Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

All About Abandonment

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108 S.Ct. 1625
Supreme Court of the United States

CALIFORNIA, Petitioner
v.
Billy GREENWOOD and Dyanne Van Houten.

No. 86–684.
|
Argued Jan. 11, 1988.
|
Decided May 16, 1988.

Synopsis

State appealed from order of the Superior Court which dismissed drug charges against defendants. The California Court of Appeal, 182 Cal.App.3d 729, 227 Cal.Rptr. 539, affirmed, and certiorari was granted. The Supreme Court, Justice White, held that defendants did not have reasonable expectation of privacy protected by the Fourth Amendment in garbage which they placed in opaque bags outside their house for collection by trash collector.

Reversed and remanded.

Justice Brennan dissented and filed an opinion in which Justice Marshall joined.

Justice Kennedy did not participate.

****1626 *35** *Syllabus*[*]

Acting on information indicating that respondent Greenwood might be engaged in narcotics trafficking, police twice obtained from his regular trash collector garbage bags left on the curb in front of his house. On the basis of items in the bags which were indicative of narcotics use, the police obtained warrants to search the house, discovered controlled substances during the searches, and arrested respondents on felony narcotics charges. Finding that probable cause to search the house would not have existed without the evidence obtained from the trash searches, the State Superior Court dismissed the charges under *People v. Krivda,* 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262, which held that warrantless trash searches violate the Fourth Amendment and the California Constitution. Although noting a post-*Krivda* state constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state, but not federal, law, the State Court of Appeal affirmed on the ground that *Krivda* was based on federal, as well as state, law.

Held:

1. The Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home. Pp. 1628–1631.

(a) Since respondents voluntarily left their trash for collection in an area particularly suited for public inspection, their claimed expectation of privacy in the inculpatory items they discarded was not objectively reasonable. It is common knowledge that plastic garbage bags left along a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through it or permitted others, such as the police, to do so. The police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Pp. 1628–1630.

(b) Greenwood's alternative argument that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law under *Krivda,* ***36** which he contends survived the state constitutional amendment, is without merit. The reasonableness of a search for Fourth Amendment purposes does not depend upon privacy concepts embodied in the law of the particular State in which the search occurred; rather, it turns upon the understanding of society as a whole that certain areas deserve the most scrupulous protection from government invasion. There is no such understanding with respect to garbage left for collection at the side of a public street. Pp. 1629–1630.

2. Also without merit is Greenwood's contention that the California constitutional amendment violates the Due Process Clause of the Fourteenth Amendment. Just as this Court's Fourth Amendment exclusionary rule decisions have not required ****1627** suppression where the benefits of deterring minor police misconduct were overbalanced by the societal costs of exclusion, California was not foreclosed by the Due Process Clause from concluding that the benefits of excluding

relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law. P. 1631.

182 Cal.App.3d 729, 227 Cal.Rptr. 539 (1986), reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. ——. KENNEDY, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

Michael J. Pear argued the cause for petitioner. With him on the briefs were *Cecil Hicks* and *Michael R. Capizzi.*

Michael Ian Garey, by appointment of the Court, 484 U.S. 808, argued the cause for respondents and filed a brief for respondent Greenwood. *Richard L. Schwartzberg* filed a brief for respondent Van Houten.*

* Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *John K. Van de Kamp,* Attorney General of California, *Steve White,* Chief Assistant Attorney General, *John H. Sugiyama,* Senior Assistant Attorney General, *Ronald E. Niver* and *Laurence K. Sullivan,* Supervising Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Robert Butterworth* of Florida, *Warren Price III* of Hawaii, *Linley E. Pearson* of Indiana, *David L. Armstrong* of Kentucky, *Hubert H. Humphrey III* of Minnesota, *LeRoy S. Zimmerman* of Pennsylvania, *Travis Medlock* of South Carolina, *W.J. Michael Cody* of Tennessee, *Kenneth O. Eikenberry* of Washington, *Donald J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming; and for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump, Courtney A. Evans, Daniel B. Hales,* and *Jack E. Yelverton.*

Opinion

***37** Justice WHITE delivered the opinion of the Court.

The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.

I

In early 1984, Investigator Jenny Stracner of the Laguna Beach Police Department received information indicating that respondent Greenwood might be engaged in narcotics trafficking. Stracner learned that a criminal suspect had informed a federal drug enforcement agent in February 1984 that a truck filled with illegal drugs was en route to the Laguna Beach address at which Greenwood resided. In addition, a neighbor complained of heavy vehicular traffic late at night in front of Greenwood's single-family home. The neighbor reported that the vehicles remained at Greenwood's house for only a few minutes.

Stracner sought to investigate this information by conducting a surveillance of Greenwood's home. She observed several vehicles make brief stops at the house during the late-night and early morning hours, and she followed a truck from the house to a residence that had previously been under investigation as a narcotics-trafficking location.

On April 6, 1984, Stracner asked the neighborhood's regular trash collector to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood's house, and turned the bags over to Stracner. The officer searched through the rubbish ***38** and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood's home.

Police officers encountered both respondents at the house later that day when they arrived to execute the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges. They subsequently posted bail.

The police continued to receive reports of many late-night visitors to the Greenwood house. On May 4, Investigator Robert Rahaeuser obtained Greenwood's garbage from the regular trash collector in the same manner as had Stracner. The garbage again contained evidence of narcotics use.

Rahaeuser secured another search warrant for Greenwood's home based on the information from the second trash search. The police found more narcotics and evidence of narcotics trafficking when they **1628 executed the warrant. Greenwood was again arrested.

The Superior Court dismissed the charges against respondents on the authority of *People v. Krivda,* 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971), which held that warrantless trash searches violate the Fourth Amendment and the California Constitution. The court found that the police would not have had probable cause to search the Greenwood home without the evidence obtained from the trash searches.

The Court of Appeal affirmed. 182 Cal.App.3d 729, 227 Cal.Rptr. 539 (1986). The court noted at the outset that the fruits of warrantless trash searches could no longer be suppressed if *Krivda* were based only on the California Constitution, because since 1982 the State has barred the suppression of evidence seized in violation of California law but not federal law. See Cal. Const., Art. I, § 28(d); *In re Lance W.,* 37 Cal.3d 873, 210 Cal.Rptr. 631, 694 P.2d 744 (1985). But *Krivda,* a decision binding on the Court of Appeal, also held that the fruits of warrantless trash searches were to be excluded under federal *39 law. Hence, the Superior Court was correct in dismissing the charges against respondents. 182 Cal.App.3d, at 735, 227 Cal.Rptr. at 542.[1]

The California Supreme Court denied the State's petition for review of the Court of Appeal's decision. We granted certiorari, 483 U.S. 1019, 107 S.Ct. 3260, 97 L.Ed.2d 760 and now reverse.

II

The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable. *O'Connor v. Ortega,* 480 U.S. 709, 715, 107 S.Ct. 1492, 1496, 94 L.Ed.2d 714 (1987); *California v. Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986); *Oliver v. United States,* 466 U.S. 170, 177, 104 S.Ct. 1735, 1740, 80 L.Ed.2d 214 (1984); *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Respondents do not disagree with this standard.

They assert, however, that they had, and exhibited, an expectation of privacy with respect to the trash that was searched by the police: The trash, which was placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump. The trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone.

It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, *40 however, unless society is prepared to accept that expectation as objectively reasonable.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals,[2] children, scavengers, **1629 [3] snoops,[4] and other members of the public. See *Krivda, supra,* 5 Cal.3d, at 367, 96 Cal.Rptr., at 69, 486 P.2d, at 1269. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for *41 public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," *United States v. Reicherter,* 647 F.2d 397, 399 (CA3 1981), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States, supra,* 389 U.S. at 351, 88 S.Ct., at 511. We held in *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), for example, that the police did not violate the Fourth Amendment by causing a pen register to be installed at the telephone company's offices to record the telephone numbers dialed by a criminal suspect. An individual has no legitimate expectation of privacy in the numbers dialed on his telephone, we reasoned, because he voluntarily conveys those numbers

to the telephone company when he uses the telephone. Again, we observed that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.,* at 743–744, 99 S.Ct., at 2582.

Similarly, we held in *California v. Ciraolo, supra,* that the police were not required by the Fourth Amendment to obtain a warrant before conducting surveillance of the respondent's fenced backyard from a private plane flying at an altitude of 1,000 feet. We concluded that the respondent's expectation that his yard was protected from such surveillance was unreasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.,* 476 U.S., at 213–214, 106 S.Ct., at 1813.

Our conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeals. See *United States v. Dela Espriella,* ***42** 781 F.2d 1432, 1437 (CA9 1986); *United States v. O'Bryant,* 775 F.2d 1528, 1533–1534 (CA11 1985); *United States v. Michaels,* 726 F.2d 1307, 1312–1313 (CA8), cert. denied, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984); *United States v. Kramer,* 711 F.2d 789, 791–794 (CA7), cert. denied, 464 U.S. 962, 104 S.Ct. 397, 78 L.Ed.2d 339 (1983); *United States v. Terry,* 702 F.2d 299, 308–309 (CA2), cert. denied ****1630** *sub nom. Williams v. United States,* 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983); *United States v. Reicherter, supra,* at 399; *United States v. Vahalik,* 606 F.2d 99, 100–101 (CA5 1979) (*per curiam*), cert. denied, 444 U.S. 1081, 100 S.Ct. 1034, 62 L.Ed.2d 765 (1980); *United States v. Crowell,* 586 F.2d 1020, 1025 (CA4 1978), cert. denied, 440 U.S. 959, 99 S.Ct. 1500, 59 L.Ed.2d 772 (1979); *Magda v. Benson,* 536 F.2d 111, 112–113 (CA6 1976) *(per curiam); United States v. Mustone,* 469 F.2d 970, 972–974 (CA1 1972). In *United States v. Thornton,* 241 U.S.App.D.C. 46, 56, and n. 11, 746 F.2d 39, 49, and n. 11 (1984), the court observed that "the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilege [*sic*] thereof." In addition, of those state appellate courts that have considered the issue, the vast majority have held that the police may conduct warrantless searches and seizures of garbage discarded in public areas. See *Commonwealth v. Chappee,* 397 Mass. 508, 512–513, 492 N.E.2d 719, 721–722 (1986); *Cooks v. State,* 699 P.2d 653, 656 (Okla.Crim.), cert. denied, 474 U.S. 935, 106 S.Ct. 268, 88 L.Ed.2d 275 (1985); *State v. Stevens,* 123 Wis.2d 303, 314–317, 367 N.W.2d 788, 794–797, cert. denied, 474 U.S. 852, 106 S.Ct. 151, 88 L.Ed.2d 125 (1985); *State v. Ronngren,* 361 N.W.2d 224, 228–230 (N.D.1985); *State v. Brown,* 20 Ohio App.3d 36, 37–38, 484 N.E.2d 215, 217–218 (1984); *State v. Oquist,* 327 N.W.2d 587 (Minn.1982); *People v. Whotte,* 113 Mich.App. 12, 317 N.W.2d 266 (1982); *Commonwealth v. Minton,* 288 Pa.Super. 381, 391, 432 A.2d 212, 217 (1981); *State v. Schultz,* 388 So.2d 1326 (Fla.App.1980); *People v. Huddleston,* 38 Ill.App.3d 277, 347 N.E.2d 76 (1976); *Willis v. State,* 518 S.W.2d 247, 249 (Tex.Crim.App.1975); *Smith v. State,* 510 P.2d 793 (Alaska), cert. denied, ***43** 414 U.S. 1086, 94 S.Ct. 603, 38 L.Ed.2d 489 (1973); *State v. Fassler,* 108 Ariz. 586, 592–593, 503 P.2d 807, 813–814 (1972); *Croker v. State,* 477 P.2d 122, 125–126 (Wyo.1970); *State v. Purvis,* 249 Ore. 404, 411, 438 P.2d 1002, 1005 (1968). But see *State v. Tanaka,* 67 Haw. 658, 701 P.2d 1274 (1985); *People v. Krivda,* 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971).[5]

III

We reject respondent Greenwood's alternative argument for affirmance: that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law. He urges that the state-law right of Californians to privacy in their garbage, announced by the California Supreme Court in *Krivda, supra,* survived the subsequent state constitutional amendment eliminating the suppression remedy as a means of enforcing that right. See *In re Lance W.,* 37 Cal.3d, at 886–887, 210 Cal.Rptr., at 639–640, 694 P.2d, at 752–753. Hence, he argues that the Fourth Amendment should itself vindicate that right.

Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs. We have emphasized instead that the Fourth Amendment analysis must turn on such factors as "our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver v. United States,* 466 U.S., at 178, 104 S.Ct., at 1741 (emphasis added). See also *Rakas v. Illinois,* 439 U.S. 128, 143–144, n. 12, 99 S.Ct. 421, 430–431,

n. 12, 58 L.Ed.2d 387 (1978). We have already concluded that society as a whole possesses no such un ****1631** derstanding ***44** with regard to garbage left for collection at the side of a public street. Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.

IV

Greenwood finally urges as an additional ground for affirmance that the California constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state but not federal law violates the Due Process Clause of the Fourteenth Amendment. In his view, having recognized a state-law right to be free from warrantless searches of garbage, California may not under the Due Process Clause deprive its citizens of what he describes as "the only effective deterrent" to violations of this right. Greenwood concedes that no direct support for his position can be found in the decisions of this Court. He relies instead on cases holding that individuals are entitled to certain procedural protections before they can be deprived of a liberty or property interest created by state law. See *Hewitt v. Helms,* 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).

We see no merit in Greenwood's position. California could amend its Constitution to negate the holding in *Krivda* that state law forbids warrantless searches of trash. We are convinced that the State may likewise eliminate the exclusionary rule as a remedy for violations of that right. At the federal level, we have not required that evidence obtained in violation of the Fourth Amendment be suppressed in all circumstances. See, *e.g., United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *United States v. Janis,* 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Rather, our decisions concerning the scope of the Fourth Amendment exclusionary rule have balanced the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity. See *Leon,* 468 U.S., at 908–913, 104 S.Ct., at 3412–3415. We ***45** have declined to apply the exclusionary rule indiscriminately "when law enforcement officers have acted in objective good faith or their transgressions have been minor," because "the magnitude of the benefit conferred on ... guilty defendants [in such circumstances] offends basic concepts of the criminal justice system." *Id.,* at 908, 104 S.Ct. at 3412 (citing *Stone v. Powell,* 428 U.S. 465, 490, 96 S.Ct. 3037, 3050, 49 L.Ed.2d 1067 (1976)).

The States are not foreclosed by the Due Process Clause from using a similar balancing approach to delineate the scope of their own exclusionary rules. Hence, the people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law.

V

The judgment of the California Court of Appeal is therefore reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Every week for two months, and at least once more a month later, the Laguna Beach police clawed through the trash that respondent Greenwood left in opaque, sealed bags on the curb outside his home. Record 113. Complete strangers minutely scrutinized their bounty, undoubtedly dredging up intimate details of Greenwood's private life and habits. The intrusions proceeded without a warrant, and no court before or since has concluded that the police acted on probable cause to believe ****1632** Greenwood was engaged in any criminal activity.

Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior. I suspect, therefore, ***46** that members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public.

