

DISTRICT COURT, MONTEZUMA COUNTY, COLORADO 865 N. Park St., Ste 100, Cortez, CO 81321	DATE FILED: March 29, 2022 4:23 PM CASE NUMBER: 2020CR326
<b>PEOPLE OF THE STATE OF COLORADO</b>  Plaintiff  v.  <b>CHRISTOPHER TUCK</b>  Defendant	▲COURT USE ONLY ▲  <b>Case Number:</b>  20CR326 Div.: 4                      Ctrm.: 4
<b>ORDER GRANTING MOTION TO SUPPRESS EVIDENCE</b>	

This Order concerns Defendant's Motion to Suppress Evidence as Fruits of an Unlawful Search Warrant filed on July 6, 2021.

An evidentiary hearing was held on Defendant's motion on February 28, 2022. The Court heard testimony and received evidence at the hearing. The Court permitted the parties to file briefs after the hearing. The Court has reviewed the filings of the parties.

The positions of the parties can be summarized as follows:

1. Defendant argues that the drone flight over Defendant's property on August 24, 2020, was a warrantless search. Because the information obtained during the August 24, 2020 warrantless drone flight provided

the basis for the search warrant obtained September 1, 2020 and executed September 2, 2020, - Defendant argues that the evidence obtained pursuant to the search warrant obtained September 1, 2020 and executed September 2, 2020 should be suppressed.

2. The District Attorney argues that a warrant was not required for the August 24, 2020 drone flight. In the alternative, the District Attorney argues that the “good faith exception” should apply, because law enforcement believed that the August 24, 2020 drone flight was legal – accordingly, law enforcement reasonably believed that the search warrant obtained on September 1, 2020 was based on sufficient probable cause. As a second alternative, the District Attorney argues that many drone photos were taken while the drone was over a neighbor’s property and those photos alone provide probable cause for the search warrant application.

#### APPLICABLE LAW

The Colorado Supreme Court in Mendez v. People, 986 P.2d 275 at 279 (Colo. 1999) proscribed that:

The Fourth Amendment of the United States Constitution and article II, section 7 of the Colorado Constitution proscribe all unreasonable searches and seizures. Under these provisions, a warrantless search is invalid unless it is supported by probable cause and is justified under one of the narrowly defined exceptions to the warrant requirement. See People v. Garcia, 752 P.2d 570, 581 (Colo.1988).

CRS § 41-1-107 provides that **“The ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft.”** Surface owners in Colorado own the space above their land – subject to the right of flight of aircraft.

Intruding on the space above the surface of land – without permission of the owner – is a trespass in Colorado. The Colorado Supreme Court recognized this principle in People v. Emmert, 597 P.2d 1025 at 1027 (Colo. 1979):

The common law rule holds that he who owns the surface of the ground has the exclusive right to everything which is above it (“Cujus est solum, ejus est usque ad coelum”). This fundamental rule of property law has been recognized not only judicially but also by our General Assembly when in 1937 it enacted what is now codified as section 41-1-107, C.R.S. 1973:

“The ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft.”

CRS § 41-2-101 (1) provides the Colorado statutory definition of aircraft:

“Aircraft” means any vehicle used or designed for carrying any person, persons, or freight and used or designed for aviation or flight in the air in control of a crew member, whether it is or is not a certificated vehicle under the rules of the federal aviation administration, and the federal department of transportation, or its successor.

The drone flown over Defendant’s property on August 24, 2020 was not an aircraft under Colorado law. The drone was not designed for “carrying any person, persons, or freight” and was not “in control of a crew member”.

The District Attorney relies on People v. Tafoya 494 P.3d 613 (Colo. 2021) to support its position. In Tafoya, law enforcement mounted a camera on a utility pole across the street from the defendant’s home without a warrant. Law enforcement

obtained a warrant, based upon the evidence obtained from the pole camera. The camera continuously recorded footage of the defendant's property for 3 months. The Tafoya Court relied on the continuous nature of the surveillance in its ruling finding that the Fourth Amendment was violated. Tafoya 494 P.3d at 623.

The District Attorney argues that the drone surveillance of Defendant's property in the case lasted less than 7 minutes versus the 3 months in Tafoya. However, the crux of the issue in this case is that law enforcement intentionally trespassed into the space above Defendant's property. The drone flight was brief, however, it was not on public property. The camera in Tafoya was on public property.

"The prime purpose of the exclusionary rule is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment." United States v. Calandra, 414 U.S. 338 at 374 (1974) and People v. Tomaske, 440 P.3d 444 (Colo. 2019).

