

FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

DEC 09 2004

LARAYNE CLEEK, CLERK
BY: *Cherry Paccetti*

TULARE COUNTY SUPERIOR COURT
STATE OF CALIFORNIA
APPELLATE DEPARTMENT

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11 Mark Trinkle, dba Trinkle Ag)
12)
13 Plaintiff, Respondent,)
14 vs.)
15 California Department of Pesticide)
16 Regulation)
17 Respondent, Appellant,)
18)
19 The People of the State of California)
20 and Does 1 to 25,)
21 Real Parties in Interest.)

Case No.: VCL04-100206

DECISION ON APPEAL

21 The Honorable Glade Roper, Presiding Judge of the Appellate Division, and the
22 Honorable Gerald Sevier and the Honorable Joseph Kalashian, sitting by special assignment of
23 the Honorable Ronald George, the Chairperson of the Judicial Council.

24
25 FACTS

26 An administrative hearing was held September 11, 2003 before Dennis C. Plann, Deputy
27 Agricultural Commissioner/Sealer of the Fresno County Department of Agriculture as hearing
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1 officer. At the hearing evidence was presented by Douglas Edwards, Roger L. Taff and Clifford
2 Francone of the Fresno County Department of Agriculture; Steve Schweizer of the Kings County
3 Department of Agriculture; and Mark Trinkle¹, doing business as Trinkle Ag Flying Service. The
4 oral evidence presented at the hearing can be summarized as follows:
5

6 1. Castemagna Farms, was growing onions in a field.

7 2. On January 22, 2003 Petitioner sprayed the herbicide paraquat on a field designated
8 19-1, located a half-mile to the East of the onion field.

9 2. Six days later, January 28, Blair sprayed the herbicide Pursuit on an alfalfa field
10 immediately to the North of the onion field. Gary Minnetti², who works for Castemagna Farms,
11 saw it drift toward his onions and called the Agricultural Commissioner to complain.
12

13 3. January 29th Francone, a Supervising Agricultural/Standards Specialist, met with
14 Minnetti at the onion field and noticed yellowing and spotting of the onions. The yellowing was
15 not necessarily the result of an herbicide.
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17 4. February 5th someone was spraying the field immediately to the East of the onions.
18 Minnite told Francone that it was Petitioner spraying paraquat. Petitioner denied that he sprayed
19 paraquat on that field. Francone collected samples of the plants. Paraquat was found on the
20 plants. The amount found on the onions seems to indicate that spray went from northeast to
21 southwest.
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23 5. No other applications of paraquat were reported in the vicinity of the onions.

24 6. The onions were yellowed or spotted, but grew and were harvested.
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26 ¹Petitioner is incorrectly referred to as "Mark Twinkle, dba Twinkle Ag" in the Decision
Granting Writ filed May 4, 2004.

27 ²The name is spelled as "Minnite" in the transcript of the oral testimony and in reports by
28 Francone at pages 83 and 84 of the certified transcript.

1 from a desire to favor one side against the other. There is nothing in the record to indicate why
2 the wind evidence would have been found to be unreliable or irrelevant.

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4 In considering the proper application of the "substantial evidence" test, the California
5 Supreme Court said in *People v. Johnson*, 26 Cal. 3d 557, 577 (1980):

6 A formulation of the substantial evidence rule which stresses the
7 importance of isolated evidence supporting the judgment, however,
8 risks misleading the court into abdicating its duty to appraise the
9 whole record. As Chief Justice Traynor explained, the "seemingly
10 sensible" substantial evidence rule may be distorted in this fashion,
11 to take "some strange twists." "Occasionally" he observes, "an
12 appellate court affirms the trier of fact on isolated evidence torn
13 from the context of the whole record. Such a court leaps from an
14 acceptable premise, that a trier of fact could reasonably believe the
15 isolated evidence, to the dubious conclusion that the trier of fact
16 reasonably rejected everything that controverted the isolated
17 evidence. Had the appellate court examined the whole record, it
18 might have found that a reasonable trier of fact could not have
19 made the finding in issue. One of the very purposes of review is to
20 uncover just such irrational findings and thus preclude the risk of
21 affirming a finding that should be disaffirmed as a matter of law."
22 (Traynor, *The Riddle of Harmless Error* (1969) p. 27.) (Fns.
23 omitted.)