I

"A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." *United States v. Jacobsen,* 466 U.S. 109, 120, n. 17, 104 S.Ct. 1652, 1660, n. 17, 80 L.Ed.2d 85 (1984) (citations omitted). Thus, as the Court observes, if Greenwood had a reasonable expectation that the contents of the bags that he placed on the curb would remain private, the warrantless search of those bags violated the Fourth Amendment. *Ante,* at ——.

The Framers of the Fourth Amendment understood that "unreasonable searches" of "paper[s] and effects"—no less than "unreasonable searches" of "person[s] and houses"—infringe privacy. As early as 1878, this Court acknowledged that the contents of "[l]etters and sealed packages ... in the mail are as fully guarded from examination and inspection ... as if they were retained by the parties forwarding them in their own domiciles." *Ex parte Jackson,* 96 U.S. (6 Otto) 727, 733, 24 L.Ed. 877. In short, so long as a package is "closed against inspection," the Fourth Amendment protects its contents, "wherever they may be," and the police must obtain a warrant to search it just "as is required when papers are subjected to search in one's own household." *Ibid.* Accord, *United States v. Van Leeuwen,* 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).

With the emergence of the reasonable-expectation-of-privacy analysis, see *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring); *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979), we have reaffirmed this fundamental principle. In *Robbins v. California,* 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), for example, Justice Stewart, writing for a plurality of four, pronounced that "unless the container is such that its contents may be said to be in plain view, those contents are fully ***47** protected by the Fourth Amendment," *id.,* at 427, 101 S.Ct., at 2846, and soundly rejected any distinction for Fourth Amendment purposes among various opaque, sealed containers:

> "[E]ven if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase, another may put into a paper bag.... And ... no court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffelbag, or box." *Id.,* at 426–427, 101 S.Ct., at 2846.

See also *id.,* at 428, 101 S.Ct., at 2847 (expectation of privacy attaches to any container unless it "so clearly announce[s] its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer"). With only one exception, every Justice who wrote in that case eschewed any attempt to distinguish "worthy" from "unworthy" containers.[1]

****1633** More recently, in *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), the Court, relying on the "virtually unanimous agreement ***48** in *Robbins* ... that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper," held that a distinction among "paper bags, locked trunks, lunch buckets, and orange crates" would be inconsistent with

> "the central purpose of the Fourth Amendment.... [A] traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.
>
> "As Justice Stewart stated in *Robbins,* the Fourth Amendment provides protection to the owner of *every container that conceals its contents from plain view.*" *Id.,* at 822–823, 102 S.Ct., at 2171–2172 (emphasis added; footnote and citation omitted).

See also *Jacobsen, supra,* 466 U.S., at 129, 104 S.Ct., at 1664 (opinion of WHITE, J.).

Accordingly, we have found a reasonable expectation of privacy in the contents of a 200–pound "double-locked footlocker," *United States v. Chadwick,* 433 U.S. 1, 11, 97 S.Ct. 2476, 2483, 53 L.Ed.2d 538 (1977); a "comparatively small, unlocked suitcase," *Arkansas v. Sanders,* 442 U.S. 753, 762, n. 9, 99 S.Ct. 2586, 2592, n. 9, 61 L.Ed.2d 235 (1979); a "totebag," *Robbins,* 453 U.S., at 422, 101 S.Ct., at 2844; and "packages wrapped in green opaque plastic," *ibid.* See also *Ross, supra,* 456 U.S., at 801, 822–823, 102 S.Ct., at 2160, 2171–2172 (suggesting that a warrant would have been required to search a " 'lunch-type' brown paper bag" and a "zippered red leather pouch" had they not been found in an automobile); *Jacobsen, supra,* 466 U.S., at 111, 114–115, 104 S.Ct. at 1655, 1656–1657 (suggesting that a warrantless search of an "ordinary cardboard box wrapped in brown paper" would have violated the Fourth Amendment had a private party not already opened it).

Our precedent, therefore, leaves no room to doubt that had respondents been carrying their personal effects in opaque, sealed plastic bags—identical to the ones they placed on the curb—their privacy would have been protected from warrantless police intrusion. So far as Fourth Amendment protection is concerned, opaque plastic bags are every bit as ***49** worthy as "packages wrapped in green opaque plastic" and "double-locked footlocker[s]." Cf. *Robbins, supra,* 453 U.S., at 441, 101 S.Ct., at 2854 (REHNQUIST, J., dissenting) (objecting to Court's discovery of reasonable expectation of privacy in contents of "two plastic garbage bags").

II

Respondents deserve no less protection just because Greenwood used the bags to discard rather than to transport his personal effects. Their contents are not inherently any less private, and Greenwood's decision to discard them, at least in the manner in which he did, does not diminish his expectation of privacy.[2]

***50** ****1634** A trash bag, like any of the above-mentioned containers, "is a common repository for one's personal effects" and, even more than many of them, is "therefore ... inevitably associated with the expectation of privacy." *Sanders, supra,* 442 U.S., at 762, 99 S.Ct., at 2592 (citing *Chadwick, supra,* 433 U.S., at 13, 97 S.Ct., at 2484). "[A]lmost every human activity ultimately manifests itself in waste products...." *Smith v. State,* 510 P.2d 793, 798 (Alaska), cert. denied, 414 U.S. 1086, 94 S.Ct. 603, 38 L.Ed.2d 489 (1973). See *California v. Rooney,* 483 U.S. 307, 320–321, n. 3, 107 S.Ct. 2852, 2859, n. 3, 97 L.Ed.2d 258 (1987) (WHITE, J., dissenting) (renowned archaeologist Emil Haury once said, "[i]f you want to know what is really going on in a community, look at its garbage") (quoted by W. Rathje, Archaeological Ethnography ... Because Sometimes It Is Better to Give Than to Receive, in Explorations in Ethnoarchaeology 49, 54 (R. Gould ed. 1978)); Weberman, The Art of Garbage Analysis: You Are What You Throw Away, 76 Esquire 113 (1971) (analyzing trash of various celebrities and drawing conclusions about their private lives). A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,' " which the Fourth Amendment is designed ***51** to protect. *Oliver v. United States,* 466 U.S. 170, 180, 104 S.Ct. 1735, 1742, 80 L.Ed.2d 214 (1984) (quoting *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)). See also *United States v. Dunn,* 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987).

The Court properly rejects the State's attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy. As the author of the Court's opinion observed last Term, a defendant's "property interest [in trash] does not settle the matter for Fourth Amendment purposes, for the reach of the Fourth Amendment is not determined by ****1635** state property law." *Rooney, supra,* 483 U.S., at 320, 107 S.Ct., at 2858 (WHITE, J., dissenting). In evaluating the reasonableness of Greenwood's expectation that his sealed trash bags would not be invaded, the Court has held that we must look to "understandings that are recognized and permitted by society."[3] Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives. See *State v. Schultz,* 388 So.2d 1326, 1331 (Fla.App.1980) (Anstead, J., dissenting). That was, quite naturally, the reaction to the sole incident on which the Court bases its conclusion that "snoops" and the like defeat the expectation of privacy in trash. *Ante,* at 1628, and n. 4. When a tabloid reporter examined then-Secretary of State ***52** Henry Kissinger's trash and published his findings, Kissinger was "really revolted" by the intrusion and his wife suffered "grave anguish." N.Y. Times, July 9, 1975, p. A1, col. 8. The public response roundly condemning the reporter demonstrates that society not only recognized those reactions as reasonable, but shared them as well. Commentators variously characterized his conduct as "a disgusting invasion of personal privacy," Flieger, Investigative Trash, U.S. News & World Report, July 28, 1975, p. 72 (editor's page); "indefensible ... as civilized behavior," Washington Post, July 10, 1975, p. A18, col. 1 (editorial); and contrary to "the way decent people behave in relation to each other," *ibid.*

Beyond a generalized expectation of privacy, many municipalities, whether for reasons of privacy, sanitation, or both, reinforce confidence in the integrity of sealed

trash containers by "prohibit[ing] anyone, except authorized employees of the Town ..., to rummage into, pick up, collect, move or otherwise interfere with articles or materials placed on ... any public street for collection." *United States v. Dzialak,* 441 F.2d 212, 215 (CA2 1971) (paraphrasing ordinance for town of Cheektowaga, New York). See also *United States v. Vahalik,* 606 F.2d 99, 100 (CA5 1979) (*per curiam*); *Magda v. Benson,* 536 F.2d 111, 112 (CA6 1976) (*per curiam*); *People v. Rooney,* 175 Cal.App.3d 634, 645, 221 Cal.Rptr. 49, 56 (1985), cert. dism'd, 483 U.S. 307, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987); *People v. Krivda,* 5 Cal.3d 357, 366, 96 Cal.Rptr. 62, 68, 486 P.2d 1262, 1268 (1971), vacated and remanded, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972); *State v. Brown,* 20 Ohio App.3d 36, 38, n. 3, 484 N.E.2d 215, 218, n. 3 (1984). In fact, the California Constitution, as interpreted by the State's highest court, guarantees a right of privacy in trash vis-à-vis government officials. See *Krivda, supra* (recognizing right); *In re Lance W.,* 37 Cal.3d 873, 886–887, 210 Cal.Rptr. 631, 639–640, 694 P.2d 744, 752–753 (1985) (later constitutional amendment abolished exclusionary remedy but left intact the substance of the right).

***53** That is not to deny that isolated intrusions into opaque, sealed trash containers occur. When, acting on their own, "animals, children, scavengers, snoops, [or] other members of the public," *ante,* at 1628 (footnotes omitted), *actually* rummage through a bag of trash and expose its contents to plain view, "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that ****1636** could have been observed by any member of the public," *ante,* at 1629. That much follows from cases like *Jacobsen,* 466 U.S., at 117, 120, n. 17, 104 S.Ct., at 1658, 1660, n. 7 (emphasis added), which held that police may constitutionally inspect a package whose "integrity" a private carrier has *already* "compromised," because "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not *already* been frustrated"; and *California v. Ciraolo,* 476 U.S. 207, 213–214, 106 S.Ct. 1809, 1813, 90 L.Ed.2d 210 (1986) (emphasis added), which held that the Fourth Amendment does not prohibit police from observing what "[a]ny member of the public flying in this airspace who glanced down *could* have seen."

Had Greenwood flaunted his intimate activity by strewing his trash all over the curb for all to see, or had some nongovernmental intruder invaded his privacy and done the same, I could accept the Court's conclusion that an expectation of privacy would have been unreasonable. Similarly, had police searching the city dump run across incriminating evidence that, despite commingling with the trash of others, still retained its identity as Greenwood's, we would have a different case. But all that Greenwood "exposed ... to the public," *ante,* at 1628, were the exteriors of several opaque, sealed containers. Until the bags were opened by police, they hid their contents from the public's view every bit as much as did Chadwick's double-locked footlocker and Robbins' green, plastic wrapping. Faithful application of the warrant requirement does not require police to "avert their eyes from evidence of criminal activity that could have been observed by any member of the public." Rather, it only requires them ***54** to adhere to norms of privacy that members of the public plainly acknowledge.

The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone. "What a person ... seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected." *Katz,* 389 U.S., at 351–352, 88 S.Ct., at 511. We have therefore repeatedly rejected attempts to justify a State's invasion of privacy on the ground that the privacy is not absolute. See *Chapman v. United States,* 365 U.S. 610, 616–617, 81 S.Ct. 776, 779–780, 5 L.Ed.2d 828 (1961) (search of a house invaded tenant's Fourth Amendment rights even though landlord had authority to enter house for some purposes); *Stoner v. California,* 376 U.S. 483, 487–490, 84 S.Ct. 889, 891–893, 11 L.Ed.2d 856 (1964) (implicit consent to janitorial personnel to enter motel room does not amount to consent to police search of room); *O'Connor v. Oretega,* 480 U.S. 709, 717, 107 S.Ct. 1492, 1497, 94 L.Ed.2d 714 (1987) (a government employee has a reasonable expectation of privacy in his office, even though "it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office"). As Justice SCALIA aptly put it, the Fourth Amendment protects "privacy ... not solitude." *O'Connor, supra,* at 730, 107 S.Ct., at 1504 (opinion concurring in judgment).

Nor is it dispositive that "respondents placed their refuse at the curb for the express purpose of conveying it to

a third party, ... who might himself have sorted through respondents' trash or permitted others, such as the police, to do so." *Ante,* at 1629. In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance ***55** commanded him to do so, Orange County Code § 4–3–45(a) (1986) (must "remov[e] from the ****1637** premises at least once each week" all "solid waste created, produced or accumulated in or about [his] dwelling house"), and prohibited him from disposing of it in any other way, see Orange County Code § 3–3–85 (1988) (burning trash is unlawful). Unlike in other circumstances where privacy is compromised, Greenwood could not "avoid exposing personal belongings ... by simply leaving them at home." *O'Connor, supra,* at 725, 107 S.Ct., at 1502. More importantly, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the "express purpose" of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to "sor[t] through" the personal effects entrusted to them, "or permi[t] others, such as police to do so." Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance. See *Ex parte Jackson,* 96 U.S. (6 Otto) 727, 24 L.Ed. 877 (1878); *United States v. Van Leeuwen,* 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970); *United States v. Jacobsen, supra* (1984).[4]

III

In holding that the warrantless search of Greenwood's trash was consistent with the Fourth Amendment, the Court paints a grim picture of our society. It depicts a society in which local authorities may command their citizens to dispose of their personal effects in the manner least protective of the ***56** "sanctity of [the] home and the privacies of life," *Boyd v. United States,* 116 U.S., at 630, 6 S.Ct. at 532, and then monitor them arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual's expectation of privacy in the most private of personal effects sealed in an opaque container and disposed of in a manner designed to commingle it imminently and inextricably with the trash of others. *Ante,* at 1628. The American society with which I am familiar "chooses to dwell in reasonable security and freedom from surveillance," *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948), and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge.

I dissent.

All Citations

486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30, 56 USLW 4409

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Court of Appeal also held that respondent Van Houten had standing to seek the suppression of evidence discovered during the April 4 search of Greenwood's home. 182 Cal.App.3d, at 735, 227 Cal.Rptr., at 542–543.

2 For example, *State v. Ronngren,* 361 N.W.2d 224 (N.D.1985), involved the search of a garbage bag that a dog, acting "at the behest of no one," *id.,* at 228, had dragged from the defendants' yard into the yard of a neighbor. The neighbor deposited the bag in his own trash can, which he later permitted the police to search. The North Dakota Supreme Court held that the search of the garbage bag did not violate the defendants' Fourth Amendment rights.

3 It is not only the homeless of the Nation's cities who make use of others' refuse. For example, a nationally syndicated consumer columnist has suggested that apartment dwellers obtain cents-off coupons by "mak[ing] friends with the fellow who handles the trash" in their buildings, and has recounted the tale of "the 'Rich lady' from Westmont who once a week puts on rubber gloves and hip boots and wades into the town garbage dump looking for labels and other proofs of purchase" needed to obtain manufacturers' refunds. M. Sloane, "The Supermarket Shopper's" 1980 Guide to Coupons and Refunds 74, 161 (1980).

