IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DONALD & TANYA DORR,	)	
	)	
Appellants,	)	
v.	)	Case No. F-2007-616
	)	NOT FOR PUBLICATION
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Donald Dorr was tried by the trial court, the Honorable James D. Goodpaster, and convicted of Unlawful Cultivation of Marihuana, under 63 O.S.2001, § 2-509 (Count I); Unlawful Possession of Marihuana with Intent to Distribute, under 63 O.S.Supp.2003, § 2-401(B)(1) (Count II); Carrying a Firearm After Felony Conviction, under 21 O.S.Supp.2003, § 1283 (Count III); and Unlawful Possession of Paraphernalia, under 63 O.S.2001, § 2-405(B) (Count IV), in Mayes County District Court, Case No. CF-2004-266B. Tanya Dorr, the wife of Donald Dorr, was tried along with Donald Dorr and convicted of Unlawful Cultivation of Marihuana, under 63 O.S.2001, § 2-509 (Count I); Unlawful Possession of Marihuana with Intent to Distribute, under 63 O.S.Supp.2003, § 2-401(B)(1) (Count II); and Unlawful Possession of Paraphernalia, under 63 O.S.2001, § 2-405(B) (Count IV), in Mayes County District Court, Case No. CF-2004-266A.

The Honorable James D. Goodpaster sentenced Donald Dorr to

imprisonment for twenty (20) years and a $1000 fine on Count I; imprisonment for ten (10) years on Count II; imprisonment for five (5) years on Count III; and a fine of $250 on Count IV, with all of the sentences to be run concurrently.[1] The court sentenced Tanya Dorr to imprisonment for ten (10) years, with the entire sentence suspended and the first two (2) years under supervision, and a $500 fine on Count I; imprisonment for ten (10) years, with the entire sentence suspended, on Count II; and a fine of $250 on Count IV, with the sentences in Counts I and II to be run concurrently.[2] Donald and Tanya Dorr ("the Dorrs") together appeal their convictions.

The Dorrs raise the following propositions of error:

I. ILLEGAL SEARCH—THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO SUPPRESS EVIDENCE FACILITATED BY A POLICE OBSERVER IN A HELICOPTER.
II. ILLEGAL SEARCH—THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO SUPPRESS EVIDENCE GATHERED BY THE POLICE FOR FAILURE TO OBTAIN A SEARCH WARRANT.
III. ILLEGAL SEARCH—THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO SUPPRESS EVIDENCE OBTAINED BY COERCED VERBAL CONSENT TO SEARCH.
IV. ILLEGAL SEARCH—THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO SUPPRESS EVIDENCE OBTAINED BY COERCED WRITTEN CONSENT TO SEARCH.
V. ILLEGAL SEARCH—THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO SUPPRESS EVIDENCE INASMUCH AS MIRANDA RIGHTS READ AFTER CONSENT TO SEARCH WAS OBTAINED.
VI. ILLEGAL SEARCH—THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO SUPPRESS EVIDENCE OBTAINED BY OFFICERS OUTSIDE THEIR JURISDICTIONAL BOUNDARIES.
VII. ILLEGAL SEARCH—THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO SUPPRESS BY IGNORING THE FACT THAT THE STATE DID NOT PRESENT ANY CASES OR ANY LEGAL AUTHORITY TO REFUTE THE MOTION.
VIII. THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO REINSTATE THEIR CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING.

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[1] Donald Dorr was also ordered to pay a victim's compensation assessment of $100 on each of the first three counts, as well as a $1,000 drug fund assessment and other court costs and fees.
[2] Tanya Dorr was also ordered to pay a victim's compensation assessment of $100 on each of the first two counts, as well as a $500 drug fund assessment and other court costs and fees.

