IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CARROL GENE HIGHTOWER,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2003-278**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Carrol Gene Hightower was tried by jury in the District Court of Cleveland County, Case No. CF-1997-1543, and convicted of Cultivation of Marijuana (Count 1), in violation of 63 O.S.Supp.1997, § 2-509, Possession of Marijuana with Intent to Distribute (Count 2), in violation of 63 O.S.Supp.1997, § 2-401(B)(2), Maintaining a Dwelling House Used for the Keeping of CDS (Count 4), in violation of 63 O.S. 1991, § 2-404, and Failure to Display a Stamp on Controlled Drug, (Count 5), in violation of 63 O.S.1991, § 450.8.[1] The jury set punishment at twelve (12) years imprisonment and a $17,000.00 fine on Count 1, fourteen (14) years imprisonment and a $10,500.00 fine of Count 2, four (4) years imprisonment and a $5,200.00 fine on Count 4, and a $2,000 fine on Count 5. The trial judge sentenced Appellant accordingly, running the sentences consecutively and suspending the sentence on Count 2. Appellant now appeals his convictions and sentences.

[1] He was found not guilty on Count III, Possession of a Firearm in the Commission of a Felony.

Appellant raises the following propositions of error in this appeal:

I. All evidence flowed from the unlawful warrantless entry onto Appellant's property and the District Court erred in not granting Appellant's motion to suppress;

II. The trial court erred in overruling Appellant's motion to dismiss because of double jeopardy and violations of 21 O.S. § 11;

III. The jury was misled by the State into believing Appellant could be convicted of maintaining a dwelling house for the purposed of keeping marijuana when the possession was for personal consumption;

IV. Appellant was prejudiced and denied a fair trial when evidence of prior arrests was given to the jury in the guilt-innocence phase of trial;

V. Appellant was denied a fair trial in that the State failed to comply with discovery and was allowed to create evidence during the trial without prior notice to Appellant;

VI. The State intentionally misled the jury with unsupported statements;

VII. The evidence in this case does not exclude every reasonable hypothesis except that of guilt; and

VIII. Due to an accumulation of irregularities committed in this case, Appellant was denied a fair trial.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find relief is required with respect to Count 2.

With respect to proposition one, we find the marijuana patch located on Appellant's property was in an open field that was first viewed from an independent source, a helicopter pilot who had spotted more than 2,000 marijuana field from the air. With his naked eye, the helicopter pilot observed

one of the two most professionally grown marijuana fields he had ever seen. Based upon this information, which was itself sufficient for the issuance of a search warrant, officers climbed the fence to the property Appellant controlled and found the patch, which contained some 931 growing plants. The patch was not within the curtilage of the mobile home located on the property, as they were separated by 75 yards.[2] As such, the warrantless search does not fall within the protections of the Fourth Amendment or Article II, § 30 of Oklahoma's Constitution.[3] *See Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."); *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)(finding a barn located sixty yards from the property's home was not within the curtilage); *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989)(finding no Fourth Amendment violation when a helicopter looked into the defendant's greenhouse with a naked eye from 400 feet in the air); *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 2508, 81 L.Ed.2d 377 (1984)(finding the "independent source" exception to the exclusionary rule "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation."); *Grider v. State*, 1987 OK 212, 743 P.2d 678 (where the Court applied the open

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[2] Because the patch was not within the curtilage and also due to the strength of the "independent source" evidence gathered from the helicopter, this case is distinguished from *Dale v. State*, 2002 OK CR 1, 38 P.3d 910.

[3] The remaining evidence was discovered as a result of a search warrant that was later obtained. However, because the first search was a valid search of an open field for which a warrant was not required, the evidence discovered as a result of the search warrant, which was partly based on

fields doctrine, *Oliver*, and *Dunn* and found no search and seizure violation); and *Fite v. State*, 1993 OK 58, 873 P.2d 293 (finding officers acted lawfully when they entered Fite's property and peered into the well house from an open field).

With respect to proposition two, we find all of Appellant's double jeopardy and double punishment claims fail, except one. We find Appellant's convictions for both possessing marijuana with the intent to distribute (Count 2) and maintaining a dwelling house used for the keeping of marijuana (Count 4) do not withstand a double punishment analysis under 21 O.S.1991, § 11. We find under this record that the crimes arise out of a single act or omission and may not be punished under two statutes. *Peacock v. State*, 2002 OK 21, 46 P.3d 713, 714; *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, 126.

With respect to proposition three, we find no error. Parties are given a wide latitude in closing arguments to discuss the evidence and reasonable inferences to be drawn therefrom. *Selsor v. State*, 2000 OK CR 9, ¶ 35, 2 P.3d 344, 354. With respect to proposition four, we presume there was regularity in the trial court proceedings. *State v. Ballard*, 1994 OK CR 6, 868 P.2d 738, 742. Assuming, *arguendo*, that exhibit 85 was given to the jury (which is entirely unclear), we find any error relating thereto harmless, given the overwhelming strength of the evidence. We have no grave doubts regarding its impact on the jury's decision. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, 702.

With respect to proposition five, we find the admission of relevant evidence

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the warrantless search, was not fruit of the poisonous tree.

is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. *Pebeahsy v. State*, 1987 OK CR 194, 742 P.2d 1162, 1163. We find no clear abuse of discretion here, nor do we find any discovery violations worthy of relief. With respect to proposition six, we find no plain error pertaining to the allegations of intentionally misleading the jury with unsupported statements.

With respect to proposition seven, we find after viewing the evidence in the light most favorable to the State and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 203-204. And finally, we find no cumulative error entitled to relief.

DECISION

The judgments and sentences are hereby **AFFIRMED** with respect to Counts 1, 4, and 5. The judgment and sentence with respect to Count 2, Possession of Marijuana with Intent to Distribute is **REVERSED** and **DISMISSED** on double punishment grounds.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TOM LUCAS, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
JOHNSON, P.J.: SPECIALLY CONCUR
LILE, V.P.J.: CONCUR
CHAPEL, J.: DISSENT
STRUBHAR, J.: CONCUR

RE

JOHNSON, P.J.: Special Concur

I especially concur in the opinion herein, but need to be clear as to the reasons that I do concur. This case is distinguishable from *Dale v. State*, 2002 OK CR 1, 38 P.3d 910, because *Dale* had a consent problem, not an open fields doctrine problem.

Oklahoma has adopted the open fields doctrine. *Fite v. State*, 1993 OK CR 58, 873 P.2d 293, *Grider v. State*, 1987 OK CR 212, 743 P.2d 678.

I still adhere to my personal belief this is the type of case that shows that law enforcement should have obtained a search warrant. In this particular case, there was plenty of time before they went in with a SWAT Team to obtain a search warrant, as without question, they had probable cause from the aerial observation.

The public's right to be protected in their homes and on their property without intrusion should be maintained at all times. Law enforcement has an opportunity and, with probable cause, can obtain a search warrant in a very short time. Judge Chapel in *Fite* used the "harmless error/independent source" doctrine to avoid wrangling over the open fields doctrine. I therefore specially concur in the opinion herein.