4 Even the refuse of prominent Americans has not been invulnerable. In 1975, for example, a reporter for a weekly tabloid seized five bags of garbage from the sidewalk outside the home of Secretary of State Henry Kissinger. Washington Post, July 9, 1975, p. A1, col. 8. A newspaper editorial criticizing this journalistic "trash-picking" observed that "[e]vidently ... 'everybody does it.' " Washington Post, July 10, 1975, p. A18, col. 1. We of course do not, as the dissent implies, "bas[e] [our] conclusion" that individuals have no reasonable expectation of privacy in their garbage on this "sole incident." *Post,* at 1634.

5 Given that the dissenters are among the tiny minority of judges whose views are contrary to ours, we are distinctly unimpressed with the dissent's prediction that "society will be shocked to learn" of today's decision. *Post,* at 1632.

1 See 453 U.S., at 436, 101 S.Ct., at 2851 (BLACKMUN, J., dissenting); *id.,* at 437, 101 S.Ct., at 2851 (REHNQUIST, J., dissenting); *id.,* at 444, 101 S.Ct., at 2855 (STEVENS, J., dissenting). But see *id.,* at 433–434, 101 S.Ct., at 2849–2850 (Powell, J., concurring in judgment) (rejecting position that all containers, even "the most trivial," like "a cigarbox or a Dixie cup," are entitled to the same Fourth Amendment protection). Cf. *New York v. Belton,* 453 U.S. 454, 460–461, n. 4, 101 S.Ct. 2860, 2864, n. 4, 69 L.Ed.2d 768 (1981) (defining "container," for purposes of search incident to a lawful custodial arrest, as "any object capable of holding another object," including "luggage, boxes, bags, clothing, and the like").

In addition to finding that Robbins had a reasonable expectation of privacy in his duffelbag and plastic-wrapped packages, the Court also held that the automobile exception to the warrant requirement, see *Carroll v. United States,* 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925), did not apply to packages found in an automobile. The Court overruled the latter determination in *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), but reaffirmed that where, as here, the automobile exception is inapplicable, police may not conduct a warrantless search of any container that conceals its contents.

2 Both to support its position that society recognizes no reasonable privacy interest in sealed, opaque trash bags and to refute the prediction that "society will be shocked to learn" of that conclusion, *supra,* at 1632, the Court relies heavily upon a collection of lower court cases finding no Fourth Amendment bar to trash searches. But the authority that leads the Court to be "distinctly unimpressed" with our position, *ante,* at 1630, n. 5, is itself impressively undistinguished. Of 11 Federal Court of Appeals cases cited by the Court, at least 2 are factually or legally distinguishable, see *United States v. O'Bryant,* 775 F.2d 1528, 1533–1534 (CA11 1985) (police may search an apparently valuable briefcase "discarded next to an overflowing trash bin on a busy city street"); *United States v. Thornton,* 241 U.S.App.D.C. 46, 56, 746 F.2d 39, 49 (1984) (reasonable federal agents could believe in good faith that a trash search is legal), and 7 rely entirely or almost entirely on an abandonment theory that, as noted *infra,* at 1629, the Court has discredited, see *United States v. Dela Espriella,* 781 F.2d 1432, 1437 (CA9 1986) ("The question, then, becomes whether placing garbage for collection constitutes abandonment of property"); *United States v. Terry,* 702 F.2d 299, 308–309 (CA2) ("[T]he circumstances in this case clearly evidence abandonment by Williams of his trash"), cert. denied *sub nom. Williams v. United States,* 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983); *United States v. Reicherter,* 647 F.2d 397, 399 (CA3 1981) ("[T]he placing of trash in garbage cans at a time and place for anticipated collection by public employees for hauling to a public dump signifies abandonment"); *United States v. Vahalik,* 606 F.2d 99, 100–101 (CA5 1979) (*per curiam*) ("[T]he act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection"), cert. denied, 444 U.S. 1081, 100 S.Ct. 1034, 62 L.Ed.2d 765 (1980); *United States v. Crowell,* 586 F.2d 1020, 1025 (CA4 1978) ("The act of placing [garbage] for collection is an act of abandonment and what happens to it thereafter is not within the protection of the fourth amendment"), cert. denied, 440 U.S. 959, 99 S.Ct. 1500, 59 L.Ed.2d 772 (1979); *Magda v. Benson,* 536 F.2d 111, 112 (CA6 1976) (*per curiam*) ("[F]ederal case law ... holds that garbage ... is abandoned and no longer protected by the Fourth Amendment"); *United States v. Mustone,* 469 F.2d 970, 972 (CA1 1972) (when defendant "deposited the bags on the sidewalk he abandoned them"). A reading of the Court's collection of state-court cases reveals an equally unimpressive pattern.

3 *Rakas v. Illinois,* 439 U.S. 128, 143–144, n. 12, 99 S.Ct. 421, 430–431, n. 12, 58 L.Ed.2d 387 (1978). See *ante,* at 1631 ("[T]he Fourth Amendment analysis must turn on such factors as 'our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion' ") (quoting *Oliver v. United States,* 466 U.S. 170, 178, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984)); *Robbins v. California,* 453 U.S. 420, 428, 101 S.Ct. 2841, 2846, 69 L.Ed.2d 744 (1981) (plurality opinion) ("Expectations of privacy are established by general social norms"); *Dow Chemical Co. v. United States,* 476 U.S. 227, 248, 106 S.Ct. 1819, 1832, 90 L.Ed.2d 226 (1986) (opinion of Powell, J.); Bush & Bly,

Expectation of Privacy Analysis and Warrantless Trash Reconnaissance after *Katz v. United States,* 23 Ariz.L.Rev. 283, 293 (1981) ("[S]ocial custom ... serves as the most basic foundation of a great many legitimate privacy expectations") (citation omitted).

4 To be sure, statutes criminalizing interference with the mails might reinforce the expectation of privacy in mail, see, *e.g.,* 18 U.S.C. §§ 1701–1705, 1708, but the expectation of privacy in no way depends on statutory protection. In fact, none of the cases cited in the text even mention such statutes in finding Fourth Amendment protection in materials handed over to public or private carriers for delivery.

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421 Mass. 37
Supreme Judicial Court of Massachusetts,
Middlesex.

COMMONWEALTH
v.
KRISCO CORP. (and
eleven companion cases[1]).

Argued April 3, 1995.
|
Decided Aug. 2, 1995.

Synopsis

Defendant operators of auto body and paint shop moved to suppress evidence seized from dumpster on their commercial premises. The Superior Court, Middlesex County, Gorgon L. Doerfer, J., granted motion, and Commonwealth's application for interlocutory appeal was allowed by Lynch, J. Transferring case from Appeals Court on its own initiative, the Supreme Judicial Court, Liacos, C.J., held that: (1) defendants enjoyed constitutionally protected expectation of privacy in dumpster; (2) consent to search of dumpster was not voluntary; and (3) search of dumpster was not justified by exigent circumstances.

Affirmed.

Attorneys and Law Firms

****580** ***38** Martin E. Levin, Asst. Atty. Gen., for the Com.

Morris M. Goldings, Boston (Amy J. Axelrod, with him), for defendants.

Before LIACOS, C.J., and WILKINS, ABRAMS and O'CONNOR, JJ.

Opinion

LIACOS, Chief Justice.

The defendants, Krisco Corp. and Kristopher Ogonowsky, each were indicted by a Middlesex County grand jury on four counts of violating G.L. c. 21C, § 5 (1994 ed.), which prohibits, inter alia, the transfer of hazardous waste to an unlicensed individual. Each defendant was also indicted on two counts of attempting an illegal transfer of hazardous waste in violation of the statute. The defendants filed a motion to suppress evidence seized from a dumpster on the defendants' commercial premises. After an evidentiary hearing, a judge in the Superior Court granted the defendants' motion. A single justice of this court allowed the Commonwealth's application for interlocutory appeal. We affirm the allowance of the motion to suppress.

We recite the facts found by the motion judge. The defendants operated an auto body repair and paint shop in Somerville ****581** under the name MAACO. The business came to the attention of the Department of Environmental Protection (department) when it received an anonymous telephone call from a "disgruntled former employee" regarding the improper disposal of hazardous paint materials at the shop. The former employee stated that he had been paid regularly while under the defendants' employ not to reveal the illegal disposal method. He described how the defendants disposed of the paint by placing one-gallon cans in the shop's dumpster shortly before pick up by a waste hauler. The former employee also stated that the truck driver was paid to haul the paint away and to remain silent about the illegal scheme.

Based on this information, David Spector, an inspector from the "Environmental Strike Force" (comprised of members of the department, the Attorney General's office, and the State police) began a surveillance of the dumpster from the upper story of a neighboring building. The dumpster was ***39** located in an alley that was kept closed most of the time except during the emptying of the dumpster. From his surveillance point, Spector could see the alley and the surface of the inside of the dumpster. Spector conducted surveillance of the dumpster over a period of weeks.

The contents of the dumpster were not visible to passersby in the alley. However, it was possible to climb into the dumpster and look through its contents. Occasionally, objects were thrown into the dumpster by unknown persons. The dumpster was emptied weekly into a truck which compacted the material immediately. A private company, Waste Management Company, was under contract with the defendant corporation to pick up the contents of the dumpster and haul it away.[2] There was no evidence regarding the ultimate destination of the garbage.

The dumpster was emptied every Thursday between July 23, 1992, and October 8, 1992. On twelve dates Spector made observations of the dumpster and, on many of these dates, saw paint cans thrown into the dumpster by people

on the premises, shortly before pick up. He also observed the defendant Ogonowsky pass what he believed to be money to a waste disposal company employee when the dumpster was emptied. He recorded these observations with a video camera. The observations were consistent with the information received from the disgruntled former employee.

***40** Spector conferred with Nancy Thornton, an environmental engineer attached to the strike force, and showed her the video-tape of his surveillance. Thornton knew that the kind of paint used in auto body shops contained ingredients which make paint a hazardous material requiring special disposal and that both placement of the material into the dumpster and its subsequent disposal by Waste Management would be unlawful. The judge concluded that, based on this information, Thornton had probable cause to believe that the defendants were engaged in a regular and knowing illegal scheme to dispose of paint by prearrangement with the operator of the disposal truck to put the paint cans in the dumpster shortly before pick up so as to avoid detection.

By mid-September, Thornton made a decision to conduct an administrative inspection as a way to gain entrance to the premises and to seize paint cans from the dumpster for use as evidence in a later enforcement proceeding. Thornton planned to wait until Spector observed cans being thrown into the dumpster and then enter the premises and ****582** search the dumpster before the arrival of the Waste Management truck.

On October 8, 1992, Spector observed an employee dispose of from five to eight cans in the dumpster and passed the information to Thorton by walkie-talkie. In the company of another member of the strike force, Thornton entered the MAACO shop through the front door and told Ogonowsky that she was an inspector from the department and was there to do a "multimedia" inspection. Ogonowsky asked her what that was and she told him that it was an inspection for air pollution, water pollution, solid waste, hazardous waste, drains, and industrial waste. Ogonowsky told her that the Massachusetts Water Resources Authority had been there previously to inspect the drains. She said she would still like to do an inspection. He asked her to do it quickly because he was busy.

While Thornton's colleague inspected the shop's records, Thornton examined the shop and then moved to the dumpster. Ogonowsky was friendly and cordial and asked Thorton ***41** whether she was going to climb into the dumpster. When she said yes, he remarked he was glad he did not have her job.

Thornton retrieved paint cans from the dumpster and informed Ogonowsky that they were hazardous waste which could not lawfully be disposed of in the dumpster. Ogonowsky said the cans must have been placed there by accident.

The judge held that the warrantless search of the shop and the dumpster could not be justified as an administrative search,[3] under a theory of consent to search, or as a search based on exigent circumstances. The judge also disagreed with the Commonwealth's contention that the defendants lacked a reasonable expectation of privacy in the dumpster which would preclude protection under the Fourth Amendment to the United States Constitution and art. 14 of the Declaration of Rights of the Massachusetts Constitution.

1. *Expectation of privacy.* The Fourth Amendment and art. 14 protect from unreasonable search and seizure those areas in which individuals have a subjective expectation of privacy that is objectively "reasonable," "justified," or "legitimate." *California v. Greenwood,* 486 U.S. 35, 39, 108 S.Ct. 1625, 1628, 100 L.Ed.2d 30 (1988). See *Commonwealth v. Welch,* 420 Mass. 646, 653, 651 N.E.2d 392 (1995); *Commonwealth v. A Juvenile (No. 2),* 411 Mass. 157, 160–161, 580 N.E.2d 1014 (1991); *Commonwealth v. Cote,* 407 Mass. 827, 833, 556 N.E.2d 45 (1990), quoting *Commonwealth v. Blood,* 400 Mass. 61, 68, 507 N.E.2d 1029 (1987); *Commonwealth v. Pratt,* 407 Mass. 647, 660–661, 555 N.E.2d 559 (1990); *Commonwealth v. Panetti,* 406 Mass. 230, 231–232, 547 N.E.2d 46 (1989). Thus, the first step in analyzing a search or seizure by government agents is whether the individual against whom the fruit of the search or seizure is used as evidence (1) had a subjective expectation of privacy in the place ***42** searched or the item seized that (2) society would accept as reasonable. *California v. Greenwood, supra* at 39, 108 S.Ct. at 1628. *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 516–17, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring).

Usually, the second part of the test, i.e., whether the asserted expectation of privacy was objectively reasonable, is the most disputed. This element is highly dependent on the particular facts involved and is determined by examining the circumstances of the case in light of several factors. *Commonwealth v. One 1985 Ford Thunderbird Auto.,* 416 Mass. 603, 607, 624 N.E.2d 547 (1993). These factors include the nature of the intrusion, whether the government agents had a lawful right to be where they were, and the character of

the location searched. See *Commonwealth v. Welch, supra* at 653–654, 651 N.E.2d 392; *Commonwealth v. One 1985 Ford Thunderbird Auto., supra.* An examination of the character of the location should ****583** include a determination whether the defendants owned the place or controlled access to it as well as whether the place was freely accessible to others. *Commonwealth v. Welch, supra. Commonwealth v. Panetti, supra* at 232, 547 N.E.2d 46. We also consider whether the defendant took normal precautions to protect his privacy. *Commonwealth v. Pina,* 406 Mass. 540, 545, 549 N.E.2d 106, cert. denied, 498 U.S. 832, 111 S.Ct. 96, 112 L.Ed.2d 67 (1990). *Commonwealth v. D'Onofrio,* 396 Mass. 711, 716–717, 488 N.E.2d 410 (1986). *Commonwealth v. Simmons,* 392 Mass. 45, 50, 466 N.E.2d 85, cert. denied, 469 U.S. 861, 105 S.Ct. 196, 83 L.Ed.2d 128 (1984).