IX. THE TRIAL COURT DENIED THE APPELLANTS' MOTION TO REINSTATE THEIR CONSTITUTIONAL RIGHT TO A TRIAL BY JURY.

In Proposition I, the Dorrs challenge the initial helicopter flyover of their property, which first alerted Oklahoma Bureau of Narcotics Agent Brad Balch that the Dorrs were possibly growing marijuana on their property. Balch's observation of the Dorrs' property was part of a larger aerial investigation looking for evidence of marijuana growing in rural Mayes County. The Supreme Court addressed such helicopter surveillance in *Florida v. Riley*[3] and concluded that it did not typically constitute a Fourth Amendment "search."[4] This Court addressed a similar situation in *Dale v. State*,[5] where Drug Task Force agents were alerted to the possible cultivation of marijuana on a rural Oklahoma property "based on their aerial observation of the suspected marijuana the day before."[6] This Court commented, citing *Riley*, that this aerial observation "itself was entirely lawful."[7]

The Dorrs cite to and rely upon this Court's unpublished decision in *Milligan v. State* as support for their claim that the initial helicopter observation

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[3] 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989).

[4] The 5-4 decision in *Riley* held that a law enforcement agent who observed marijuana growing in a greenhouse located in a residential backyard, within the home's "curtilage," using only the "naked eye" but from a helicopter hovering 400 feet about the property, had not "searched" the greenhouse, under the Fourth Amendment, because the homeowner did not have a reasonable expectation of privacy against such an observation. *Id.* at 450-52, 109 S.Ct. at 696-97; 488 U.S. at 452, 109 S.Ct. at 698 (O'Connor, J., concurring in the judgment). Both the plurality opinion and O'Connor's separate opinion left open the possibility that some helicopter surveillance operations could constitute unreasonable Fourth Amendment "searches." *Id.*

[5] 2002 OK CR 1, 38 P.3d 910.

[6] *Id.* at ¶ 9, 38 P.3d at 912.

[7] *Id.* at ¶ 9 n.3, 38 P.3d at 912 n.3 (citing and summarizing *Riley*).

of the marijuana on their property was itself illegal.[8] In *Milligan*, this Court held that "Milligan had a reasonable expectation of privacy which was violated when OBN agents observed his curtilage from the helicopter."[9] The Dorrs, however, have totally failed to establish that the three or four marijuana patches observed on their property from the helicopter were all within the "curtilage" of their home—and they never specifically attempted to make such a showing in the trial court. The record in this case suggests that the marijuana patch that was closest to the Dorr home was approximately 30 yards to the west of the home, near a barn, but that there were other marijuana patches on the five-acre property that were quite far from the Dorr home.[10] The Dorrs have failed to establish that *Milligan* is applicable to their case. Proposition I is rejected accordingly.

In Proposition II, the Dorrs challenge the failure of the OBN agents to get a search warrant to search their property; and in Proposition III, the Dorrs assert that the initial verbal consent to search their property, given by Donald Dorr to Agent Knox, was involuntary and therefore invalid. We take up these claims together, since both were likewise involved in the factually similar case of *Dale v. State*.[11] In both the current case and *Dale*, law enforcement officers became aware of potential marijuana cultivation on a rural, residential Oklahoma

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[8] *See Milligan v. State*, F-2003-1241 (Dec. 23, 2005). The unpublished opinion in this case is attached to the Dorrs' Reply Brief.

[9] *Id.* at p. 5. There was testimony in the record in *Milligan* suggesting that the helicopter descended to a low altitude, just above the tree line, over the Milligan property. *Id.* at pp. 4-5.

[10] In fact, Tanya Dorr's defense at trial was that most of the marijuana found on their property was found out in "the woods," far enough from the home that she did not even know it was there.

property via an aerial observation from a helicopter. And in both cases the law enforcement officers failed to seek a search warrant for the property at issue, choosing instead to assemble a large team of armed drug enforcement agents, who would then descend upon the property unannounced, using multiple vehicles and a helicopter overhead, and then directly approach the property owner and request verbal "consent" to search the property.[12]

In *Dale*, this Court stated as follows:

