UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No: 12-CR-154

MARCO MAGANA,

Defendant.

DEFENDANT, MARCO MAGANA'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

NOW COMES the Defendant, Marco Magana, appearing specially by and through his attorney, Brett Reetz, of REETZ LAW OFFICE, S.C., and for his reply to the Government's Response to Defendant's Motion to Suppress, replies as follows:

There is no factual dispute that the land where the "grow" was occurring was private property posted with No-Trespassing signs. There is also no factual dispute that the Government trespassed upon the property without a warrant and placed photographic surveillance on the property on July 12, 2012 and did so until July 16, 2012. A warrant was not obtained for the Government presence until July 15, 2012 at 4:55 p.m.

It is undisputed that the Government was trespassing. As argued by the Government, a trespass evolves into a search if law enforcement both physically occupy private property of the defendant and do so for the purpose of obtaining information. *United States v. Jones*, 132 S.Ct. 945, 949. The Government relies upon *United States v. Jones*, 132 S.Ct. 945 (2012), citing *Oliver v.*

United States Maine, v. Thornton, 466 U.S.170, 104 S.Ct. 1735 (1984) which has similar facts. In *Oliver*, Acting on reports that marihuana [sic] was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate.[1] Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper shouted: "No hunting is allowed, come back up here." The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner's home. In further factual dicta, the *Oliver* Court states, "After receiving an anonymous tip that marihuana was being grown in the woods behind respondent Thornton's residence, two police officers entered the woods by a path between this residence and a neighboring house. They followed a footpath through the woods until they reached two marihuana patches fenced with chicken wire. Later, the officers determined that the patches were on the property of respondent**, obtained a warrant to search the property**, and seized the marihuana. On the basis of this evidence, respondent was arrested and indicted." (emphasis added)

These facts, although similar, are distinguishable from the case at bar. In the present case, the agents did not just ignore No-Trespassing signs and trespass, they placed photographic surveillance equipment upon the private property without a warrant for three days. If this conduct is deemed to be constitutional and not a violation of the Fourth Amendment, then the entire concept of private property outside areas of curtilage of a residence is extinguished. Physically trespassing upon an open field, spying something illicit, and obtaining a warrant

based upon the spied upon illicit activity is different than placing photographic surveillance equipment upon private property without a warrant. The former, unfortunately yet admittedly, is still Constitutional. The latter, should be held not to be Constitutional. Private citizens, although having to endure the government's relatively unfettered ability to trespass upon one's private lands, should, at minimum, be allowed to maintain the expectation that when they are hiking or doing anything on their private land they are not subject to a sort of "Hunger Games" surveillance, unless a warrant has been issued. It is also important to note, that upon analysis of the Government's argument and application thereof, there would be no reason to ever obtain a warrant to survey private land outside the area of curtilage of the residence. The application and obtainment of the warrant in the present case would be mere superfulousness.

The Government also makes the argument that Marco Magana has no expectation of privacy because he was not a title holder on the land that was trespassed upon and surveilled without a warrant. This is the "Red Herring." Just as one would expect that, when visiting another, the government would not break down a door without a warrant, arrest them, and then assert that it wasn't a violation of the arrested person's constitutional rights because it wasn't the arrested person's residence, in the present case and in all situations for that matter, there is an expectation that Government adherence to the Constitution is comprehensive of all consequences that may result from the Government violating the Constitution. To hold otherwise would provide the Government license to break down every door so long as they only arrest and prosecute the guests.

For all of the foregoing reasons and the reasons set forth in the Motion to Suppress, all photographic evidence should be suppressed and not admitted into evidence for any purpose.

Further, all evidence resulting from the unconstitutional surveillance should also be suppressed and not admitted into evidence.

Dated this 2nd day of October, 2012.

REETZ LAW OFFICE, S.C.

By: /s/ Brett Reetz
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