1982

State of Utah v. Wayne Neil Harris : Brief of Appellant

Utah Supreme Court

H. Don Sharp; Attorney for Appellant;
David L. WIlkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent, v. WAYNE NEIL HARRIS, Defendant and Appellant.	)	NO. 18294

BRIEF OF APPELLANT

Appeal from the Judgment and Sentence of
Second Judicial District Court for
Weber County, State of Utah

HONORABLE DOUGLAS L. CORNABY, Presiding

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STATEMENT OF THE NATURE OF THE CASE

The Appellant was charged by information with the crime of "Production of a controlled substance", a third-degree felony, under Title 58-37-8(1)(a)(i), Utah Code Annotated, 1953.

DISPOSITION IN THE LOWER COURT

A Motion to Suppress evidence was filed with the District Court on November 23, 1981. Pursuant to said Motion a Suppression Hearing was held on the 2nd day of February, 1982, before the Honorable Douglas L. Cornaby. The Court denied said Motion and a jury trial commenced on the 4th day of February, 1982. At the start of the second

day of trial it became necessarty to continue the trial to February 10, 1982. On February 10, 1982, the Appellant in open court waived the jury for the remainder of the trial, and agreed to submit all issues to Judge Cornaby for decision. (R 251) The Appellant was found guilty, and on March 3, 1982, was sentenced to the Utah State Prison for a period of not to exceed five (5) years. (R 46)

RELIEF SOUGHT ON APPEAL

The Appellant requests this Court on rule that all evidence should have been suppressed or not admitted and accordingly order that Appellant's conviction be reversed and the case dismissed.

STATEMENT OF FACTS

On Saturday morning, June 27, 1981, Dee Knight, a neighbor of the Appellant, called the Mayor of Farr West in Weber County, and informed the Mayor that he observed what he believed to be marijuana growing in the Appellant's garden. The Mayor called the Weber County Sheriff's Office and Deputy Ken Anderson, along with Trooper Ralph Jackson of the Utah Highway Patrol responded to the call. The Officers arrived at Dee Knight's home at approximately 1:00 o'clock p.m. (R 75)

During the course of Mr. Knight's direct and cross-examination, it was determined that his observation of the

suspected marijuana was made about a week prior to the 27th day of June, 1981 (R 62), and Mr. Knight further testified that prior to this particular observation, he had never seen a live growing marijuana plant (R 150); he had only seen pictures of them in the newspaper. (R 63; R 142)

In factually stating what happened when the Officers arrived, it is necessary to refer to various Exhibits which have been reproduced and made a part of this Brief as follows:

1. Diagram of Appellant's yard, home, and other buildings. (Defendant's Exhibit "7" at Trial and Exhibit "A" at the Suppression Hearing. (Appendix "A")

2. Two Photographs - Defendant's Exhibits "1" and "2" at Trial, but Exhibit "B" and "C" at Suppression Hearing. (Appendix "B")

3. Two Photographs - Defendant's Exhibits "3" and "4" at Trial, but Exhibits "E" and "G" at the Suppression Hearing. (Appendix "C")

Defendant's Exhibit "7" (Appendix "A" - Diagram) was stipulated to have been drawn to scale where one-inch equals 20 feet. (R 66)

Another Diagram (Plaintiff's Exhibit "A"), was also used during trial but that diagram has been misplaced by the Weber County Clerk's Office. Therefore, there may be some confusion in comparing the trial testimony to Appendix "A". However, the testimony at the Suppression Hearing does conform to Appendix "A".

The photographs in the Appendix are correlated the diagrams (Appendix "A") as follows:

1. Suppression Hearing Exhibit "G" was taken from that point on the diagram marked "G" and is a view looking directly South. (R 69)
2. Suppression Hearing Exhibit "E" was taken from that point on the diagram marked "E" and looking Northeast. (R 69, 70)
3. Suppression Hearing Exhibit "B" was taken from that point on the diagram marked "B", and looking Southeast. (R 68-69)
3. Suppression Hearing Exhibit "C" was taken from that point on the diagram marked "C" and looking West. (R 68-70)

Trooper Jackson did not testify concerning the events of June 27, 1981, and it was acknowledged during trial that he did not know what live growing marijuana looked like. (R 212) Therefore, his participation on June 27, 1981, is not material to this Appeal.

