, appellant cites general principles of Pennsylvania law, decisions from other states, and our trespass statute, 18 Pa.C.S. § 3502, without actually explaining how any of these authorities pertains to "unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." Edmunds, 586 A.2d at 895. Appellant's reliance on authorities that either come directly from another state[13] or are indistinct from those of most other jurisdictions[14] merely highlights the absence of Pennsylvania sources to support his position. 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.

The citizens of this Commonwealth throughout our history have shown a keen interest in protecting and preserving as an asset the diverse wildlife that find refuge in the fields and forests within our borders. This interest is so strong that it is enshrined by a separate provision of the Pennsylvania Constitution:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

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[13] See Appellant's Brief at 18 (quoting Scott, 593 N.E.2d at 1336); id. (quoting Johnson, 879 P.2d at 993); id. at 19 (citing Kirchoff, 587 A.2d at 996-97).

[14] See, e.g., Appellant's Brief at 17 (citing Commonwealth v. Glass, 718 A.2d 804, 810 (Pa. Super. 1998) for the proposition that the purpose of Article I, Section 8 is "to protect citizens from unreasonable searches and seizures"); id. at 19 (citing 34 Pa.C.S. § 3502).

PA. CONST. art. 1, § 27. The legislative and executive branches, in turn, have enacted and executed a plethora of statutes and regulations designed to enforce the people's right to the preservation of our wildlife.[15] Thus, our Constitution and enacted statutes -- as well as the agencies created to enforce them -- all confirm that, in Pennsylvania, any subjective expectation of privacy against governmental intrusion in open fields is not an expectation that our society has ever been willing to recognize as reasonable. In short, the baseline protections of the Fourth Amendment, in this particular area, are compatible with Pennsylvania policy considerations insofar as they may be identified. More importantly, there is nothing in the unique Pennsylvania experience to suggest that we should innovate a departure from common law and from federal law and reject the open fields doctrine.

In light of the foregoing, we hold that the guarantees of Article I, Section 8 of the Pennsylvania Constitution do not extend to open fields; federal and state law, in this area, are coextensive.[16] Therefore, we affirm the Commonwealth Court's determination that

[15] Enforcement, it is worth noting, is a monumental task. For every three hundred fifty square miles of land in Pennsylvania, only one full-time WCO is assigned to conduct wildlife protection. A WCO's duties include not just enforcing hunting and trapping laws but also investigating hunting accidents, conducting wildlife surveys, assisting in wildlife research projects, and providing educational programs. Pa. Game Comm'n, "About the Pennsylvania Game Commission," at http://www.pgc.state.pa.us/pgc/cwp/view.asp?a=481&q=151287 (last visited Nov. 19, 2007).

[16] For this reason, the instant case does not require us to reach the constitutionality of 34 Pa.C.S. § 901(a)(2).

Officers Wasserman and Pierce did not violate appellant's right to be free from unreasonable searches and seizures.[17]

Affirmed.

Messrs. Justice Saylor, Eakin and Fitzgerald join the opinion.

Mr. Chief Justice Cappy files a dissenting opinion in which Mr. Justice Baer and Madame Justice Baldwin join.

Madame Justice Baldwin files a dissenting opinion in which Mr. Justice Baer joins.

[17] As appellant notes, the Commonwealth Court failed to conduct an Edmunds analysis, preferring not to reach the applicability of the federal open fields doctrine under Article I, Section 8. Because we believe that the foundational constitutional question must be answered, we do not endorse the court's reasoning in reaching its conclusion.