#### FINDINGS AND ORDER

1. Around August 15, 2020, Lt. Copeland with the Montezuma County Sheriff's Department ("MCSO") met with an anonymous source. The anonymous source directed Lt. Copeland to a property, 26956 Road R in Montezuma County, where the anonymous source believed large amounts of marijuana were being cultivated.
2. The Road R property belonged to Defendant.
3. Near the Road R property of Defendant, the anonymous source showed Lt. Copeland "what appeared to be the top half of a greenhouse type building on

the homes south side” The source told Lt. Copeland “that when the wind blew from the direction of the property in question, what the source recognized as the odor of marijuana could be clearly smelled”

4. Based upon this information, Lt. Copeland directed a surveillance operation of Defendant’s Road R property using a surveillance drone piloted by Detective John Haynes of the MCSO.
5. The MCSO received permission from a neighbor of Defendant to launch the drone from the neighbor’s property.
6. The MCSO programmed the flight path of the drone before launching the drone. The programmed flight path of the drone took it primarily over Defendant’s property, avoiding direct flight over Defendant’s home. The flight path of the drone also took it over the neighbor’s property. The MCSO programmed the flight for photos to be taken as soon as the drone reached approximately 390 feet above the neighbor’s property. The flight was carefully programmed with full knowledge and intent that the drone would take off from the neighbor’s property and fly primarily over Defendant’s property.
7. The MCSO did not obtain a search warrant or seek to obtain a search warrant before flying the drone over Defendant’s property.
8. On August 24, 2020, the drone flew over the Defendant’s property and the neighbor’s property.
9. The August 24, 2020, drone flight lasted less than 7 minutes. The drone did not fly over the home or curtilage on Defendant’s property.

10. The drone flight was conducted in accordance with FAA regulations for drones at approximately 390 feet in the air. All photos were taken at approximately 390 feet above Defendant's and the neighbor's properties. The drone did not fly over 400 feet. FAA regulations require drones to be flown under 400 feet. Aircraft must fly 500 feet above the ground except when taking off or landing. FAA rules allow for a 100 foot buffer between drones and aircraft. The MCSO understood FAA regulations.
11. Law enforcement was careful to not fly the drone over Defendant's home or curtilage.
12. The drone took very clear photographs of Defendant's property. The photographs were taken of Defendant's property while the drone flew over Defendant's property and while the drone flew over the neighbor's property. Most of the photographs were taken while the drone flew over Defendant's property.
13. The photographs taken while the drone was above Defendant's property and while the drone was above the neighbor's property – both clearly depict the two large marijuana grows on Defendant's property. After viewing the drone photographs, officers estimated that Defendant was growing in excess of 210 marijuana plants on his property.
14. Using the information obtained from the drone flight, Lt. Copeland applied for an obtained a search warrant for Defendant's Road R property on September 1, 2020.

15. Without the information obtained during the August 24, 2020 drone flight, the September 1, 2020 search warrant application would have been insufficient. With the information obtained during the drone flight, the search warrant application contained probable cause to support the issuance of the search warrant.
16. Law enforcement executed the search warrant on September 2, 2020, and seized 874 marijuana plants.
17. The September 2, 2020, seizure of the marijuana plants on Defendant's property is the basis for the charges in this case.
18. On August 24, 2020, the MCSO planned and executed drone surveillance of Defendant's property without a search warrant.
19. Under Colorado law, intrusion on the space above the surface of land – without permission of the owner – is a trespass.
20. The MCSO trespassed on Defendant's property when the MCSO flew a drone over Defendant's property at 390 feet and took photographs. The unlawful entry was pre-planned, intentional, and programmed.
21. Exigent circumstances did not exist for the unlawful entry.
22. Law enforcement cannot rely on the "good faith exception" to validate the search warrant, because the officers did not act in good faith. The statutes of the State of Colorado are clear that one cannot fly a drone over another's property and take pictures without permission or a search warrant. Law enforcement is presumed to know laws related to trespass and unlawful entry.

23. To permit law enforcement to use the photos taken over the neighbors' property would defeat the purpose of the exclusionary rule – "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment." The affidavit for the search warrant does not distinguish between photographs taken by the drone over the neighbor's property and photographs taken by the drone over Defendant's property.

24. The MCSO planned to unlawfully enter the space above Defendant's property on August 24, 2020. Allowing law enforcement to use photos taken over neighbors property to support the search warrant, would validate unlawful activity.

For reasons stated herein, all items seized pursuant to the search warrant issued on September 1, 2020 are hereby excluded. The items seized on September 2, 2020 are the fruits of the poisonous tree of the unlawful drone entry into the space above Defendant's property on August 24, 2020.

Law enforcement is not without remedy in the future:

- A. Surveillance by aircraft is permissible under Colorado law. Aircraft flyovers by law enforcement have long been upheld by Colorado Courts; and
- B. Drone surveillance without a search warrant solely from a neighboring property with permission or drone surveillance without a search warrant from public land is permissible under Colorado law – as long as the drone surveillance is brief in duration.



DONE AND SIGNED THIS March 29, 2022.

/s/ Todd Jay Plewe

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District Court Judge