When Deputy Anderson arrived at Dee Knight's home, he had a conversation with Mr. Knight. At that point on Appendix "A", marked with a circled "x", and also designated grape bush. (R 145, 160)

Mr. Knight told Deputy Anderson of the suspected marijuana and pointed out the Appellant doing some weeding in his back yard at the point on Appendix "A" designated as

Point "B". (R 146, 147) Following this conversation, Deputy Anderson pulled his car into the Appellant's driveway. There was a gate crossing the driveway, but it was open on this day. Deputy Anderson got out of his car, claims he walked down the fenced driveway to Point "B" on the diagram. (R 178) The Appellant disputed the location of their conversation, testifying it was in the driveway about even with the front of the house. (R 104) Deputy Anderson testified that he asked the Appellant if he was growing marijuana, and he claims the Appellant said yes. (R 78) When he asked the Appellant if he could see it, the Appellant said "no". (R 78, 179) Deputy Anderson further acknowledged he and Trooper Jackson were told to leave the property. (R 89)

Anderson then told the Appellant he could see the marijuana growing from where he was standing. The Deputy then called for a detective and when Detective Shupe arrived without a search warrant, the Appellant was arrested and the plants were confiscated.

Although Deputy Anderson testified at the Preliminary Hearing that he could see 8 to 15 plants from the point where he talked to Dee Knight (the grape bush) (R 84), and told Detective Shupe he had seen the plants from that location (R 246). It was utlimately acknowledged by Deputy Anderson that he could not identify any plants from that

location (R 80). In fact, Deputy Anderson admitted that he led Dectective Shupe to the impression that he had seen the plants from out by the road. (R 277-278)

Deputy Anderson also testified that he was not concerned about getting a search warrant (R 277), and did not discuss a search warrant with Detective Shupe (R 278). Detective Shupe, however, testified that Deputy Anderson was concerned about getting a search warrant (R 236), but Detective Shupe determined no warrant was necessary because Deputy Anderson told him the plants were "in plain view". (R 214, R 237)

As indicated above, Deputy Anderson did not identify any plants until he had entered approximately 170 feet onto the Appellant's property to search for marijuana. (R 83)

Dectective Shupe further testified that so far as his observations were concerned, the plants were only in plain view once he had penetrated onto the Appellant's property. (R 240-241)

Also, there were no exigent circumstances as was acknowledged by both Detective Shupe (R 242-244) and Deputy Anderson (R 216)

The plants Deputy Anderson claim he could see from Point "B" were approximately 33 to 35 feet to the South, with two rows of corn and three rows of tomatoes in between. (R 74) The corn was approximately chest high, whereas the marijuana plants were only 2 1/2 to 3 feet. (R 80)

Gordon Sorensen testified at the Suppression Hearing that he was very familiar with the Appellant's property in that he went there regularly to take care of the Appellant's bees. He further testified that the plants Deputy Anderson claims to have seen from Point "B" were not visible from that point. (R 93-96)

Travis Honeysuckle also testified that Deputy Anderson could not distinguish marijuana plants from Point "B" (R 98-101)

ARGUMENT

POINT I.

DEPUTY ANDERSON'S UNINVITED ENTRY ON THE APPELLANT'S PROPERTY TO SEARCH FOR MARIJUANA CONSTITUTED AN UNLAWFUL SEARCH AND SEIZURE.

The only knowledge of marijuana cultivation Officer Anderson had at the time he entered approximately 170 feet into the Appellant's property was the word of Dee Knight. Mr. Knight had never seen a live marijuana plant prior to observing what he thought were marijuana plants in the Appellant's garden. Deputy Anderson's entry into the back yard was specifically to search for marijuana, and he did not secure a search warrant.

"The general rule is that searches without a warrant are per se unreasonable." State of Utah in the interest of K.K.C., 636 P.2d 1044, (Utah, 1981); State v. Kent, 20 Utah 2d1, 432 P.2d 64 (1967); State v. Lee, 633 P.2d 48 (Utah, 1981).

One of the exceptions of the above general rule involves exigent circumstances, State v. Lee, supra. However, as noted in the Statement of Facts, it was noted in the record that neither Detective Shupe nor Deputy Anderson felt exigent circumstances were a factor.

Another exception to the general rule is the "plain view doctrine". This doctrine was discussed extensively in State v. Lee, supra, wherein this court held there was no expectation of privacy from people using a pathway to the front door, and anything observed in that area was not protected. In this case, however, Deputy Anderson proceeded approximately 170 feet down a driveway that was fenced on both sides and with a gate at the top of the driveway.