In cases involving the reasonableness of an expectation of privacy in trash and garbage, courts have focused on the degree to which the garbage at issue was exposed, or accessible, to the public. *California v. Greenwood, supra* at 40–41, 108 S.Ct. at 1628–29. *United States v. Comeaux,* 955 F.2d 586, 589 (8th Cir.), cert. denied, 506 U.S. 845, 113 S.Ct. 135, 121 L.Ed.2d 89, and cert. denied sub nom. *Roberson v. United States,* 506 U.S. 944, 113 S.Ct. 387, 121 L.Ed.2d 296 (1992). *United States v. Hedrick,* 922 F.2d 396, 400 (7th Cir.), cert. denied, 502 U.S. 847, 112 S.Ct. 147, 116 L.Ed.2d 113 (1991). *United States v. Dunkel,* 900 F.2d 105, 107 (7th Cir.1990), vacated on other grounds, 498 U.S. 1043, 111 S.Ct. 747, 112 L.Ed.2d 768 (1991). *Commonwealth v. Pratt, supra* at 660–661, 555 N.E.2d 559. *Commonwealth v. Chappee,* 397 Mass. 508, 512–513, 492 N.E.2d 719 (1986). It is well established ***43** that, in general, government agents may make a warrantless search of areas in which the public has free access, including areas in which trash or garbage is discarded. *United States v. Hall,* 47 F.3d 1091, 1095 (11th Cir.), petition for cert. filed, 63 U.S.L.W. 3892 (1995). See *Sullivan v. District Court of Hampshire,* 384 Mass. 736, 742, 429 N.E.2d 335 (1981) ("an individual can have only a very limited expectation of privacy with respect to an area used routinely by others").

In regard to the privacy interest in garbage, most cases have involved searches of garbage found on or near residential property. The leading case, *California v. Greenwood, supra,* established that trash left bagged and on the curb outside the curtilage of a home is not protected by the Fourth Amendment because it is left in a place "particularly suited for public inspection" and for the purpose of transferring possession to a third person, the garbage collector, who would then be free to search the garbage or allow others to search it. *Id.* at 40–41, 108 S.Ct. at 1628–29. Federal courts have applied *Greenwood* 's reasoning in a variety of factual settings involving residences, and have consistently focused on the degree to which the garbage was accessible to the public. See, e.g., *United States v. Scott,* 975 F.2d 927, 929 (1st Cir.1992), cert. denied, 507 U.S. 1042, 113 S.Ct. 1877, 123 L.Ed.2d 495 (1993) (no reasonable expectation of privacy in shredded documents in trash bag on curb outside residence); *United States v. Comeaux, supra* (no reasonable expectation in trash bag left in alley behind home even if within curtilage because trash exposed to public); *United States v. Hedrick, supra* (no reasonable expectation of privacy in trash bags left in barrels within curtilage of home where barrels were fully visible and accessible to public); *United States v. Certain Real Property Located at 987 Fisher Rd.,* 719 F.Supp. 1396, 1404 (E.D.Mich.1989) (reasonable expectation of privacy in trash bags placed against outside wall of house within curtilage and not visible from street). See also *United States v. Michaels,* 726 F.2d 1307, 1312–1313 (8th Cir.), cert. denied, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984) (pre-*Greenwood* case holding no reasonable expectation ***44** of privacy in trash deposited in communal trash bin of apartment complex).

Our court has addressed the constitutional implications of such searches on two occasions, both involving residential property. In these cases we followed the reasoning of the Federal cases. See *Commonwealth v. Pratt, supra* (no reasonable expectation of privacy under art. 14 or Fourth Amendment in trash bags left curbside for collection); *Commonwealth v. Chappee, supra* at 512, 492 N.E.2d 719 (similar facts decided on basis of Fourth Amendment only).

The degree of public access is usually much greater in commercial locations than in ****584** residential locations. Historically, courts have held that an individual's expectation of privacy in commercial premises is somewhat less than in a residence. *United States v. Hall, supra* at 1095. Thus, although the test whether the expectation of privacy is reasonable is the same for both the residential and commercial spheres, the factors employed in the analysis are not necessarily accorded the same weight when commercial property is involved. *Id.* Unlike activities or objects in the home, which need only be removed from plain view to be protected, one seeking to protect his or her privacy in a commercial location must take affirmative steps to bar the public from the area they wish to keep private. *Id.* See *Katz v. United States, supra* at 351–352, 88 S.Ct. at 511 (what an individual "seeks to preserve as private, even in an area accessible to the public,

may be constitutionally protected"); *United States v. Swart,* 679 F.2d 698, 701 (7th Cir.1982) (defendant had reasonable expectation of privacy in area of business premises not open to public).

Federal courts have, on a few occasions, considered the reasonableness of the expectation of privacy in dumpsters on commercial property. In these cases, as in cases involving residential property, the courts have generally considered the public's accessibility to the dumpster the most important factor as to whether an expectation of privacy in the dumpster was reasonable. They have also considered whether any actions were taken to exclude the public from the dumpster. ***45** The United States Court of Appeals for the Seventh Circuit has held that the owner of an office building had no reasonable expectation of privacy in a dumpster located in the parking lot of the building. *United States v. Dunkel, supra.* The court pointed out that seven tenants of the building used the dumpster and that the parking lot in which the dumpster was located was used by visitors to the building and was fully accessible to the public. *Id.* at 106–107. The location was not secured in any way so as to exclude the public. *Id.* More recently, the United States Court of Appeals for the Eleventh Circuit held that a defendant had no reasonable expectation of privacy in shredded documents found in a dumpster on the defendant's commercial property where the dumpster was located on a road which was not marked as private or barricaded in any way and was thus fully accessible to the public. *United States v. Hall, supra* at 1093, 1095.

The dumpster at issue in the instant case was located in an alley adjacent to the defendants' business and, although strangers occasionally managed to throw objects into the dumpster, it was intended for use exclusively by the MAACO shop. The contents of the dumpster were not visible to passersby and it was possible to gain access to its contents only by climbing into the dumpster. Unlike cases finding no reasonable expectation of privacy, Ogonowsky in the instant case took affirmative steps to protect his privacy interest in the dumpster. He installed gates at either end of the fenced alley and kept them closed until the waste hauler arrived. In these circumstances, the judge was warranted in concluding that the defendants demonstrated their subjective expectation of privacy in the contents of the dumpster, and that, further, this expectation was one which society would accept as reasonable. See *Commonwealth v. Chappee, supra* at 512, 492 N.E.2d 719.

Because the defendants enjoyed an expectation of privacy in the dumpster which was constitutionally protected, the strike force agent who conducted the search of the dumpster was required to obtain a search warrant prior to conducting the search. She did not. The record discloses no reason for ***46** this failure in light of the existence of ample probable cause. Warrantless searches are presumptively unreasonable and therefore illegal absent a showing by the Commonwealth of the existence of one of the recognized exceptions to the warrant requirement. Here, the Commonwealth relies on the theory of consent, and, in the alternative, the existence of exigent circumstances which it alleges made the obtaining of a warrant impracticable.

2. *Consent.* "When a prosecutor relies upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by ****585** showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina,* 391 U.S. 543, 548–549, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968). See *Commonwealth v. Buchanan,* 384 Mass. 103, 106–107, 423 N.E.2d 1005 (1981). Consent is made freely and voluntarily when it is given "unfettered by coercion, express or implied." *Commonwealth v. Harmond,* 376 Mass. 557, 561, 382 N.E.2d 203 (1978), quoting *Commonwealth v. Walker,* 370 Mass. 548, 555, 350 N.E.2d 678, cert. denied, 429 U.S. 943, 97 S.Ct. 363, 50 L.Ed.2d 314 (1976).

The judge concluded that the consent given by Ogonowsky in the instant case was "nothing more than acquiescence to a show of lawful authority." "Voluntariness of consent 'is a question of fact to be determined in the circumstances of each case.' " *Commonwealth v. Harmond, supra,* quoting *Commonwealth v. Aguiar,* 370 Mass. 490, 496, 350 N.E.2d 436 (1976). This finding was not clearly erroneous and was warranted by the evidence. See *Commonwealth v. Cantalupo,* 380 Mass. 173, 177, 402 N.E.2d 1040 (1980); *Commonwealth v. Bizarria,* 31 Mass.App.Ct. 370, 378, 578 N.E.2d 424 (1991). Thornton declared that she was from the Department of Environmental Protection and was on the premises for the purpose of making an administrative inspection. Ogonowsky was not informed that he could demand she obtain a warrant. Although this fact is not determinative of the issue, it is relevant with regard to the voluntariness of the consent. *Schneckloth v. Bustamonte,* 412 U.S. 218, 248–249, 93 S.Ct. 2041, 2058–59, 36 L.Ed.2d 854 (1973). *Commonwealth v. Cantalupo, supra* at 178, 402 N.E.2d 1040. *Commonwealth v. Buchanan, supra* at 107, 423 N.E.2d 1005.

***47** 3. *Exigent circumstances.* The Commonwealth argues that its agents did not have probable cause to search the dumpster until the paint cans were placed in it on October 8, the day of the search, and that they had insufficient time to obtain a warrant to search the dumpster between the time the paint cans were placed in the dumpster and the arrival of the Waste Management truck. Thus, the Commonwealth argues, once probable cause was established, the circumstances became exigent and a warrant was not required.

We agree with the judge that Spector and Thornton had established probable cause to believe that paint cans would be placed in the dumpster on October 8, a Thursday, long before that date arrived. Spector had begun surveillance of the dumpster weeks before and had observed paint cans being placed in the dumpster on nearly every Thursday at the same time of day. The warrant could have been executed within seven days after its issuance and thus could have been obtained even though the paint cans were not in the dumpster at the time of issuance. See G.L. c. 276, § 3A (1994 ed.). We conclude that no exigent circumstances existed which would relieve the Commonwealth of its responsibility in obtaining a search warrant. See *Commonwealth v. Forde,* 367 Mass. 798, 801–803, 329 N.E.2d 717 (1975) (warrantless search of apartment violated Fourth Amendment where police failed to obtain warrant even though they had surveilled apartment for some time and had probable cause for week prior to search). Any perceived exigency due to the short period of time between the placement of the paint cans in the dumpster and the arrival of the Waste Management truck was reasonably foreseeable and therefore cannot be relied on by the Commonwealth. *Id.* at 802–803, 329 N.E.2d 717. Those cases relied on by the Commonwealth, *Commonwealth v. Killackey,* 410 Mass. 371, 572 N.E.2d 560 (1991); *Commonwealth v. Cast,* 407 Mass. 891, 556 N.E.2d 69 (1990); *Commonwealth v. King,* 35 Mass.App.Ct. 221, 617 N.E.2d 1036 (1993), are distinguishable from the instant case in that they all involve warrantless searches of automobiles. Exigency requirements are applied far less stringently with regard to automobiles ***48** due to their inherent mobility. *Commonwealth v. Cast, supra* at 904, 556 N.E.2d 69.

The order of suppression is affirmed.

So ordered.

All Citations

421 Mass. 37, 653 N.E.2d 579, 42 ERC 1023

Footnotes

1 Six against Kristopher Ogonowsky and five against Krisco Corp.

2 The relevant findings of the judge were stated as follows:

> "The contents of the dumpter could not be seen by casual passers by. Some effort and risk would be involved for someone to climb into the dumpster and rummage around, and there was only a limited window of opportunity for such rummaging. It was reasonable to expect that it was unlikely to occur in any given short period of time. Although activity around the dumpster could be seen from elevated positions it was reasonable to expect that particular items of trash could not be identified from such a vantage point.
>
> "The dumpster was technically for the sole use of the defendants, not the general public. It was a piece of personal property which was not itself slated for disposal, but for re-use. The dumpster was not abandoned in any sense, as a trash bag is. Although it was not locked, the defendant had a right to secure it until it was emptied."

3 On this appeal, the Commonwealth does not argue that the judge erred in concluding that the search of the defendants' premises and the dumpster was not a valid administrative search. The judge found that the search "was not a valid administrative search, but rather was a criminal investigative search using G.L. c. 216, § 8, as a subterfuge to avoid the burden of obtaining a warrant." See *Commonwealth v. Bizarria,* 31 Mass.App.Ct. 370, 377–378, 578 N.E.2d 424 (1991). See also *Commonwealth v. Tart,* 408 Mass. 249, 256, 557 N.E.2d 1123 (1990); *Commonwealth v. Frodyma,* 386 Mass. 434, 437–438, 443–445, 436 N.E.2d 925 (1982).

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754 S.W.2d 656
Court of Criminal Appeals of Texas,
En Banc.

Leroy COMER, Appellant,

v.

The STATE of Texas, Appellee.

No. 265–84.
|
April 9, 1986.
|
Rehearing Denied April 13, 1988.
|
Rehearing Dismissed May 28, 1988.

Synopsis

Defendant was convicted in the Criminal District Court No. 2, Tarrant County, John Bradshaw, J., of possession of heroin, and he appealed. The Fort Worth Court of Appeals, Second Supreme Judicial District, affirmed in unpublished opinion, and defendant petitioned for discretionary review. The Court of Criminal Appeals, W.C. Davis, J., held that arresting officers lacked reasonable suspicion to initiate investigatory stop of truck in which defendant was a passenger. On State's motion for rehearing, the Court of Criminal Appeals, Teague, J., held that defendant did not voluntarily abandon heroin-filled syringe when he dropped syringe onto pavement and attempted to kick it under truck, but rather relinquished it as result of police misconduct in making improper stop.

Reversed and remanded; motion for rehearing overruled.

Onion, P.J., and McCormick, White, and Duncan, JJ., dissented on opinion on motion for rehearing.

Attorneys and Law Firms

***657** Richard Alley (court appointed), Fort Worth, for appellant.

Tim Curry, Dist. Atty. and C. Chris Marshall, David L. Richards, Gary Medlin and Christopher J. Pruitt, Asst. Dist. Attys., Fort Worth, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

W.C. DAVIS, Judge.

Appellant pled guilty to possession of heroin and was sentenced to fifteen years' incarceration in the Texas Department of Corrections. Appellant preserved his right to appeal the denial of his Motion to Suppress.

The Fort Worth Court of Appeals, in an unpublished opinion, concluded that there was sufficient probable cause to support appellant's arrest. *Comer v. State,* No. 2–83–317–CR (Tex.App.—Ft. Worth, delivered January 11, 1984). Accordingly, the Court of Appeals found the trial court's denial of appellant's Motion to Suppress proper. Although properly raised by appellant, for reasons not made clear in the opinion, the Court of Appeals did not decide whether the initial detention was adequately supported by probable cause. We granted appellant's petition for discretionary review to determine whether the arresting officers had sufficient reasonable suspicion to initiate the investigatory stop which preceded the arrest.

At 7:40 p.m. on Saturday, November 6, 1982, Officers Cook and Burnette observed appellant and another male sitting in the cab of a pickup truck in the parking lot of Frank's Barbeque Restaurant located on East Rosedale in Fort Worth. The interior dome light was on and the two men were engaged in some activity concentrated on the seat between them. As the officers entered the parking lot the truck began to pull away, at which time the officers, believing some criminal activity to be taking place, initiated an investigatory stop.

After appellant emerged from the truck Officer Cook saw him drop a syringe onto the pavement and attempt to kick it under the truck. The syringe was later analyzed and found to contain heroin. Each officer testified that the part of town where the incident occurred was a high crime area and that, based upon their knowledge and experience, they believed that some criminal activity was taking place. Although the officers also testified that they believed that the restaurant was closed, the owner of the restaurant, Frank Taylor, testified that he never closed the establishment before 10:00 p.m. on Saturday nights.