> We begin by restating the fundamental rule that searches conducted outside the judicial process, without prior approval by a magistrate, are presumptively unreasonable under both the Fourth Amendment to the United States Constitution, and Article 2, § 30 of the Oklahoma Constitution. The exceptions to this rule are "jealously and carefully drawn," and there must be a showing by those who seek exemption that the exigencies of the situation made immediate action imperative.[13]

The Court found that "[t]he agents had ample time to seek a search warrant based on their aerial observation of the suspected marijuana," which was one day earlier.[14] We concluded as follows: "The Court finds no reason for a warrantless search. When law enforcement has this much time to obtain a search warrant, one should and must be obtained. The State presented no

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[11] 2002 OK CR 1, 38 P.3d 910.

[12] The main factual difference between *Dale* and the current case, which the State emphasizes, is that in *Dale* the agents had to climb over a locked gate to enter the property, whereas in the current case the gate happened to be open, because the Dorrs were mowing the lawn that day.

[13] *Id.* at ¶ 7, 38 P.3d at 911-12 (citing *Coolidge v. NewHampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971), and *Castleberry v. State*, 1984 OK CR 30, ¶¶ 6-7, 678 P.2d 720, 723).

[14] *Id.* at ¶ 9, 38 P.3d at 912.

evidence of any exigent circumstances that would show a warrantless entry was necessary."[15]

In the current case, only about 30 minutes passed between the aerial observation of the marijuana on the Dorr property and the law enforcement entry onto the property. However, neither the agents who testified nor the State on appeal have offered any reason, let alone "exigent circumstances," that necessitated such a rapid entry onto the Dorr property. In fact, when Agent Balch was asked at trial whether the OBN team had "enough time to go and get a search warrant with those [GPS] coordinates and with those coordinates find out who was the owner and the location of the land," Balch responded, "I would assume so." None of the agents who testified offered any reason to explain why they did not attempt to obtain a search warrant. Though the agents noted that they initially did not know who lived on the property or what the actual address was, they did not assert that they could not have gotten this information or that there was any other practical contingency that prevented them from obtaining a search warrant. In the current case, as in *Dale*, the State has not presented any evidence to show that a warrantless entry onto the Dorr property was necessary or that any "exigent circumstance" existed.

It should be noted that in *Dale* this Court concluded that the officers entered the property illegally, because they had to climb over a locked gate. The Dorrs' gate was not shut or locked at the time the officers entered their property,

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[15] *Id.* at ¶ 9, 38 P.3d at 912 (citation omitted).

making *Dale* distinguishable in this regard. Nevertheless, the *Dale* Court further concluded that the verbal consent to search the property given by the property owner in that case was involuntary and therefore unlawful.[16] We wrote:

> "[C]onsidering the totality of the circumstances, including (1) the unlawful entry itself, (2) the number of agents participating, (3) their manner of dress, (4) the fact that they were armed not only with pistols but also with semi-automatic weaponry, and (5) the presence of the police helicopter immediately overhead during the encounter, we are convinced that Appellant's consent to the search of the premises was not voluntary in the constitutional sense of the term. . . . Consequently, the agents' search of the marijuana patch, based on the Appellant's, involuntary consent, was unlawful, and the fruits thereof must be suppressed.[17]

Hence the *Dale* Court's reversal of the defendant's convictions in that case was based not only upon the illegality of the entry onto his property, but also upon a separate finding that the defendant's "consent" to search his property was involuntary and therefore unlawful—thereby necessitating the suppression of all the evidence subsequently obtained on the property.

The *Dale* Court evaluated the totality of the circumstances in that case to determine that the defendant's verbal "consent" was involuntary. When this Court evaluates the totality of the circumstances in the current case, we come to the same conclusion. In fact, of the five factors noted in *Dale* contributing to a finding that the consent was involuntary, four factors are the same in the current case. Without even attempting to get a search warrant (and without any

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[16] In addition, one judge, in a one-sentence separate opinion, specifically noted, "I agree that the 'consent' to search was not voluntary under the facts in this case, and the results of the search must be suppressed." *See id.*, 2002 OK CR 1, 38 P.3d at 913 (Lile, J., specially concurring).