Had Deputy Anderson walked down Dee Knight's property to a point about 35 feet South of the hay barn, he could have made the same observation Mr. Knight made, and if in fact he believed the plants were marijuana, he should have applied for a search and seizure warrant. As noted earlier, there were no exigent circumstances to justify seizing the property without a warrant.

POINT II.

ITEMS SEIZED PURSUANT TO SEARCH WARRANT ON JUNE 29, 1981, SHOULD HAVE BEEN SUPPRESSED.

On Monday, June 29, 1981, Weber County Sheriff's Office executed a search warrant on the Appellant's property. The

Search Warrant, Affidavit and Return are a part of the file as State's Exhibit "B". Also, a copy of the inventory left at the Appellant's home is a part of the record as Appellant's Exhibit "6".

The Affidavit in Support of the Search Warrant consists primarily of what was observed by Deputy Anderson and Detective Shupe on June 27, 1981, along with a statement from Dee Knight that he saw the Appellant carry some green leafy plants from his garden to his home. The Affidavit further states as follows:

> This substance was cut from the plants in his garden that are suspected to be marijuana plants.

There is nothing in the Affidavit to show any basis for such suspicion. In fact, Dee Knight testified that he could not identify what types of plants were taken into the home.

If this Court holds that the search on the 27th day of June, 1981 was illegal, then the evidence gathered on that day cannot be used to support the securing of a search warrant, based on the doctrine of the "fruit of the poison tree", Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed2d 1181 (1961).

Appellant's Exhibit "6" shows the item removed from the house on the 29th of June, 1981. Title 77-23-6, Utah Code Annotated, reads as follows:

> Receipt For Property Taken. - When the officer seizes property pursuant to a search warrant, he shall give a receipt

> to the person from whom it was seized or in whose possession it was found. If no person is present, the officer shall leave the receipt in the place where he found the property. Failure to give or leave a receipt shall not render the evidence seized inadmissible at trial.

The return on the search warrant (Exhibit "B", p. 4), has two quantity discrepencies with Appellant's Exhibit "6", plus four additional entries, one of which was a book entitled "How to Grow Marijuana". These items were admitted into evidence over objection.

Although the above statute states that failure to leave such a receipt does not make the evidence inadmissible, the Appellant contends to leave an inventory receipt, but to add several items to that list when they made the return to the Court is highly suspect and improper.

In a case of cultivation of marijuana, admitting into evidence a book on how to grow marijuana is highly prejudicial in connection with showing intent to grow as opposed to the plants growing wild.

In addition, the prosecution got into the search on the 29th of June, 1981, for the sole purpose of offering the five or six plants found in the garden on that day. The prosecution had no intention of bringing up the item found in the house. (R 195)

The Court, on its own, stated that all the evidence gained in the search of June 29, 1981, would be presented to the jury. (R 197) Subsequently, the jury was waived. We

would contend that the Court improperly interpose himself into the State's case and in doing so, cause a violation of Rule 55 of the Rules of Evidence. Said rule reads as follows:

> Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that the committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

POINT III.

THE COURT COMMITTED ERROR IN ADMITTING INTO EVIDENCE THE RESULTS OF THE CHEMICAL TESTS.

The chemist based his opinion that the various plants contained marijuana on the Duguenois Levine Test. (R 283) The conclusion he drew was based on comparing the color results with colors of other known samples of marijuana. (R 293) However, the chemist destroyed the results of his test when he completed it. We would contend that this is in violation of the best evidence rule, and he should be required to return the results of the tested material and the known sample for courtroom comparison.

The chemist further testified that he did not distinguish between cannabis sativa L. and cannabis indicia. (R 292) The Utah Legislature in 1981, changed the definition of marijuana by striking all references to cannabis indicia. The Appellant contends that whereas prior to 1981, Legislature recognized cannabis indicia and then struck it from the statute in 1981, that it becomes incumbent on the State to prove that items admitted into evidence are in fact cannabis sativa L. and not cannabis indicia.

In the case of U.S. v. Lewallen, 385 F.Supp. 1140 (1974), the court took the position that where Congress had not included cannabis indicia as a part of a penal statute, then it was incumbent on the government to prove that the substance was in fact cannabis sativa L. In the case before this Court, however, cannabis indicia was specifically removed from the statute. Therefore, the State must distinguish between the two substances.