It is well established that an officer may briefly stop a suspicious individual, whether a pedestrian or a passenger in

a vehicle, in order to determine his/her identity or to maintain the status quo while obtaining further information. *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Johnson v. State,* 658 S.W.2d 623 (Tex.Cr.App.1983). However, in order to justify such a stop the officer must have "specific articulable facts which, in light of his experience and personal knowledge, together with other inferences from the facts, would reasonably warrant the intrusion on the freedom of the citizen detained for further investigation." *Johnson,* supra, at 623. Detention based on a hunch is illegal. *Williams v. State,* 621 S.W.2d 609 (Tex.Cr.App.1981). These "specific articulable facts" must create in the individual officer's mind a reasonable suspicion that "some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime." *Johnson,* supra, at 626.

In *Tunnell v. State,* 554 S.W.2d 697 (Tex.Cr.App.1977), this court held the basis for the investigatory stop insufficient. In *Tunnell,* supra, a police officer observed the defendant and two other men seated inside a parked car in a well-lighted hospital parking lot at 2:16 a.m. The officer was aware that a nearby Kraft Food Company plant operated 24 hours per day but decided the activity was suspicious and decided to investigate. As the officer approached the parking lot the vehicle began to move away. After following for some time the officer stopped the car.

In *Johnson,* supra, this Court again found the basis for the investigatory stop insufficient. In *Johnson,* supra, the officer observed the defendant's pickup truck parked in the lot of a McDonald's restaurant at 5:00 a.m., a time at which the restaurant was closed. The bed of the pickup truck was loaded with furniture. The officer thought this suspicious, approached ***658** the truck and ordered the defendant out.

The facts of the instant case are remarkably similar to those in *Tunnell,* supra, and *Johnson,* supra.

We find it difficult to discover any facts showing activity out of the ordinary in the instant case save that the officer described the area as being one of high crime and that appellant attempted to leave as the officers approached. In any case, the events in the instant case, like those in *Tunnell,* supra, and *Johnson,* supra, are as consistent with innocent activity as they are with criminal activity. Where this is true the detention is unlawful. *Shaffer v. State,* 562 S.W.2d 853 (Tex.Cr.App.1978). As this detention was unlawful the contraband recovered as a result of the ensuing search was inadmissible. *Baldwin v. State,* 606 S.W.2d 872 (Tex.Cr.App.1980).

Accordingly, the judgments of the Court of Appeals and the trial court are reversed and the cause is remanded to the trial court.

Before the court en banc.

OPINION ON STATE'S MOTION FOR REHEARING

TEAGUE, Judge.

On original submission we held that the arresting officer lacked sufficient reasonable suspicion to initiate the investigatory stop which preceded appellant's arrest. We adhere to what we stated and held on original submission. However, the State now argues that our inquiry must not end with this determination, but that we must also decide whether the appellant voluntarily abandoned the heroin-filled syringe. We agree. If appellant voluntarily abandoned the syringe, then the contraband became admissible evidence against appellant, notwithstanding the illegality of the initial detention. For the reasons articulated below, we hold that appellant did not voluntarily abandon the contraband, but rather relinquished it as a result of police misconduct.

Although it is true that an accused person's abandonment of property or evidence can remove the taint of an illegal arrest, stop, or detention, it is also true that for this to occur the abandonment must be actually voluntary and not merely the result of police unlawfulness. *United States v. Beck,* 602 F.2d 726, 729–730 (5th Cir.1979). Moreover, the results of a search or seizure will never attenuate unlawful police conduct nor will it be considered in making the determination whether the police were initially acting lawfully. *Taylor v. State,* 604 S.W.2d 175 (Tex.Crim.App.1980).

That voluntariness is an integral component to the concept of abandonment has been made clear in several decisions by the Fifth Circuit Court of Appeals. "To be sure, the voluntary abandonment of evidence can remove the taint of an illegal stop or arrest ...; an abandonment is not deemed voluntary [however] ... if it is merely the product of police misconduct [and, therefore, cannot vitiate the taint of an illegal detention.]" *United States v. Santia–Manriquez,* 603 F.2d 575, 578 (5th Cir.1979). "The only courts that have allowed the seizure of evidence that was thrown ... have

emphasized that 'no improper or unlawful act was committed by any of the officers' prior to the evidence being tossed ..." *Fletcher v. Wainwright,* 399 F.2d 62, 64 (5th Cir.1968). See also *United States v. Morin,* 665 F.2d 765, 770 (5th Cir.1982); *United States v. Beck,* supra, at 726; *United States v. Colbert,* 474 F.2d 174 (5th Cir.1973).

Ringel, in his highly respected work entitled *Search & Seizures; Arrests and Confessions* (1985), expresses the concept of voluntary abandonment this way:

> The intent to abandon implies voluntariness. Abandonment cannot be voluntary if it has been coerced by unlawful police action such as approaching a suspect with the intention to arrest without probable cause of the initiation of an illegal investigatory stop or search. Therefore, when the police are illegally threatening to arrest and search a suspect, and the suspect attempts to divest himself of incriminating evidence that he reasonably believes will inevitably be discovered, his efforts do not constitute such an 'abandonment' or voluntary exposure as would waive his constitutional right to later move for suppression of the evidence thus obtained ... (Citations omitted.) *Id.,* at Vol. 1, § 8.04(a).[1]

Texas case law has not always focused on the voluntariness of the abandonment in light of police misconduct. Instead, some decisions opted to merely conclude that "[w]hen police take possession of abandoned ***659** property, there is not seizure under the Fourth Amendment." *Clapp v. State,* 639 S.W.2d 949, 953 (Tex.Crim.App.1982), and cases cited therein. See also *Rodriguez v. State,* 689 S.W.2d 227, 230 (Tex.Crim.App.1985) (Abandoned contraband is not obtained as a result of a search even when the police utilize a pretext to stop the defendant); *McClain v. State,* 505 S.W.2d 825, 827 (Tex.Crim.App.1974); *Tatum v. State,* 505 S.W.2d 548, 550 (Tex.Crim.App.1974).

Other cases, however, limit the inquiry to the defendant's intent to abandon the property. See *Sullivan v. State,* 564 S.W.2d 698, 702 (Tex.Crim.App.1978) (opinion on rehearing) ("Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts,") citing and quoting *United Stated v. Colbert,* 474 F.2d 174, 176 (5th Cir.1973). See also *Smith v. State,* 530 S.W.2d 827 (Tex.Crim.App.1975); *Hudson v. State,* 642 S.W.2d 562 (Tex.App.—Fort Worth 1982); *French v. State,* 636 S.W.2d 749 (Tex.App.—Corpus Christi 1982).

What both lines of cases do not make clear is that abandonment consists of two components: 1) a defendant must intend to abandon property, and 2) a defendant must freely decide to abandon the property; the decision must not merely be the product of police misconduct. See *United States v. Beck,* supra. To the extent that any of these cases conflict with that notion, they are overruled. We hold that to resolve abandonment issues there must be a determination of whether the accused voluntarily abandoned the property independent of any police misconduct.

We now turn to the facts of the case at bar to determine whether appellant voluntarily abandoned the syringe. Appellant was a passenger in the vehicle which the police were unlawfully pursuing. The arresting officer testified that when appellant exited the vehicle appellant dropped "something" from his hand to the pavement and attempted to kick this object under the vehicle. The object turned out to be the syringe.

To make the determination of voluntary abandonment we must determine if appellant intended to abandon the syringe and, if so, then determine whether or not appellant's decision to abandon the contraband was merely the product of the illegal acts of the police. It is questionable whether appellant intended to abandon the syringe, or whether he was only attempting to conceal it. Assuming, *arguendo,* that appellant intended to abandon the syringe, we cannot conclude that this relinquishment was independent of the unlawful police conduct. To the contrary, we find that the decision to abandon the property was a *direct result* of the police misconduct. Therefore, appellant's relinquishment of the syringe did not remove the taint of the illegal police conduct.

The right of the people of this State to be free from unreasonable searches and seizures involves the right to be let alone, which is probably the most comprehensive of all our constitutional rights, as well as one of the rights most valued by civilized men and women. *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Unless legal justification is shown, such right must not be infringed upon by the police. We find no meaningful constitutional distinction between the situation where, because of police unlawfulness, the police search an individual and find contraband and the situation where, because of police unlawfulness, the individual throws or drops an object to the ground and the police seize it. In both instances the evidence is subject to being suppressed because it was the direct result of initial police misconduct. Unless

the State establishes that the taint has been purged, such unlawfully obtained evidence should always be suppressed and should never be used to convict the accused. See *United States v. Jeffers,* 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951); *Brock v. United States,* 223 F.2d 681, 684–685 (5th Cir.1955). "While a police officer must be vigilant and resourceful in combating crime, he is required to do so within the constitutional framework that seeks the preservation of the dignity of the individual." Moscolo, "The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis," 20 *Buff.L.Rev.* 399 (1971).

The State's motion for rehearing is overruled.

ONION, P.J., and McCORMICK, WHITE and DUNCAN, JJ., dissent.

All Citations

754 S.W.2d 656

Footnotes

1 Also see "Seizure of Abandoned Property," *Search and Seizure Law Report,* Vol. 1, No. 13, November, 1974; "Abandonment of Property Under the Fourth Amendment," *Id.,* Vol. 10, No. 1, January, 1983; 1 *Am.Jur.2d* Abandoned, Lost, Etc., Property § 1; Annot., 40 *A.L.R.4th* 381 (1985).

806 P.2d 1136
Court of Criminal Appeals of Oklahoma.

Gene Edward COOPER, Appellant,

v.

STATE of Oklahoma, Appellee.

No. F–88–1018.
|
Feb. 26, 1991.

Synopsis

Defendant was convicted in the District Court, Oklahoma County, James L. Gullett, J., of possession of controlled dangerous substance with intent to distribute after former conviction of two or more felonies, and he appealed. The Court of Criminal Appeals, Lane, P.J., held that: (1) defendant was not arrested before officer retrieved discarded cigarette package containing controlled substances, and (2) defendant's sentence was properly enhanced.

Affirmed.

***1137** An Appeal from the District Court of Oklahoma County; James L. Gullett, District Judge.

Gene Edward Cooper, Appellant, was tried by jury for the crime of Possession of a Controlled Dangerous Substance with Intent to Distribute After Former Conviction of Two or More Felonies in Case No. CRF–88–1899 in the District Court of Oklahoma County before the Honorable James L. Gullet, District Judge. Appellant was sentenced to fifty (50) years in the custody of the Oklahoma Department of Corrections and has perfected this appeal. Judgment and Sentence is AFFIRMED.

Attorneys and Law Firms

Redmond P. Kemether, Oklahoma City, for appellant.

Robert H. Henry, Atty. Gen., Steven S. Kerr, Asst. Atty. Gen., Oklahoma City, for appellee.

OPINION

LANE, Presiding Judge:

Appellant was convicted of Possession of a Controlled Dangerous Substance with Intent to Distribute After Former Conviction of Two or More Felonies (63 O.S.1981, § 2–401) in District Court of Oklahoma County, Case No. CRF–88–1899. The jury recommended that Appellant serve fifty (50) years in the custody of the Department of Corrections and the trial court sentenced accordingly. He has appealed alleging that his arrest was illegal thus, his motion to suppress the evidence should have been granted, that the testimony of the arresting officer contained a number of improper "evidentiary harpoons," that his conviction was enhanced improperly and under the wrong statute, that evidence of parole was placed before the jury and that the prosecutor made a number of comments which were unfairly prejudicial. We have reviewed these allegations and do not find reason to reverse or modify the conviction.

Appellant's first allegation of error concerns the propriety of his arrest. He claims that the arresting officer did not have probable cause to arrest him, thus evidence obtained during a subsequent search must be suppressed. Review of the facts involving the arrest reveal that there is no merit to this argument.

Oklahoma City Police Officer Phil Davis had apparently had contact with Appellant on several occasions. During an unrelated drug raid, he was informed that Appellant was selling controlled substances. Davis testified after receiving this information, he kept a lookout for Appellant in the bars that were in his territory, intending to investigate the statement. He knew from past experience that Appellant generally set up in some small bar to sell drugs.

On the day of Appellant's arrest, Davis arrested Appellant's daughter earlier in the day. Although the arrest had nothing to do with Appellant, Davis asked the daughter which bar her father was currently frequenting. She told him that Appellant hung out at the Horseshoe Lounge at S.W. 29th and Kentucky.

Davis went over to the Horseshoe lounge that afternoon. He did not know if Appellant would be at the bar, but he intended to perform a routine bar check with the hope of finding Appellant. When Davis entered the bar, he saw Appellant standing at the shuffleboard table. When Appellant saw the officer, he immediately turned to the wall and put his hand inside his jacket. He dropped a crumpled cigarette package on the floor under the table.

Davis immediately asked Appellant to put his hands in the air. Davis reached down and retrieved the package which contained 24 small plastic bags which contained powdery substances later identified as amphetamine and methamphetamine.

Appellant now claims that the crumpled package which Davis picked up from the floor was obtained as the result of an illegal arrest and should have been suppressed. We disagree. Although Appellant ***1138** attempts to frame his argument in terms of whether the officer had probable cause to investigate Appellant, this is not the focus of our review. Whatever motives Davis may have had for going into the bar are totally irrelevant. Whether or not he hoped to find Appellant has no bearing on whether or not the officer had a right to be where he was at the time the drugs were discovered. Officer Davis was in the bar performing a routine bar check when he saw Appellant turn, rummage in his coat and then drop a package on the floor. The officer said nothing at all to Appellant until after this suspicious behavior was completed.

At the time the officer picked up the package from the floor, he had done nothing with regard to Appellant other than ask him to put his hands in the air. Certainly this request was made for the safety of the officer while he got the package off the floor. Appellant was never under arrest or questioned until after the officer found the drugs in the crumpled package. Unlike the cases cited by Appellant, most notably *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Revels v. State,* 666 P.2d 1298 (Okl.Cr.1983), this was not a case where a suspect was stopped by an officer and searched based on a belief by the officer that the accused had been involved in a crime. On the contrary, no move had been made by Davis before the package was dropped on the ground.

At the point when Davis bent down to pick up the package, there had been no arrest and certainly no search. At most, Davis' request that Appellant raise his arms into the air would have been for the purpose of an investigatory detention as defined in *Castellano v. State,* 585 P.2d 361, 365 (Okl.Cr.1978). While the request of necessity momentarily restricted Appellant's freedom of movement, there was no attempt at that point to restrain him or take him into custody. The officer was simply concerned with his own safety while he bent down to the floor.

The evidence offered against Appellant, the cigarette package and the substances which were found inside, resulted from the retrieval of abandoned property and were not in any way involved with a search of Appellant. As was the case in *Atterberry v. State,* 726 P.2d 898 (Okl.Cr.1986), when the package was dropped on the floor, it must be considered to have been abandoned. In connection with this conclusion, we must consider Appellant's defense at trial was that the package did not belong to him. In *Atterberry* we held that when property had been abandoned by a suspect, "he had no further reasonable expectation of privacy and could not thereafter complain of the seizure" by the police officer. *Id.* at 899. We find the same to be true here. The package was clearly abandoned by Appellant. There was nothing improper in the manner in which the evidence offered at trial was obtained. Accordingly, the motion to suppress was properly denied.