[17] *Id.* at ¶ 10, 38 P.3d at 912 (internal citations omitted).

apparent reason for this failure), the law enforcement officers descended military-style upon the Dorrs' residential property: unannounced, wearing combat gear and bullet-proof vests, armed with pistols, rifles, and automatic or semi-automatic weapons, in three vehicles, and with a military helicopter hovering overhead. This Court declines to find that Donald Dorr's initial consent to the search of his property was voluntary simply because he and his son happened to be mowing their lawn (with their gate open) at the time of this invasion.

We conclude that Donald Dorr's initial verbal consent to Agent Knox's search of his property was involuntary and unlawful. Hence all of the incriminating evidence offered in this case against both Donald and Tanya Dorr, all of which was the fruit of this poisonous tree, should have been suppressed.[18] This Court finds that the trial court abused its discretion in denying the Dorrs' motion to suppress. Thus all of the Dorrs' convictions must be reversed and the cases against them dismissed.

This Court's conclusion that the Dorrs' motion to suppress should have been granted renders all of their other claims moot.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that all of Donald Dorr's convictions and all of Tanya Dorr's convictions must be reversed and that the cases against them shall be dismissed.

Decision

All of Donald Dorr's convictions and all of Tanya Dorr's convictions in the current case are hereby **REVERSED AND DISMISSED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	DISSENT
C. JOHNSON, V.P.J.:	CONCUR
A. JOHNSON, J.:	DISSENT
LEWIS, J.:	CONCUR

[18] All of the necessary incriminating evidence in the current case was discovered subsequent to and as a result of this original verbal consent to search.

LUMPKIN, PRESIDING JUDGE: DISSENT

I must dissent to the Court's disregard of established jurisprudence regarding the open fields doctrine. As I set out in my dissent in *Dale v. State*, 2002 OK CR 1, 30 P.3d 910, both the U.S. Supreme Court and this Court have adopted and applied the open fields doctrine for decades. The issue of consent in this case is a red herring because consent is not required when applying the open fields doctrine, as the Court states it does in this case. The marihuana was not within protected areas which are subject to protection either by the federal or state Constitutions.

The Court seems to be enamored and offended by the fact police officers dress as police officers. The Court fails to recognize the danger involved in eradicating growing marihuana fields which are often booby-trapped and guarded by armed personnel to protect the crop. The record reveals the officers acted with caution and in a pleasant manner under the circumstances. Other than being dressed as police officers, the evidence reveals the officers approached and visited with Appellant Donald Dorr in a normal fashion and a valid consent to search was given twice, first orally and then in writing. In other words, the officers did more than what was required, not less. The open fields doctrine obviates the need for consent.

Judge Goodpasture conducted a hearing on the Motion to Suppress and denied the motion based on that evidence. I trust the reasoning of this seasoned and well reputed jurist. A review of this record reveals that decision

was supported by the evidence presented and there was no abuse of discretion. This decision is supported both by the fact that consent was not required based on the open fields doctrine and the fact the officers went the extra mile by informing the Appellant, Donald Dorr, of the reason for their presence and obtaining a voluntary consent to search. Both at the suppression hearing and at trial the Appellants said the agents were "nice" and the conversation was "pleasant", and the Appellants gave consent voluntarily.

The application of the open fields doctrine is reinforced by Appellant Tonya Dorr's defense at trial that most of the plants were out in "the woods", far enough that she did not know they were there. A remote "wood" area is most assuredly not meant to be considered as a part of the protected "curtilage" that the U.S. Supreme Court meticulously defined as an area that "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). Instead, this area is clearly an open field. The U.S. Supreme Court clearly stated: "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." *Oliver v. United States*, 466 U.S. 170, 183, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984).

Therefore, the Court should abide by the Rule of Law and be bound by *stare decises* in this case. The law and facts in this case dictate the convictions and sentences should be affirmed.

