



DPS TRAINING BULLETIN



LEGAL BULLETIN NO. 387

Reference: John William McKELVEY III
v
State of Alaska

Alaska Court of Appeals
September 4, 2020

WARRANTLESS TAKING PHOTOGRAPHS OF AERIAL SURVEILLANCE VIOLATES ALASKA CONSTITUTION

FACTS:

On **AUGUST 22, 2012** (prior to marijuana legalization), Alaska State Troopers (AST) received information that McKELVEY had a marijuana grow operation on his property. McKELVEY lived in a sparsely populated area about 20 miles from Fairbanks. He had posted several “No Trespassing” and “Keep Out” signs on his driveway and other places on his property. The greenhouse area where the grow operation was taking place was about 15 feet behind McKELVEY’s house and was surrounded by tall woods. This area was not visible from the public road.

AST decided to conduct aerial surveillance of the property to confirm the information. Using one of its aircraft, AST flew about 600 feet above the property, then used a telephoto lens (280-millimeter zoom) to view the contents of the greenhouse. The officer was able to identify the marijuana grow operation using the telephoto lens. The officer then applied for and obtained a search warrant for the property.

McKELVEY was found guilty. He appealed, arguing the aerial surveillance of his yard constituted an illegal warrantless search in violation of the Fourth Amendment to the United States Constitution as well as Article I, Section 14 of the Alaska Constitution.

ISSUE:

Did the officer violate Article 1, Section 14 of the Alaska Constitution?

HELD:

Yes. Absent an applicable exception to the warrant requirement, police must obtain a search warrant before engaging in aerial surveillance with use of a telephoto lens.

REASONING:

1. Both the Alaska Supreme Court and this Court (Alaska Court of Appeals) have repeatedly interpreted Article 1, Section of the Alaska Constitution to provide greater protection to Alaskans than the corresponding provisions of the Fourth Amendment.
2. The AST investigator did not make his observations of McKELVEY's back yard and greenhouse with his unaided naked eye. Rather, he used a telephoto lens to enhance his view of the contents of the greenhouse.
3. When an individual has taken reasonable steps to protect their house and curtilage from ground-level observation, that individual has a reasonable expectation that law enforcement officers will not use a telephoto lens or other visual enhancement technology to engage in aerial surveillance of the individual's residential property for the purpose of investigating criminal activity.
4. The mere fact that a police aircraft is operated in compliance with FAA regulations is not a suitable standard for assessing whether the police have violated a person's reasonable expectation of privacy in their residential curtilage.

NOTES:

Our courts have consistently held the Alaska Constitution affords its citizens more individual rights than the United States Constitution. Even though the U.S. Supreme Court may rule differently, as it previously did in a case involving this issue (see Florida v Riley, Bulletin No. 127), it will make rulings based on the Alaska Constitution.

REVIEW FOLLOWING CASES ALSO CITED IN THIS OPINION:

Florida v RILEY, Bulletin No. 127, where the U.S. Supreme Court ruled using a helicopter flying at 400 feet above a greenhouse did not violate the Fourth Amendment, and was considered "plain view" because the officers in the helicopter had a right to be in that navigable airspace.

KYLLO v United States, Bulletin No. 250, where the U.S. Supreme Court ruled warrantless use of Thermo-Imaging device to detect heat from a private home police suspected of having a grow operation did violate the Fourth Amendment.

OLIVER v United States, Bulletin No. 82, where police received information that a grow operation was taking place. On arrival, there was a locked gate with a "no trespassing" sign. The officer went around the gate and walked towards the field (not residence or outbuildings) and discovered the grow operation. Police used this information to obtain a search warrant and arrested OLIVER. U.S. Supreme Court ruled the entry did not violate the Fourth Amendment and was justified under the "open fields" doctrine.

The Alaska Attorney General may review this case and may appeal this case to the Alaska Supreme Court.