POINT IV.

THE COURT DID NOT USE SOUND DISCRETION IN SENTENCING OF THE APPELLANT TO THE STATE PRISON.

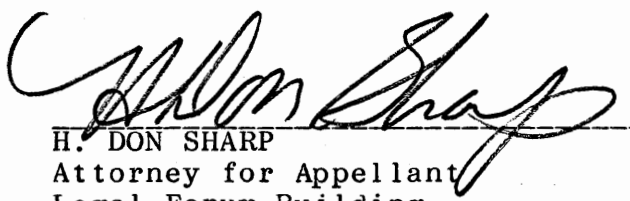
The Appellant was 41 years old when convicted (R 319); he only had two prior misdemeanor convictions, the last one being 14 years ago. (R 319) The only evidence before the Court was that Appellant was not involved in distribution, but only grew for his own use. (R 320) The psychological

tests indicated that Appellant suffered from a possibility of schizophrenia and developing paranoia, and that he needed help. (R 321) We would contend that under these conditions, it was a violation of the Court's sound discretion to impose a prison sentence, and to also deny the Appellant a certificate of probable cause so that he could be admitted to bail pending appeal.

CONCLUSION

Appellant respectfully requests this Court to reverse the trial court and order the charge dismissed.

RESPECTFULLY SUBMITTED this 11th day of June, 1982.



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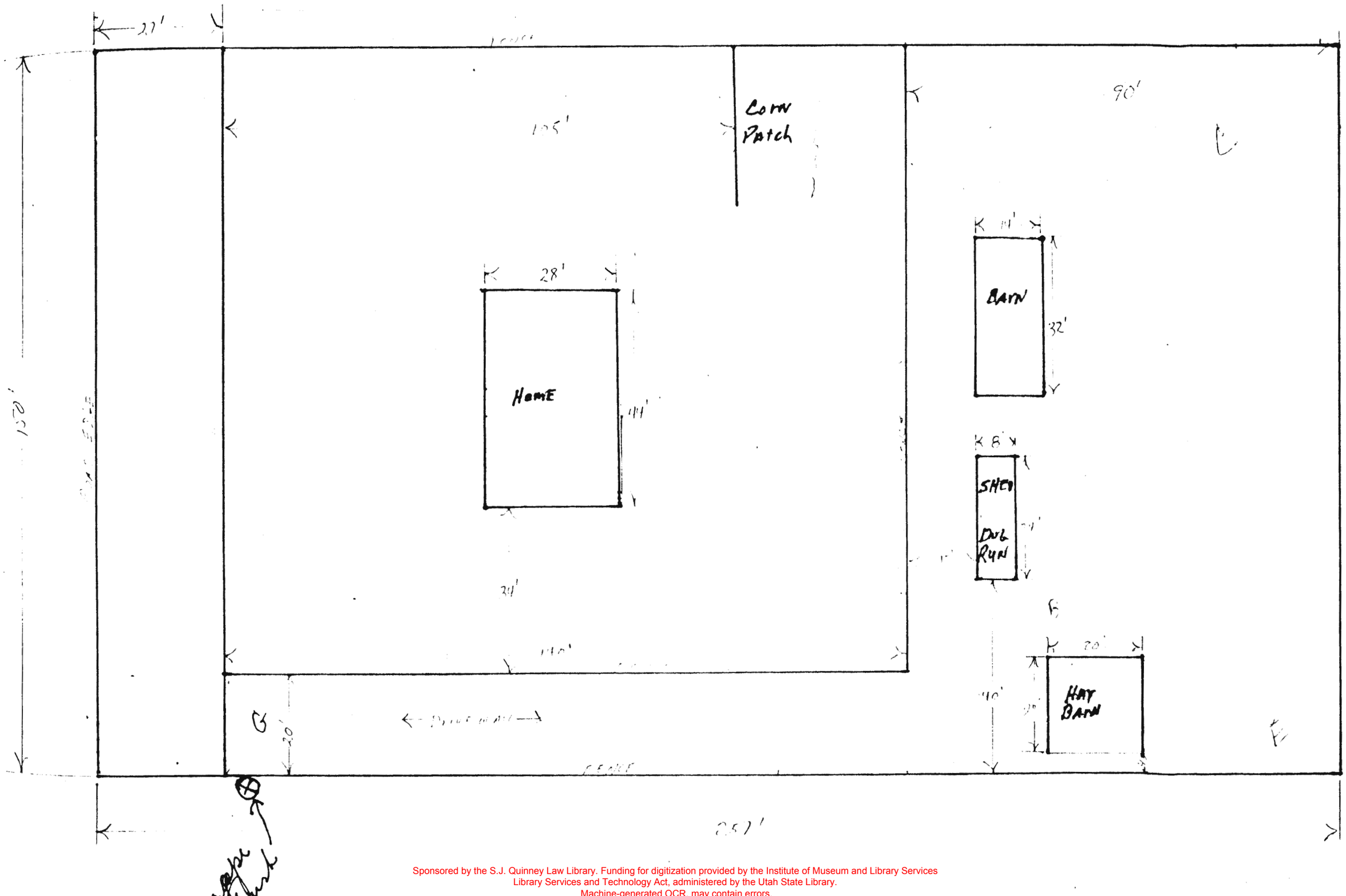
Appendix A