A. JOHNSON, JUDGE, DISSENTING:

The majority opinion reverses the trial court's decision on the motion to suppress here by ignoring both our standard of review[1] and fundamental tenets of search and seizure law.

The Dorrs waived a jury trial and agreed to a bench trial before Judge James D. Goodpaster. The trial was not the first opportunity the judge had to hear from the principal witnesses regarding the conduct of the search of the Dorrs's property. Prior to trial, Judge Goodpaster presided over a hearing on the Dorrs's motion to suppress all evidence as the fruit of an unlawful search and seizure. Donald Dorr and his teenaged son testified to the circumstances surrounding the search of their residence and property. Agent Bryant Knox, who conducted that search, testified on behalf of the State.

After hearing evidence, the Judge overruled the Dorrs's motion to suppress and the case proceeded to trial the following month. At trial, the Dorrs made no objection to the introduction of the evidence found in the course of the search, but renewed their motion to suppress at the end of trial. Judge Goodpaster affirmed his original denial of that motion.

It is important to note that there are really two separate searches at issue here. The first occurred when officers initially entered the Dorrs's

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[1] Understanding that we are not as well-positioned as the trier of fact to determine factual matters such as witness credibility, it is well-established that when this Court reviews a district court's motion to suppress evidence based on an allegation of an illegal search and seizure, we defer to the trial court's factual findings unless those findings are clearly erroneous.

property and asked to search land near the residence. The second occurred after officers searched that land and then obtained Dorr's permission to search his residence.

Contrary to the majority's characterization of the searches of Dorr's property as something akin to an air and land blitzkrieg, an examination of the record reveals something far less sinister. The records of the trial and suppression hearing show that—at the most—seven officers pulled into the driveway of Dorr's rural property in three vehicles through an open gate. Dorr and his son were in the front yard at the time and were approached by Agent Knox and one other officer. The others remained with their vehicles.

Agent Knox advised Dorr that marijuana had been seen on the property near his residence and asked permission to walk to the back of the residential property to take a look (Supp.Hrg.Tr. 38). According to Agent Knox, Dorr said "go ahead" (Supp.Hrg.Tr. 38). At the suppression hearing, Dorr testified that he could not remember consenting to the search (Supp.Hrg.Tr. 25),[2] but at trial stated explicitly that he told officers to "go ahead" (Tr. 130-131). Dorr also testified at the suppression hearing that: (1) he was not intimidated by the two

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Seabolt v. State, 2006 OK CR 50, ¶ 5, 152 P.3d 235, 237. We review *de novo* only the legal conclusions drawn by the trial court from those facts. *Id.*

[2] It stands to reason that if Dorr had been intimidated or threatened into giving permission to search, he would have remembered the act of consent. Clearly, in this instance, the district court was presented with testimony from the defendant's own mouth that contradicted his claim. On the basis of this testimony, where Dorr claimed to have no recollection of giving consent, and Agent Knox claimed that Dorr did consent, it would have been clear error (i.e., against the clear weight of the evidence) for the district court to have found the consent to be coerced.

officers (Supp.Hrg.Tr. 28); (2) both officers were polite (Supp.Hrg.Tr. 27-28);[3] (3) neither officer carried long weapons (Supp.Hrg.Tr. 24, 28); and (4) both officers kept their side arms holstered at all times (Supp.Hrg.Tr. 28). Dorr also stated that the remaining group of officers, including two with M-16-style firearms, kept their distance near their vehicles in the driveway during his initial encounter with Agent Knox (Supp.Hrg.Tr. 24-25, 30). As to the helicopter, Dorr testified he was unaware that a helicopter was present near his property until he turned off his riding lawnmower when he saw the approaching officers (Supp.Hrg.Tr. 26-27).[4]

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[3] Dorr testified similarly at trial (Tr. 137-138), but also added the contradictory assertion that Agent Knox threatened to come back and tear up his property if he had to get a search warrant (Tr. 131, 138).