Appellant next complains that during his testimony, Officer Davis made several statements which must be considered evidentiary harpoons. We have reviewed the comments identified by Appellant and find that there was no objection to any of the answers at the time the testimony was given. We have long held that unless an appropriate objection is lodged at the trial court at the proper time, any potential error has not been preserved. We will not consider allegations of evidentiary harpooning by a police officer for the first time on appeal. *Geimausaddle v. State,* 718 P.2d 711 (Okl.Cr.1986); *Odum v. State,* 651 P.2d 703 (Okl.Cr.1982); *Bruner v. State,* 612 P.2d 1375 (Okl.Cr.1980).

In his third proposition of error, Appellant alleges that his sentence was improperly enhanced with convictions which arose out of the same transactions or occurrences. The State offered proof that Appellant had been previously convicted of five felonies. On appeal, Appellant points out that he entered pleas to three of the charges on March 7, 1980, and to the other two on October 18, 1984. He claims now that the multiple charges which he pled to on each of the two occasions arose out of the same criminal activity.

***1139** We agree with Appellant that if his claims are true, then the law prohibits the use of all the convictions for enhancement of his sentence. 21 O.S.1981, § 51(B). It is equally true, however, that Appellant bears the burden of establishing the connective nature of the convictions. *Hammer v. State,* 760 P.2d 200 (Okl.Cr.1988). The fact that the convictions were all entered on one of two dates is not conclusive of the relationship between the crimes. *Vowell v. State,* 728 P.2d 854 (Okl.Cr.1986). Appellant did not raise any objection in this regard at trial and did not make any record

concerning the facts of the crimes. *Shepard v. State,* 756 P.2d 597 (Okl.Cr.1988). Any error is waived.

Although we find this allegation to have been waived, we find that in light of the fact that there is admittedly at least two different transactions or occurrences, notwithstanding his allegations concerning the others, there were still two convictions remaining which were properly used as enhancement. *Browning v. State,* 648 P.2d 1261 (Okl.Cr.1982). No error has been identified.

Appellant next contends that the State was improperly allowed to introduce evidence in the second stage of the trial which placed the issues of pardon and parole into the jury's deliberations. Specifically he claims that it was error to allow the jury to see the documents introduced to prove the prior convictions because they contained information concerning the length of his sentences. He argues that because he was up on the current charges before the expiration of the sentence in the previous cases, the jury would assume that he was on parole or probation.

While it is true that we have held this type of information should not be submitted to the jury, we have also held that it is the defendant's responsibility to object to the notations prior to the jury's deliberations, which was not done here. With regard to this same argument, we held in *Camp v. State,* 664 P.2d 1052, 1054 (Okl.Cr.1983):

> The introduction or refusal of evidence is a matter for the exercise of discretion by the trial court.... The judgment and sentence is a proper part of the proof of a former felony conviction.... The danger of prejudice did not substantially outweigh the probative value of the evidence.... Appellant suggests that portions of the instruments should have been excised by the trial court, but no such request was made by appellant at trial. (Citations omitted.)

Appellant's final contention concerning the enhancement of his sentence challenges the use of the general enhancement provisions of 21 O.S.1981, § 51(B) rather than the specific statutes dealing with second or subsequent drug convictions found in 63 O.S.1981, § 2–402. We have previously dispensed with this argument on a number of occasions, holding that if any of the previous convictions are non-drug related, enhancement may be under either section at the prosecutor's option. *Mitchell v. State,* 733 P.2d 412 (Okl.Cr.1987). We see no reason to discuss the issue further.

The final proposition of this appeal concerns a number of comments made by the prosecutor during either his closing argument or during his cross-examination of defense witnesses. Insofar as there were no objections to any of the identified comments, we have reviewed only for fundamental error, which we do not find. *Shelton v. State,* 793 P.2d 866, 871 (Okl.Cr.1990); *Thomason v. State,* 763 P.2d 1182 (Okl.Cr.1988); *Smith v. State,* 737 P.2d 1206 (Okla.Cr.1987) *cert. denied* 484 U.S. 959, 108 S.Ct. 358, 98 L.Ed.2d 383 (1987). None of the comments were so far out of the realm of legitimate argument that relief is required by this Court.

After review of the errors alleged by Appellant, we are unable to conclude that any error has occurred which requires either reversal or modification of Appellant's sentence. Accordingly, the judgment and sentence is AFFIRMED.

LUMPKIN, V.P.J., and BRETT, PARKS and JOHNSON, JJ., concurs.

All Citations

806 P.2d 1136, 1991 OK CR 26

497 S.W.3d 147
Court of Appeals of Texas, Houston (1st Dist.).

Travis Marcellaus EDWARDS, Appellant

v.

The STATE of Texas, Appellee

NO. 01-15-00416-CR, NO. 01-15-00417-CR, NO. 01-15-00418-CR
|
Opinion issued June 16, 2016
|
Discretionary Review Refused October 19, 2016

Synopsis

Background: Defendant was convicted in the 228th District Court, Harris County, of aggravated assault of a security officer, aggravated robbery, and unlawful possession of a firearm by a felon. Defendant appealed.

Holdings: The Court of Appeals, Terry Jennings, J., held that:

sufficient evidence existed that defendant, while in the course of committing a theft and with the intent to obtain or maintain control of property, used or exhibited a deadly weapon, as required to support robbery conviction, and

defendant intended to abandon his cell phone, which he left on top of a stolen vehicle while fleeing from police, and thus defendant lacked standing to challenge the reasonableness of the search of contents of phone.

Affirmed as modified.

Terry Jennings, J., concurred and filed opinion.

***151** On Appeal from the 228th District Court Harris County, Texas, Trial Court Case Nos. 1353154, 1443321, 1443322

Attorneys and Law Firms

Daucie Schindler, Assistant Public Defender, Houston, TX, for Appellant.

Devon Anderson, District Attorney—Harris County, Jessica A. Caird, Assistant District Attorney, Houston, TX, for State.

Panel consists of Justices Jennings, Massengale, and Huddle.

OPINION

Terry Jennings, Justice

A jury found appellant, Travis Marcellaus Edwards, guilty of the offenses of aggravated assault of a security officer,[1] aggravated robbery,[2] and unlawful possession of a firearm by a felon.[3] After finding true the allegation in an enhancement paragraph in each indictment that appellant had been previously convicted of a felony offense, the trial court assessed his punishment at confinement for thirty years for the offense of aggravated assault of a security officer, thirty years for the offense of aggravated robbery, and ten years for the offense of unlawful possession of a firearm by a felon. The trial court ordered that the sentences run concurrently, and it entered an affirmative finding that appellant used a deadly weapon in the commission of the offenses of aggravated assault of a security officer and aggravated robbery. In four issues, appellant contends that the evidence is legally and factually insufficient to support his conviction for the offense of aggravated robbery and the trial court erred in denying his motion to suppress evidence and admitting certain evidence.

We modify the trial court's judgments and affirm as modified.

Background

Angel Madrazo, the complainant, testified that on June 21, 2012, while he was working as a security officer at a "game room," a "shooting incident occurr[ed]." As a "certified security officer," he carried a 9–millimeter gun and a badge with the words "security officer" "[o]n [its] front." At the game room, his duties included "working at the door," "check[ing]" that no one entered the game room "with any type of weapon," and "watch[ing] over the customers." Typically, Madrazo, armed with his gun, would sit in a chair near the front door in the lobby portion of the game room.[4] In order to "enter" the game room, a person was required to be a "member," and Madrazo knew "[a]ll" of the members of the game room.

During his shift on June 21, Madrazo, standing in the lobby of the game room, saw a "white Dodge Stratus," with four men inside, parked directly in front of the game room in an "[ab]normal" place in the parking lot. Appellant and another man, ***152** neither of whom Madrazo had ever seen before, "got out" of the car and approached the game room. Madrazo asked the men "[i]f they were members and if they had been [t]here before," to which they responded "[y]es." However, Madrazo felt that "something was wrong" and became suspicious.

Madrazo asked the two men to "produce [their] memberships," but neither complied. Appellant then "pulled out a gun," "came right in front" of Madrazo, and "practically put the gun to [his] face." Because Madrazo did not have time to "pull out" his gun, he kicked appellant, who then fired his gun at Madrazo. Appellant and the other man "took off running."

Madrazo, with his gun "in ... hand," followed the two men out of the game room. Appellant and the other man ran in opposite directions, while the two men who had remained in the Dodge Stratus, exited the car, got behind it, and "fired ... shots" at Madrazo. When appellant reached a nearby "wall" and was "safe," he also "started shooting," "rapidly" and "venomous[ly]," at Madrazo. All four men "fired simultaneously" at Madrazo "from different angles," and Madrazo responded by firing his gun about "15 to 16" times. When appellant and the three other men "felt that the police were close by," they "took off running."

After the shooting, a Harris County Sherriff's Office ("HCSO") deputy showed Madrazo a photographic array of six men, and Madrazo identified appellant as the man who came into the game room and confronted him with a gun. It was not "hard" for Madrazo "to pick [appellant] out." He was "[a] hundred percent" certain that appellant was the man who had "pulled the gun on [him]," and he could not "forget" appellant. Madrazo explained that he was "afraid for [his] life" when appellant "pulled" out the gun, and based on his experience "working at game rooms," he opined that appellant had come to the game room to commit a robbery. Madrazo, however, did note that neither appellant nor the man who had entered the game room with appellant verbally "demand[ed][any] money" from Madrazo.

Maria Medina testified that on June 21, 2012, while she was working at the game room doing "housekeeping" and "pass[ing] out ... snacks[ ][and] food," two men "walked in" and "wanted to take [Madrazo's] gun away from him." When the two men tried to take Madrazo's gun, "one of the two men" shot his gun. After the shot was fired, Madrazo and the two men left the game room, with the two men running "to the right." Medina noted that only a single gunshot was fired inside the lobby of the game room, and she had previously "see[n] a large amount of cash" in the game room's office.

Katherine Butler testified that she was a member of the game room and was present when the shooting occurred. While Madrazo was standing inside the lobby, she was inside the game room "on the third machine." When a "guy" outside of the game room tried to enter by pushing the front door open, Madrazo told him that he could not. The "guy" then shot a gun. After the gun "went off," Madrazo "grabbed his gun and went out the door." There was "shooting everywhere," with "bullets ... coming from everywhere." Butler explained that "several shots" were shot at Madrazo, who was trying to "protect" the people inside of the game room, and she noted that the game room contained "[s]lot machines," into which a person would "put money" and "could win up to $600 or $700 ... or $1,000."

Curtis Young testified that he had "gamble[d]" at the game room "[m]any times" and had won "a little bit more" than $2,000 there. He noted that the game room, ***153** which had an "ATM" machine, had "about a hundred and something games" and members "gamble[d]" with cash, namely "[h]undreds, fifties, twenties, [and] tens." According to Young, it was "possible ... to win a substantial amount of money," as much as $20,000, at the game room. And he had been "concern[ed]" about "getting robbed" at the game room because "it happen[ed] a lot."

On the day of the shooting, as Young "approached" the game room, he saw a Dodge Stratus abnormally parked in front. He then saw the security officer and another "guy" "tussling." When the security officer "kicked" at the other "guy," the "guy" pulled out his gun and "started shooting" at the security officer, who subsequently "started shooting back." Several other "guys" then exited the Dodge Stratus, and "at least three" of the men "[f]ire[d] their weapon[s]" in the security officer's direction. The "guy," with whom the security officer had the "confrontation," was one of the men "shooting." Young noted that during the incident, he did not hear anyone say, "[g]ive me the money," "[p]ut your hands up," or "[e]mpty your pockets." And none of the men "tr[ied] to get any money from anyone in the parking lot."

During Young's testimony, the trial court admitted into evidence a tape recording of the telephone call that Young made for emergency assistance. During the call, Young stated that there was a "shootout," with "five guys shooting" near a "white Dodge" in the parking lot. Young described the "guys" as "young, black males" in their "20s." And he noted that the security officer was "shooting back" and the "guys" "ran off" towards some apartments.

Ashley Alexander testified that she owned the Dodge Stratus that had been parked in front of the game room on the day of the shooting. The last time that she had seen her car was in June 2012 before it was "stolen." Alexander explained that she did not drive the car to the game room location and was not at the game room on the day of the shooting. She further noted that she did not know appellant, did not lend her car to anyone, and was sleeping at the time her car was stolen.

HCSO Deputy R. Rincon testified that he was assigned to investigate the game room shooting. During the incident, several "suspects were seen" near a car that was "found" "within feet of the game room in the parking lot," and these "suspects" "took cover behind the vehicle when the shootout occurred."[5] The crime scene unit investigator, HCSO Deputy G. Clayton, "lifted" a handprint from the car, which had been "left at the scene," and "it came back" with a match to appellant. Subsequently, Rincon complied a photographic array of six men and showed it to Madrazo, who "immediate[ly]" identified appellant "as the person who approached him at the game room on June 21, 2012." In regard to appellant, Madrazo stated, "Yes, that's the one that shot at me.... He's the first one who shot at me."

Deputy Rincon further explained that the game room actually had "two doors" because it had a "greeting room." The "greeting room" was "inside the game room," but it was not actually "where the [gaming] machines" were located. According to Rincon, it was in the "greeting room" where appellant fired the initial shot. And he noted that no verbal "demand[ ]" for money had been made during the incident.

***154** Deputy Clayton testified that on June 21, 2012, he was dispatched to investigate the crime scene at the game room after the shooting. He recovered a "number of spent shell casings" from the game room's parking lot and a "9–millimeter semi-automatic weapon," which belonged to "the security guard at the scene." Clayton explained that he found "numerous shell casings" "going down the right hallway from the game room." Based on the number of "shell casings" recovered at the scene, Clayton opined that "at least two guns" had been used during the shooting.

Deputy Clayton further testified that he examined the Dodge Stratus that was parked in front of the game room. He noted that its "ignition system had been broken" or "tampered with," which indicated that the car had been stolen. Clayton also recovered, from "the rear deck, the rear trunk lid" of the car, a handprint. When he "processed" the handprint through an "automatic fingerprint system," he received a "hit," or a "possible identification," for appellant. Clayton then performed a "manual comparison," which showed that "th[e] [hand]print on the vehicle matched" appellant's known handprint. On the day before trial, Clayton made another comparison of appellant's handprint with the one found on the car, and "the print that was taken off the vehicle was, again, identified for [appellant]." Clayton opined that the handprint found on the car parked directly in front of the game room was "left by" appellant. Clayton also noted that he had recovered a cellular telephone that had been "left on top of the vehicle," and the trial court admitted it into evidence.

Tuan Pham, an investigator with the Harris County District Attorney's Office, testified that he is a member of the "digital forensic investigations unit" and "handle[s] ... any kind of digital media that needs to be downloaded and preserved and put into an evidentiary format." He explained that he "did [an] extraction" of the cellular telephone recovered by Deputy Clayton from the top of the Dodge Stratus on the day of the shooting. Pham "download[ed] ... information off of" the cellular telephone, "extract[ing] the data," including photographs, text messages, and the call log.