17 From the entire record the undisputed evidence may be summarized as follows: Trinkle
18 sprayed paraquat a half-mile away, the wind was blowing away from the onions, Blair sprayed
19 Pursuit onto the onions, someone else sprayed paraquat next to the onions on the day they were
20 sampled 15 days later, paraquat was found on the onions, the onions were spotted but not
21 necessarily from an herbicide, Pursuit would not have been detected on the onions. From this the
22 hearing officer concluded that Trinkle sprayed the onions.

24 Assuming that the hearing officer disregarded the wind evidence, the remaining evidence
25 was: Trinkle sprayed paraquat a half-mile away, Blair sprayed Pursuit onto the onions, someone
26 else sprayed paraquat next to the onions on the day they were sampled 15 days later, paraquat
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1 was found on the onions, the onions were spotted but not necessarily from an herbicide, Pursuit
2 would not have been detected on the onions, therefore Trinkle sprayed the onions. We are unable
3 to see from either set of facts how any substantial evidence supports the conclusion that Trinkle
4 sprayed the onions.
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6 The Department argues that the hearsay evidence proffered by Trinkle regarding the
7 detection window of Pursuit should not be accepted "because it was offered at an informal
8 administrative hearing with no lawyers participating (emphasis original)." To the contrary,
9 precisely because it was an informal administrative hearing, hearsay evidence was accepted and
10 considered by the hearing officer. Excluding hearsay evidence would also exclude the original
11 complaint from Minetti, Trinkle's application to apply paraquat and the results of the tests done
12 on the samples. Requiring Trinkle to comply with courtroom evidence rules while allowing the
13 Department to offer hearsay evidence would be manifestly unfair.
14

15 It certainly is possible that spray from Trinkle drifted onto the onions. It is also possible
16 that Blair accidentally or intentionally mixed paraquat with Pursuit when it sprayed next to the
17 onions, or that Blair had failed to properly clean the tanks, or that some unknown nefarious
18 individual intentionally sprayed paraquat onto the onions, or that whoever sprayed paraquat next
19 to the onions on February 5th allowed the spray to drift onto the onions. But mere possibility is
20 not legally sufficient substantial evidence, especially in light of undisputed facts that the wind
21 was blowing away when Trinkle sprayed, and that someone else sprayed paraquat next to the
22 onion field while the investigators were there.
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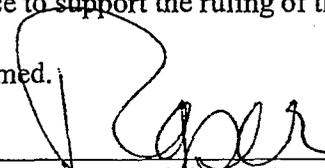
24 By analogy, we can picture an officer called to the location of a dead body with a gunshot
25 wound, and finding a crowd of people standing around, one of whom possesses a smoking gun.
26 It is possible that a man in the next block sitting in his livingroom watching television, with a
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1 gun on the desk next to him, shot the victim rather than the person with a smoking gun next to
2 the body. Further investigation could prove this to be the case. But it stretches the imagination
3 to consider the man in his living room to be the prime suspect, and there is certainly no
4 substantial evidence that he committed the homicide.
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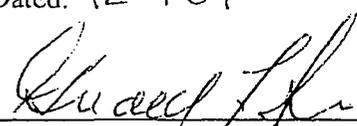
6 The Department next claims that the trial court erred by requiring the Commissioner to
7 investigate unreported paraquat applications, and prove that none occurred. We agree with the
8 Department that the Commissioner should not be required to prove that no other unreported
9 applications of paraquat occurred. However, the record contains evidence that someone sprayed
10 paraquat right next to the onion field on the same day that samples were collected. At a
11 minimum, this negates any presumption that no one else sprayed paraquat in the area. Even
12 more, reports of someone spraying paraquat right next to the onion field is strong evidence that
13 the residue found on the onions more likely came from that spraying than from Trinkle's
14 spraying half a mile away. Nothing in the record indicates why the paraquat found on the onion
15 samples was tied to Trinkle's application rather than the application on the adjoining field.
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18 Considering the record as a whole, we find the Department's conclusion that the paraquat
19 found on the onions came from Trinkle's spray clearly erroneous. The trial court correctly
20 examined the entire record and found no substantial evidence to support the ruling of the hearing
21 officer. The judgement issuing the Writ of Mandate is affirmed.
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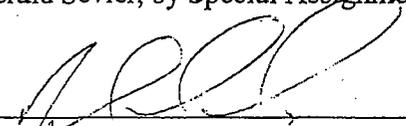
23 Dated: 12-9-04



Glade F. Roper, Presiding Judge

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Gerald Sevier, by Special Assignment

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Joseph Kalashian, by Special Assignment
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