[4] Dorr's testimony at the suppression hearing indicates that he was not sure he noticed the helicopter at all. Specifically, Dorr testified as follows:

> Q. Do you recall the helicopter over your property?
>
> A. I don't know about the helicopter. I was mowing grass with a big riding mower and I just shut it off when I seen the vehicles coming up the road.
>
> Q. Is that noise from the riding mower sufficient loud enough to cover the noises of a helicopter?
>
> A. I guess, you know, I didn't hear it like I said until I shut it off, then I heard it.
>
> Q. Then you heard the helicopter?
>
> A. Well I think I heard it you know. I ain't for sure. Like I said, I, they were coming up the road, I had my mind on something else besides them, you know, just I had to talk to these guys and I didn't see the helicopter myself, you know, because it's back, it was back in the woods, you know, back in behind the barn off to the side of the house back in the edge of the woods.

(Supp.Hrg.Tr. 26-27). Based on this testimony, it is difficult to understand how the majority can place such emphasis on the role of the helicopter as being a major component of an intimidating display of police authority. Granted, Dorr changed his testimony at trial and stated that he saw the helicopter and was offended by its presence over his property (Tr. 135-

I. The Field

A. Consent

On this record, I cannot conclude that the district court's factual finding of voluntary consent is clearly erroneous. In fact, I believe it would have been clear error for the district court to find that the consent to search the property adjacent to the residence was not voluntary. Such a finding would have been against the clear weight of the evidence given that Dorr testified he did not feel intimidated or threatened (Supp.Hrg.Tr. 28). Thus, to the extent that the district court refused to suppress the evidence of the 69 ten-foot tall marijuana plants found on the land adjacent to Dorr's residence based on the factual finding that the warrantless search was the result of a voluntary consent, I conclude that finding is not clearly erroneous and must be affirmed.

B. Open Fields Doctrine

Nevertheless, even if it is assumed that Dorr's initial consent, a consent limited to a search of the property adjacent to the back side of the residence, was not voluntary, the denial of the suppression motion with regard to evidence found in that area was proper on other grounds. The Fourth Amendment to the United States Constitution prohibits police from making a warrantless, nonconsensual entry into a suspect's home. *See Payton v. New*

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136), but the credibility of that testimony is certainly suspect. In particular, the transcript of Dorr's trial testimony on this point shows that: (1) the statements were elicited on questioning by defense counsel that was so leading that it drew multiple objections from the prosecutor (Tr. 135-136); and (2) the trial court found Dorr's testimony unbelievable (Tr. 163). More importantly, by the time Dorr testified about the helicopter at trial, the district court had already ruled on the suppression motion based on the evidence before it at the suppression hearing, and by the time Dorr testified at trial, and even later reasserted his suppression motion, the evidence at issue had already been admitted without objection.

York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 650-651. The curtilage area, the area immediately surrounding the home, also falls within the area entitled to this protection based on the premise that the curtilage privacy interest is an extension of the privacy interest inherent in the home itself. *See Oliver v. United States*, 466 U.S. 170, 178, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214, 223-224 (1984); *Luman v. State*, 1981 OK CR 70, ¶ 5, 629 P.2d 1275, 1276. In line with this reasoning, this Court has consistently held, that when a search takes place outside the curtilage area, the open fields doctrine applies, and no search warrant is required for entry. *Horner v. State*, 1992 OK CR 46, ¶ 15, 836 P.2d 679, 682; *Luman*, 1981 OK CR 70, ¶ 5, 629 P.2d at 1276.

Under the testimony given by all witnesses, at the suppression hearing and at trial, the ten-foot tall marijuana plants were seized as a result of a warrantless entry to an area beyond that immediately surrounding the residence. The question becomes, therefore, whether the area was within the protected residential curtilage. A determination of whether an area is curtilage is made on a consideration of four factors: (1) the proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put, specifically, whether the area is used for the intimate activities of the home; and (4) the steps taken by the resident to protect the area from observation. *United States* v. *Dunn*, 480 U.S. 294, 300-301, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987). The area in question here fails to qualify as curtilage on all four points.