During Pham's testimony, the trial court admitted into evidence eight photographs, State's Exhibits 209–16, that he had extracted from the cellular telephone. Pham, while describing certain photographs as "selfies,"[6] identified appellant as the only person pictured in the photographs. He noted that the cellular telephone did not contain "selfie photographs" of any other individuals and the "vast majority of the photographs" on the cellular telephone were of appellant, including him "nude." Pham explained that in State's Exhibit 209, appellant can be seen holding the cellular telephone that Deputy Clayton recovered from the top of the Dodge Stratus on the day of the shooting.

Pham further explained that he knew that the photographs, State's Exhibits 209–16, "were actually taken with" the cellular telephone itself because the "metadata"[7] for each

particular photograph showed its origin. And the metadata for the "numerous nude pictures" of appellant on the cellular telephone showed that they had been taken with that telephone. Pham did note, however, that the cellular ***155** telephone contained photographs of individuals other than appellant, including "pictures of other males."

Pham further testified that the "only e-mail" account "uploaded" on the cellular telephone was "Travis.edwards83@gmail.com" and e-mails had been received on the phone via that e-mail address from June 10, 2012 until June 22, 2012. Pham also retrieved the cellular telephone's "chat log" from "Facebook messenger,"[8] which showed messages from "Travis Edwards" to other Facebook users from March 28, 2012 until June 5, 2012.

In regard to the text messages extracted from the cellular telephone, Pham noted that on April 5, 2012, in response to a text message asking, "What is your last name," "Edwards" was replied from the cellular telephone.[9] Further, on June 21, 2012, the day of the shooting, the following text messages were sent from and received by the cellular telephone:

Received: "A lil mexican man for security. One man, two chicks mexicans. They by the door the mexican chick in purple got the money."

Sent: "So its four people total. One security guard two floor workers both ladies and a dude? What cide do he have his strap[10] on? Also is he opening tha doors to let people out"?

Received: "Right side but he old."

Sent: "How many people total on tha floor n where is the employee only door at? also is he opening tha door to let people out?

Received: "He swing the door open wide."

Sent: "How many people total on tha floor 3 or 4? Whenever its good we ready."

Received: "Yea he open it and he watching tv with two of the workers talking the one with money in the purple got the money."

Sent: "So its just two ladies n a security guard? i keep asking bcuz dont wont no surprises."

Received: "One other Mexican man in a gray shirt."

Sent: "Do he have a strap"?

Received: "Yea on the right side."

Sent: "We were finding a escape route. Is it still good?"

Received: "Yea."

Received: "They empting two machine."

Sent: "Let them empty them all out. Keep ur eyes open they bout to hit tha bacc room n count tha scrill."[11]

Received: "Ok."

Sent: "Where is the employees only room located"?

Received: "In the front."

Sent: "To the left r right? Queen i need specific details."

***156** Received: "Nall the back but let me watch them cause they signs fucked up thats a restroom right in front but its two doors in the back."

Sent: "To the left r right? Queen I need specific details."

Received: "They all doing the machines with the money in a honey bun box."

Sent: "Let them finish n when they all on tha floor text me when its good."

Received: "Ok."

Received: "Money room back right hand side on the ATM Side."

Sent: "When its cool let us know."

Received: "Ok one chick in the back but they close at 12."

Sent: "Is u ready n can that door b kicced open. Is the money room open"?

Received: "The chick in black in ther and the chain off the door what I need to do"?

Sent: "If its cool n tha security guard chilling draw ur tic n hit me."

Received: "Im da only person left whats good"

Sent: "When u c us pull up cum out. When he get out."

Received: "Come on."

Sufficiency of Evidence

In his third issue, appellant argues that the evidence is legally insufficient to support his conviction for the offense of aggravated robbery because "[n]o witness testified that he attempted to obtain control over their property." In his fourth issue, appellant argues that the evidence is factually insufficient to support his conviction for the offense of aggravated robbery because "[v]iewing all of the evidence in a neutral light, no rational jury could [have] f[ound] beyond a reasonable doubt that [he] had the intent to obtain and maintain control of [Madrazo's] property." He also asserts in his fourth issue that if the Court "fails to conduct a factual sufficiency review," as required by the Texas Constitution,[12] he "will be denied due process of law."[13]

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 318–19, 99 S.Ct. 2781, 2788–89, 61 L.Ed.2d 560 (1979); *Williams v. State,* 235 S.W.3d 742, 750 (Tex.Crim.App.2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State,* 755 S.W.2d 866, 867 (Tex.Crim.App.1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *Williams,* 235 S.W.3d at 750. However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.* This Court now reviews the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency. *Ervin v. State,* 331 S.W.3d 49, 52–56 (Tex.App.–Houston [1st Dist.] 2010, pet. ref'd). And this Court has previously rejected constitutional challenges, such as those made by appellant, to the use of the *Jackson*—sufficiency standard when conducting a factual-sufficiency ***157** review. *See, e.g., Kiffe v. State,* 361 S.W.3d 104, 109–10 (Tex.App.–Houston [1st Dist.] 2011, pet. ref'd); *see also Tan v. State,* No. 01–15–00511–CR, 2016 WL 1267813, at *3 (Tex.App.–Houston [1st Dist.] Mar. 31, 2016, no pet.) (mem. op., not designated for publication).

A person commits the offense of robbery "if, in the course of committing theft ... and with intent to obtain or maintain control of the property, he ... intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Tex. Penal Code Ann. § 29.02(a)(2) (Vernon 2011). A person commits the offense of aggravated robbery if he commits robbery and "uses or exhibits a deadly weapon." *Id.* § 29.03(a)(2) (Vernon 2011). A firearm is considered a deadly weapon. *Id.* § 1.07(a)(17)(A) (Vernon Supp.2015). " 'In the course of committing theft' means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft." *Id.* § 29.01(1) (Vernon 2011). Theft is the unlawful appropriation of property with intent to deprive the owner of the property. *Id.* § 31.03(a) (Vernon Supp.2015).

"Intent is almost always proven by circumstantial evidence." *Trevino v. State,* 228 S.W.3d 729, 736 (Tex.App.–Corpus Christi 2006, pet. ref'd); *see also Hart v. State,* 89 S.W.3d 61, 64 (Tex.Crim.App.2002) ("Direct evidence of the requisite intent is not required...."). "A jury may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the accused, and the method of committing the crime and from the nature of wounds inflicted on the victims." *Manrique v. State,* 994 S.W.2d 640, 649 (Tex.Crim.App.1999); *see also Razor v. State,* No. 03–13–00568–CR, 2015 WL 3857293, at *2 (Tex.App.–Austin June 17, 2015, no pet.) (mem. op., not designated for publication) ("The jury may infer the requisite intent to obtain control of a victim's property from the conduct of the defendant."). Proof of a completed theft is not required to establish the commission of a robbery. *Wolfe v. State,* 917 S.W.2d 270, 275 (Tex.Crim.App.1996).

Here, Madrazo testified that while working as a security officer at a game room, he saw a "white Dodge Stratus," with four men inside, parked directly in front of the game room in an "[ab]normal" place in the parking lot. When appellant and another man approached the game room, Madrazo asked them whether "they were members and if they had been [to the game room] before." Although the men responded "[y]es," they did not "produce [their] memberships" upon Madrazo's request, and he became suspicious and felt that "something was wrong." Appellant then "pulled out a gun," "came right in front" of Madrazo, and "practically put the gun to [his] face." Madrazo kicked appellant, who then fired his gun and "took off running."

Madrazo followed appellant and the other man, who ran in the opposite direction from appellant. The two men who had remained in the Dodge Stratus, exited the car, got behind it, and "fired ... shots" at Madrazo. Appellant, who had reached a nearby "wall," also "started shooting," "rapidly" and "venomous[ly]," at Madrazo. All four men "fired simultaneously" at Madrazo "from different angles" until they "felt that the police were close by" and "took off running." Based on his experience "working at game rooms," Madrazo opined that appellant had come to the game room to commit a robbery, and Madrazo was "afraid for [his] life" when appellant "pulled" out a gun.

Medina, an employee at the game room, similarly testified that two men "walked in" and "wanted to take [Madrazo's] gun ***158** away from him." When the two men tried to take Madrazo's gun, "one of the two men" shot his gun.

Further, Butler, a member of the game room, testified that "at the time" of the shooting, Madrazo was standing inside the lobby when a "guy" outside of the game room tried to enter by pushing the front door open. Because Madrazo told the "guy" that he could not enter, the "guy" shot a gun. After the gun "went off," Madrazo "grabbed his gun and went out the door." There was "shooting everywhere," with "bullets ... coming from everywhere." "[S]everal shots" were fired at Madrazo.

Young, who "gamble[d]" at the game room, testified that he saw a Dodge Stratus abnormally parked directly in front of the game room. He then saw the security officer and another "guy" "tussling." When the security officer "kicked" at the other "guy," the "guy" pulled out his gun and "started shooting" at the security officer. Several other "guys" then exited the Dodge Stratus, and "at least three" of the men, "[f]ire[d] their weapon[s]" in the direction of the security officer. The "guy," with whom the security officer had the "confrontation," was one of the men "shooting." Young explained that he had been "concern[ed]" about "getting robbed" at the game room because "it happen[ed] a lot."

In regard to the presence of money in the game room, Medina testified that she had previously "see[n] a large amount of cash" in the game room's office. Similarly, Young explained that he had "gamble[d]" at the game room "[m]any times" and had won "a little bit more" than $2,000 there. The game room had "about a hundred and something games," and members "gamble[d]" with cash, namely "[h]undreds, fifties, twenties, [and] tens." The game room also had an "ATM" machine, and it was "possible ... to win a substantial amount of money," as much as $20,000, at the game room. Further, Butler testified that the game room contained "[s]lot machines," into which a person would "put money" and "could win up to $600 or $700 ... or $1,000."

Finally, Pham testified about the contents of the cellular telephone recovered by Deputy Clayton from the top of the Dodge Stratus on the day of the shooting.[14] The cellular telephone contained photographs of appellant, including "selfies" of appellant, photographs of appellant in the "nude," and at least one photograph of appellant holding the cellular telephone itself. The cellular telephone also had "uploaded" onto it an email account in appellant's name and a "chat log" from "Facebook messenger," which showed messages from a Facebook account in appellant's name.

In regard to the text messages that were sent from and received by the cellular telephone, Pham explained that messages dated June 21, 2012 discussed a "[M]exican" security officer, his whereabouts, and the fact that he carried a gun. Several messages discussed the location of the people who had "the money," "[h]ow many people" were on the "floor," whether "machine[s]" had been "empt[ied]," the location of certain rooms, including a "[m]oney room" and an "employees only room," where "scrill," i.e., money, would be "count[ed]," and an "escape route."[15]

***159** Although appellant asserts that "[n]o witness testified that he attempted to obtain control over their property" and there is "no evidence that he ever 'demanded any money,' " we note that the intent to obtain or maintain control of property may be inferred from appellant's actions and a verbal demand for money or property is not required. *Johnson v. State,* 541 S.W.2d 185, 187 (Tex.Crim.App.1976); *Birl v. State,* 763 S.W.2d 860, 863 (Tex.App.–Texarkana 1988, no pet.); *Chastain v. State,* 667 S.W.2d 791, 795 (Tex.App.–Houston [14th Dist.] 1983, pet. ref'd). Further, proof of a completed theft is not required to establish the commission of an aggravated robbery; thus, the fact that appellant did not actually succeed in taking any money or property is of no moment. *Robinson v. State,* 596 S.W.2d 130, 134 (Tex.Crim.App.1980); *see also* Tex. Penal Code Ann. § 29.01 ("[i]n the course of committing theft" means conduct occurring in attempt to commit theft).

The instant case is similar to a case previously decided by our sister court. *See King v. State,* 157 S.W.3d 873 (Tex.App.–Houston [14th Dist.] 2005, pet. ref'd). In *King,* the defendant and another man entered a grocery store. *Id.* at 874. While the

other man was "obtaining change for a dollar" from the store's owner, the defendant "took a gun from his backpack" and "pointed it at" the owner. *Id.* The defendant "fired one shot" at the owner, who ducked under the counter and retrieved "his own weapon," which he then fired as the defendant fled the premises. *Id.* While noting that the "actual commission of theft is not a prerequisite to the commission of robbery" and the "[i]ntent to steal may be inferred from a[ ] [defendant's] actions or conduct," the court held that "a rational jury could have inferred from [the defendant's] conduct that he intended to rob" the store owner. *Id.* at 874–75; *see also Chastain,* 667 S.W.2d at 795 ("While no one heard [defendant] or his accomplice actually demand money from the attendant," "the attendant was shot," and "there was sufficient evidence to allow the jury to find that [defendant] w[as] acting with intent to obtain control of the money under the attendant's care, custody, and control.").

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the jury could have reasonably found that appellant, while in the course of committing a theft and with the intent to obtain or maintain control of property, used or exhibited a deadly weapon, placing Madrazo in fear of imminent bodily injury or death. Accordingly, we hold that the evidence is sufficient to support appellant's conviction for the offense of aggravated robbery.

We overrule appellant's third and fourth issues.

Motion to Suppress

In his first issue, appellant argues that the trial court erred in denying his motion to suppress evidence retrieved from the cellular telephone recovered by Deputy Clayton from the top of the Dodge Stratus because the search warrant obtained by law enforcement officers was "general" and allowed for an "overbroad" search of the contents of the cellular telephone.

We review a trial court's denial of a motion to suppress evidence under a ***160** bifurcated standard of review. *Turrubiate v. State,* 399 S.W.3d 147, 150 (Tex.Crim.App.2013). We review the trial court's factual findings for an abuse of discretion and the trial court's application of the law to the facts de novo. *Id.* At a suppression hearing, the trial court is the sole and exclusive trier of fact and judge of the witnesses' credibility and may choose to believe or disbelieve all or any part of the witnesses' testimony. *Maxwell v. State,* 73 S.W.3d 278, 281 (Tex.Crim.App.2002); *State v. Ross,* 32 S.W.3d 853, 855 (Tex.Crim.App.2000). When, as here, a trial judge does not make explicit findings of fact, we review the evidence in a light most favorable to the trial court's ruling. *Walter v. State,* 28 S.W.3d 538, 540 (Tex.Crim.App.2000). Almost total deference should be given to a trial court's implied findings, especially those based on an evaluation of witness credibility or demeanor. *Valtierra v. State,* 310 S.W.3d 442, 447 (Tex.Crim.App.2010). We will sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.* at 447–48.

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Tex. Const. art. I, § 9; *State v. Betts,* 397 S.W.3d 198, 203 (Tex.Crim.App.2013). The rights secured by the Fourth Amendment and Article I, Section 9 are personal, and, accordingly, an accused has standing to challenge the admission of evidence obtained by an "unlawful" search or seizure only if he had a legitimate expectation of privacy in the place invaded. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978); *Betts,* 397 S.W.3d at 203. A defendant who challenges a search has the burden of proving facts demonstrating a legitimate expectation of privacy. *Betts,* 397 S.W.3d at 203; *Villarreal v. State,* 935 S.W.2d 134, 138 (Tex.Crim.App.1996). He must show that he had a subjective expectation of privacy in the place invaded and that society is prepared to recognize that expectation of privacy as objectively reasonable. *Betts,* 397 S.W.3d at 203; *Villarreal,* 935 S.W.2d at 138; *see also Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).