PLAINTIFF'S EXHIBIT
A
14409

Defendant's Exhibit 7
Case No. 14409
Date:
Received: FEB 4 1982

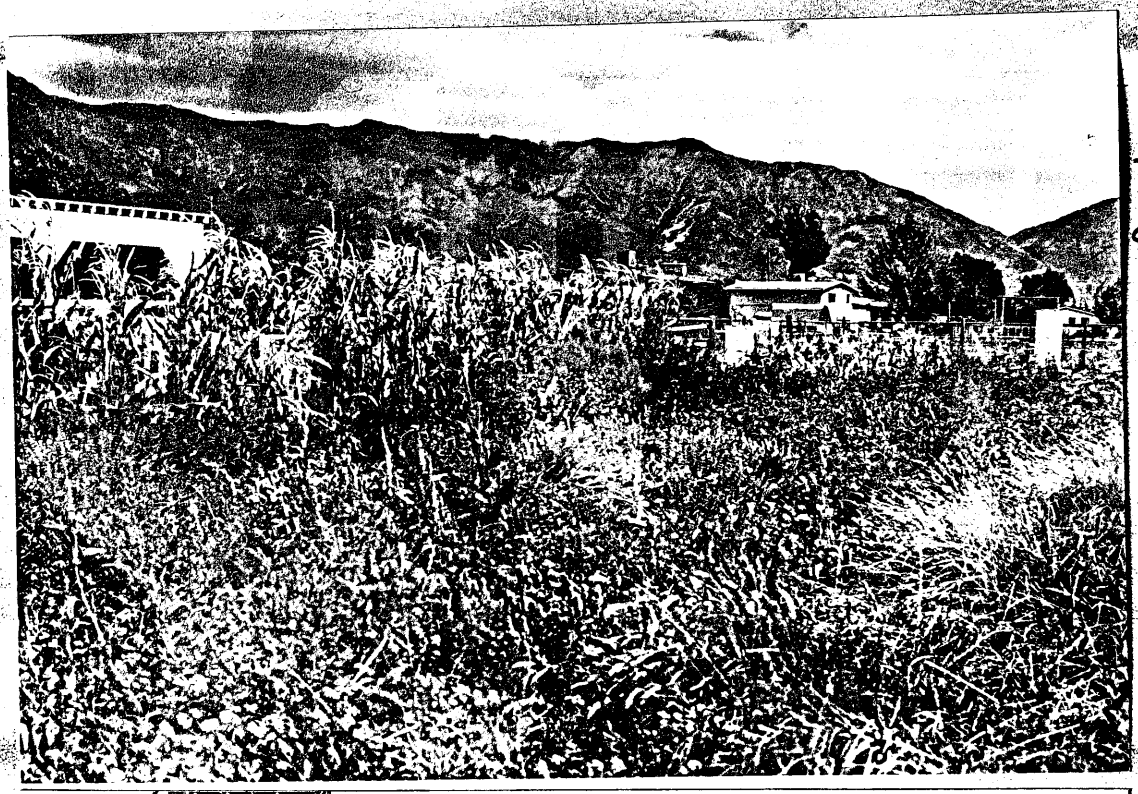


Appendix B

Trial Ex
Suppress E

Trial Ex
Suppress

Appendix "C"



Trial Ex.
Suppress
Ex. E

Trial Ex.
Suppress
Ex. G