First, the distance to the marijuana plants from the residence is variously described as somewhere between 30 and 300 yards (Supp.Hrg.Tr. 10, 39). Even at the closer distance, nearly one-third the length of a football field, the area at issue is likely not close enough to be an area in which the householders conducted "intimate activities of the home." Second, all testimony at the suppression hearing and at trial was consistent that the area in which the marijuana plants were found was not within any enclosure that included the residence. Agent Knox testified at the suppression hearing for example that the plants were growing on land beyond the freshly mowed property immediately adjacent to the residence (Supp.Hrg.Tr. 39). Third, there is nothing in the record indicating that the portion of the property where the plants were growing was used for any household purpose, much less any "intimate" household activities. At the suppression hearing, for example, Dorr referred to the area as "pasture" land (Supp.Hrg.Tr. 25) and at trial, Dorr's wife (co-defendant/co-appellant) stated that she never went into that portion of the property because it was infested with snakes and ticks (Tr. 148). Fourth, there is no evidence that Dorr took any steps to shield the area from observation. All of these factors weigh against a finding that the searched area fell within the Fourth Amendment protected curtilage.

2. The Residence

Because the area in which the marijuana plants were found was not curtilage, it was nothing but an open field. No warrant was necessary for officers to enter the property after having seen marijuana in plain view from the

air. The officers' entry to the field was lawful, even if Dorr had not given consent.

The seizure of evidence from inside the residence is a separate matter, however, because it was conducted under a separate consent. But, even here, the district court's factual finding of voluntary consent is not clearly erroneous.

Agent Knox testified at the suppression hearing and at trial that while he observed the marijuana plants at the back of the residence, he also noticed water hoses trailing away from the plants toward the residence and saw a worn pathway from the residential portion of the property to the marijuana patch (Supp.Hrg. 39; Tr. 25, 33). At this point he returned to Dorr in the front yard, explained what he found, and asked Dorr to sign a written consent to search the residence. At the suppression hearing, Dorr's testimony was that when Agent Knox asked him to sign the consent form he was still in the company of just two officers and that both officers remained polite and kept their side arms holstered. Dorr also conceded that Agent Knox went over the form with him (Supp.Hrg.Tr. 31). Dorr expressly denied that Agent Knox threatened him in any way (Supp.Hrg.Tr. 31).[5] Thus, at the time of the signing of the consent to

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[5] Dorr changed his testimony on this point at trial and accused Agent Knox of threatening him. Specifically, Dorr testified as follows:

> Q. [by defense counsel Paternostro] Okay. Were you intimidated in any way to give your consent because of this show of force?
>
> A. Well, yeah.
>
> MR. RAMSEY [prosecutor]: Again counsel is leading.
> THE COURT: Leading but I'm going to let him answer.
>
> Q. Were you intimidated?

search the residence, the record at the suppression hearing showed that nothing of consequence had changed since Dorr gave the officers permission to search the exterior of his property. Specifically, the number of officers on the property had not increased and Dorr was still in the presence of at most, two officers and those two remained polite with weapons holstered. Given this record, I cannot conclude that the district court's determination that Dorr's consent was voluntary is clearly erroneous.

Finally, I cannot agree with the majority's reliance on the case of *Dale v.*

A. Well, yeah, yeah, I was.

Q. Okay. And after he came back from looking in the back, what did, what did he ask you then?

A. He just asked me to sign the consent to search form and I asked him where the, you know, if he had a warrant and he said, "No, I don't but I can go get one".

Q. And after he said I can go get one, did he follow up –

MR. RAMSEY: Judge, he's leading his witness.
THE COURT: Don't start leading again.
MR. PATERNOSTRO: Okay.

Q. After that statement, what did he say?

A. He asked me, let's see, he asked me to sign the consent. Well I asked him then, you know, if he had a warrant and he said, "No, I haven't got one but I can go get one," you know, and he said "If I do, I'll bring back 30 car loads of laws and we'll tear the top of the hill up, you know."

Q. Did you?

A. So I went ahead and signed it.

Q. Did that statement that he talked about additional officers, did that coerce you into signing that consent form?

A. Well sure. I didn't want them to tear my place up.

(Tr. 131-132).

State, 2002 OK CR 1, 38 P.3d 910, as its sole authority for concluding that Dorr was intimidated by an overbearing show of police authority into granting permission to search his property. While the majority asserts that the instant case is nearly identical to *Dale*, and that *Dale* compels reversal of the district court's denial of the suppression motion, the majority overlooks several significant differences between this case and *Dale* that render it inapposite here.

First, the marijuana patch detected by aerial surveillance in *Dale* was, unlike the instant case, well within the curtilage associated with the defendant's residence. That is, the marijuana patch was in close proximity to the defendant's residence and enclosed within a fence surrounding it and the residence. Thus, in *Dale*, the aerial surveillance, and ultimately the warrantless physical entry, was an intrusion into an area equivalent to the residence itself. Clearly, in the *Dale* case, the open fields doctrine was not implicated as the warrantless intrusion by police invaded the curtilage, a place protected by the privacy interests inherent to the residence itself.

Second, in *Dale*, unlike the instant case, officers had to climb over a locked driveway gate in order to approach the residence in an attempt to secure consent for a warrantless search. Here, by contrast, the gate to the Dorrs's driveway was open. This is a significant fact that the *Dale* court explained as follows:

> Police may obviously enter upon areas of residential property which are intended as public access points; they may for example, walk up a driveway or walkway

> to the front porch of a typical urban home in order to contact the occupant, because that is what the area is intended for. In this case, however, the driveway which led to Appellant's rural home was blocked by a locked gate, clearly indicating that no uninvited visitors were allowed beyond that point. The agents not only crossed that barrier, but continued to approach until they were situated between the two residential structures, for the sole purpose of obtaining consent to search.

Dale, 2002 OK CR 1, ¶ 7, n.2, 38 P.3d 910, 912, n.2.

In this case, there is no dispute that the officers entered the Dorrs's property through an open driveway gate. Thus, by entering through this well-accepted public access point and confining themselves to the driveway while attempting to obtain consent to search, the officers operated in a manner expressly condoned by *Dale*. Furthermore, unlike the situation in *Dale* where the officers intruded well into the residential curtilage, to the point of reaching the intended search area, the intrusion through the gate to the Dorr property was minimal. Agent Knox and his associate encountered Dorr in the front yard of the residence and stopped well short of reaching the intended search target, the open land behind the residence. Moreover, while this initial encounter took place in the front yard, the other officers remained at their vehicles, apparently never leaving the driveway, an area *Dale* explicitly held police may lawfully intrude.

Third, the role of the helicopter in this case is significantly different from that in *Dale*. In the *Dale* case, the helicopter remained in a low hover over the property during the encounter between the defendant and agents seeking consent to search. Certainly, a police helicopter in a low hover directly over a

police-citizen encounter exerts an intimidating presence. There is no evidence in this case, however, that the helicopter was even in the area when the actual encounter between Dorr and Agent Knox occurred, much less any evidence that the helicopter was hovering directly overhead. In fact, as noted above, Dorr testified he barely noticed the helicopter (Supp.Hrg.Tr. 26-27). Furthermore, in *Dale*, the helicopter exerted an additional intimidating influence on the homeowner because it actually landed on his property. Here, by contrast, the helicopter never landed.[6]

For all these reasons, I believe the majority has mistakenly concluded that Dorr's consent to search was involuntary and therefore wrongly reverses the district court's judgment. I respectfully dissent.

[6] The aerial observer onboard the helicopter testified at trial that the helicopter never hovered over the Dorr property, but merely circled its perimeter a few times and departed once the ground-based officers had located the entrance to the property (Tr. 16-17). Inexplicably, the majority's analysis ignores this testimony.