A party lacks standing to object to the reasonableness of a search of abandoned property. *McDuff v. State,* 939 S.W.2d 607, 616 (Tex.Crim.App.1997); *see also State v. Granville,* 423 S.W.3d 399, 409 (Tex.Crim.App.2014) ("Although a person may have a reasonable and legitimate expectation of privacy in the contents of his cell phone, he may lose that expectation ... if he abandons his cell phone...."); *Gonzales v. State,* 190 S.W.3d 125, 135 (Tex.App.–Houston [1st Dist.] 2005, pet. ref'd). Abandonment of property occurs when a defendant intends to abandon the property and his decision to abandon it is not due to law enforcement misconduct. *McDuff,* 939 S.W.2d at 616; *Citizen v. State,* 39 S.W.3d 367, 372 (Tex.App.–Houston [1st Dist.] 2001, no pet.). "When police take possession of property abandoned independent of police misconduct[,] there is no seizure under the Fourth Amendment." *McDuff,* 939 S.W.2d at 616. Abandonment

is primarily a question of intent that can be inferred from the words and actions of the party and other circumstances surrounding the alleged abandonment. *Id.*; *Tankoy v. State,* 738 S.W.2d 63, 66 (Tex.App.–Houston [1st Dist.] 1987, no pet.). The dispositive issue is whether the accused voluntarily discarded, left behind, or otherwise relinquished his interest in property so that he could no longer retain a reasonable ***161** expectation of privacy with regard to it at the time of the search. *McDuff,* 939 S.W.2d at 616.

Here, appellant does not argue, and there is no evidence, that any potential law enforcement misconduct led to his alleged abandonment of the cellular telephone.[16] Therefore, our analysis focuses on whether appellant intended to abandon the cellular telephone.

On June 21, 2012, appellant was one of four men inside of a Dodge Stratus that was parked directly in front of the game room in an "[ab]normal" place in the parking lot. Appellant and another man "got out" of the car and approached the game room. After "pull[ing] out a gun" and "practically" putting it in Madrazo's face, appellant fired his gun and "took off running."

When Madrazo followed appellant out of the game room, the two men who had remained in the Dodge Stratus, exited the car, got behind it, and "fired ... shots" at Madrazo. Appellant ran for "safe[ty]" to a nearby "wall" and then continued shooting, "rapidly" and "venomous[ly]," at Madrazo. However, when appellant and the three other men "felt that the police were close by," they "took off running," leaving the car parked directly in front of the game room. *Cf. Matthews v. State,* 431 S.W.3d 596, 610 (Tex.Crim.App.2014) (defendant "abandoned his reasonable expectation of privacy in the van when he fled" from law enforcement officers); *Gonzales,* 190 S.W.3d at 135 (defendant abandoned car he left in parking lot, not parked in parking space, with its door open and items inside); *see also Royston v. State,* No. 14–13–00920–CR, 2015 WL 3799698, at *3–5 (Tex.App.–Houston [14th Dist.] June 18, 2015, pet. ref'd) (mem. op., not designated for publication) (defendant abandoned cellular telephone when he left it in public dressing room and walked away).

Upon his arrival at the scene, Deputy Clayton conducted an investigation and "processed" the area near the game room. He "took photographs," "collected" evidence, and searched "the Dodge Stratus that was parked in front of the game room." According to Clayton, the car was not "moved by police officers" and remained in the same position, i.e., parked in front of the game room, it was in when law enforcement officers "arrived on the scene." From the car, Clayton recovered, among other items, the cellular telephone that had been "left on top of the vehicle."[17]

We conclude that appellant has not shown that he had a reasonable expectation of privacy in the cellular telephone that was abandoned and "left" on top of the Dodge Stratus, and, therefore, appellant lacks standing to complain of the reasonableness of the search of the contents of the cellular telephone. *See Swearingen v. State,* 101 S.W.3d 89, 101 (Tex.Crim.App.2003) ("[W]hen a defendant voluntarily abandons property, he lacks standing to contest the reasonableness of the search of the abandoned property."); *Gonzales,* 190 S.W.3d at 135. Accordingly, we hold that ***162** the trial court did not err in denying appellant's motion to suppress evidence.[18]

We overrule appellant's first issue.

Admission of Evidence

In his second issue, appellant argues that the trial court erred in admitting text messages retrieved from the cellular telephone recovered by Deputy Clayton because they were not "properly authenticated." *See* Tex. R. Evid. 901.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Tillman v. State,* 354 S.W.3d 425, 435 (Tex.Crim.App.2011); *Walker v. State,* 321 S.W.3d 18, 22 (Tex.App.–Houston [1st Dist.] 2009, pet. dism'd). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Montgomery v. State,* 810 S.W.2d 372, 380 (Tex.Crim.App.1990). When considering a trial court's decision to admit evidence, we will not reverse the trial court's ruling unless it falls outside the "zone of reasonable disagreement." *Green v. State,* 934 S.W.2d 92, 102 (Tex.Crim.App.1996) (internal quotations omitted).

We may not determine whether a trial court erred in the admission of evidence unless error is preserved for our review. *See Martinez v. State,* 98 S.W.3d 189, 193 (Tex.Crim.App.2003). To preserve the issue of erroneously admitted evidence, a party must make a timely and specific objection and obtain a ruling from the trial court. Tex. R. App. P. 33.1(a); *Martinez,* 98 S.W.3d at 193. "The

purpose of requiring a specific objection in the trial court is twofold: (1) to inform the trial [court] of the basis of the objection and give [it] the opportunity to rule on it; [and] (2) to give opposing counsel the opportunity to respond to the complaint." *Resendez v. State,* 306 S.W.3d 308, 312 (Tex.Crim.App.2009). A party "must be specific enough so as to 'let the trial [court] know what he wants, why he thinks himself entitled to it, and do so clearly enough for the [trial court] to understand him at a time when the trial court is in a proper position to do something about it.' " *Id.* at 313 (quoting *Lankston v. State,* 827 S.W.2d 907, 909 (Tex.Crim.App.1992)). Also, a party fails to preserve error when the contention urged on appeal does not comport with the specific complaint made in the trial court. *See Lovill v. State,* 319 S.W.3d 687, 691–92 (Tex.Crim.App.2009); *Rothstein v. State,* 267 S.W.3d 366, 373 (Tex.App.–Houston [14th Dist.] 2008, pet. ref'd).

We consider the context of the complaint to determine if the party preserved error. *Resendez,* 306 S.W.3d at 313. If the correct ground for exclusion was obvious to the trial court and opposing counsel, waiver will not result from a general or imprecise objection. *Zillender v. State,* 557 S.W.2d 515, 517 (Tex.Crim.App.1977). However, if the context shows that a party failed to effectively communicate his argument, then the error is deemed waived on appeal. *Lankston,* 827 S.W.2d at 909.

Appellant does not direct the Court to the specific text-messages that he asserts the trial court improperly admitted into ***163** evidence. Our review of the record indicates that State's Exhibits 200, 201, 203, 205, and 208 contain text messages sent from and received by the cellular telephone.[19] Notably, however, appellant failed to object to the admission of any of these exhibits on the basis of improper authentication.

Here, when the State sought to admit State's Exhibits 200–08, appellant generally objected based on "relevance" and "prejudice."[20] Appellant then made the following objections specifically regarding the text-message exhibits:

> [Appellant's Counsel]: I would like a running objection to State's Exhibit 208 from my prior objection and my Motion to Suppress.... In addition to that, I would like to object to State's Exhibit 208, to the relevance of this document. And I would like to object to the text messages that talk about sexual—that are sexually explicit, as to[o] prejudicial to the defendant and that the probative value does not outweigh the undo prejudice of that particular exhibit of text messages.
>
> ...
>
> [Appellant's Counsel]: And I have the same objection to State's Exhibit 201. I would like to make a running objection on my Motion to Suppress in addition to that, the private explicit nature of these texts, stating that they are extremely prejudicial to my client and the probative value does not substantially outweigh the undue prejudice.
>
> ...
>
> [Appellant's Counsel]: I would like to state the same objection for State's Exhibit 200.
>
> [Appellant's Counsel]: I would like to make the same objections to State's Exhibit 203, as well as foundation.
>
> ...
>
> [Appellant's Counsel]: ... I would like to make the same objections to State's Exhibit 205, improper foundation.

Although appellant complains on appeal that State's Exhibits 200, 201, and 208 lacked proper authentication, he did not raise an improper authentication objection with respect to these exhibits at trial. Accordingly, we hold that appellant did not preserve his complaint in regard to State's Exhibits 200, 201, and 208 for our review. *See Lovill,* 319 S.W.3d at 691–92 (error not preserved when contention urged on appeal does not comport with specific complaint made in trial court); *Rothstein,* 267 S.W.3d at 373 ("An objection stating one legal theory may not be used to support a different legal theory on appeal.").

In regard to State's Exhibits 203 and 205, appellant objected to their admission based on "foundation" and "improper foundation," respectively. However, an objection to the admission of evidence must be reasonably specific enough so as to apprise the trial court of its legal basis, and a defendant must inform the trial court how the predicate is deficient; a mere objection of improper predicate is not sufficient. *See Bird v. State,* 692 S.W.2d 65, 70 (Tex.Crim.App.1985); *Hernandez v. State,* 53 S.W.3d 742, 745 (Tex.App.–Houston [1st Dist.] 2001, pet. ref'd); ***164** *Jones v. State,* 825 S.W.2d 470, 472 (Tex.App.–Corpus Christi 1991, pet. ref'd).

Here, appellant's objections of "foundation" and "improper foundation" were too general and not specific enough to advise the trial court of his complaint that the exhibits had not been properly authenticated as required by Texas Rule of Evidence 901. *See* Tex. R. App. P. 33.1(a); *Bird,* 692 S.W.2d at 70; *see also Pendley v. State,* No. 2–03–111–CR, 2004 WL 2712109, at *6 (Tex.App.–Fort Worth Nov. 24, 2004, pet. ref'd) (mem. op., not designated for publication) (defendant's objection "that the proper foundation had not been laid" for admission of videotapes "too general to apprise the trial court of his specific complaint" regarding authentication). And appellant did not inform the trial court of any defect in the authentication of State's Exhibits 203 and 205.[21]

Accordingly, we hold that appellant also did not preserve for our review his improper-authentication complaint in regard to State's Exhibits 203 and 205.

We overrule appellant's second issue.

Modification of Judgments

We note that the trial court's written judgments do not accurately comport with the records in these cases in that they state "Not True" in regard to appellant's "[p]lea to 1st [e]nhancement [p]aragraph." Here, the records reveal that appellant pleaded "True" to the allegation in the enhancement paragraph in each indictment that he had previously been convicted of the felony offense of aggravated robbery.

"[A]ppellate court[s] ha[ve] the power to correct and reform a trial court judgment 'to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.' " *Nolan v. State,* 39 S.W.3d 697, 698 (Tex.App.–Houston [1st Dist.] 2001, no pet.) (quoting *Asberry v. State,* 813 S.W.2d 526, 529 (Tex.App.–Dallas 1991, pet ref'd)). Although neither party addresses the inconsistency between the trial court's written judgments and the records in these cases, we, based on our review, conclude that the portions of the judgments regarding appellant's pleas as to the allegation in the enhancement paragraph do not accurately comport with the records. *See Asberry,* 813 S.W.2d at 529–30 (authority to reform incorrect judgment not dependent upon request of any party).

Accordingly, we modify the trial court's judgments to reflect that appellant pleaded "True" to the "1st [e]nhancement [p]aragraph" in each indictment. *See* Tex. R. App. P. 43.2(b); *Bigley v. State,* 865 S.W.2d 26, 27–28 (Tex.Crim.App.1993); *Torres v. State,* 391 S.W.3d 179, 185 (Tex.App.–Houston [1st Dist.] 2012, pet. ref'd) (modifying judgment to state defendant pleaded "true" to allegations in enhancement paragraphs).

Conclusion

We affirm the judgments of the trial court as modified.

Jennings, J., concurring.

***165 CONCURRING OPINION**

I write separately to further explain why although this Court has a duty to address the factual-sufficiency challenge of appellant, Travis Marcellaus Edwards, in accord with the Factual–Conclusivity Clause of the Texas Constitution,[1] I agree that we must, at this time, overrule his challenge in light of this Court's precedent in *Ervin v. State,* 331 S.W.3d 49 (Tex.App.–Houston [1st Dist.] 2010, pet. ref'd).

In his fourth issue, appellant argues that the evidence is factually insufficient to support his conviction for the offense of aggravated robbery because, "[v]iewing all of the evidence in a neutral light, no rational jury could [have] f[ound] beyond a reasonable doubt that [he] had the intent to obtain and maintain control of [the complainant's] property." He also asserts in his fourth issue that if this Court "fails to conduct a factual sufficiency review," as required by the Texas Constitution, he "will be denied due process of law." *See* U.S. Const. amends. V ("No person shall be ... deprived of life, liberty, or property, without due process of law...."), XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law...."); Tex. Const. art. I, § 19 ("No citizen of this State shall be deprived life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."); *id.* art. V, § 6(a) ("[T]he decision of [the Texas Courts of Appeals] shall be conclusive on all questions of fact brought before them on appeal or error.").

I agree that not addressing appellant's factual-sufficiency challenge in accord with the Factual–Conclusivity Clause violates his rights to due process and equal protection of law.

See Bearnth v. State, 361 S.W.3d 135, 146–47 (Tex.App.–Houston [1st Dist.] 2011, pet. ref'd) (Jennings, J., concurring); *Kiffe v. State,* 361 S.W.3d 104, 110–19 (Tex.App.–Houston [1st Dist.] 2011, pet. ref'd) (Jennings, J., concurring); *Mosley v. State,* 355 S.W.3d 59, 73–77 (Tex.App.–Houston [1st Dist.] 2010, pet. ref'd) (Jennings, J., concurring); *Kibble v. State,* 340 S.W.3d 14, 24–27 (Tex.App.–Houston [1st Dist.] 2010, pet. ref'd) (Jennings, J., concurring); *Ervin,* 331 S.W.3d at 56–70 (Jennings, J., concurring); *see also Ibe v. State,* No. 01–12–00422–CR, 2014 WL 1058129, at *3 n. 1 (Tex.App.–Houston [1st Dist.] Mar. 18, 2014, no pet.) (mem. op., not designated for publication) (panel acknowledging failure to address defendant's question of fact violated United States Constitution's guarantees of due process of law and equal protection of laws); *Fisher v. State,* No. 01–11–00516–CR, 2013 WL 4680226, at *4–5 (Tex.App.–Houston [1st Dist.] Aug. 29, 2013, pet. ref'd) (mem. op., not designated for publication) (same).

As the Texas Court of Criminal Appeals clearly explained, as recently as 2009, in addition to being supported by legally-sufficient evidence, under Texas law,

> A verdict must also be supported by factually sufficient evidence. But unlike a legal sufficiency review, which is a federal due process requirement, a ***factual sufficiency review is a creature of state law.*** On direct appeal, a court must begin its factual sufficiency review with the assumption that the evidence is legally sufficient under *Jackson.*[2] ***Evidence that is legally sufficient, however, can be deemed factually insufficient in two ways: (1) the evidence supporting the conviction is "too weak" to support the factfinder's verdict,*** ***166** ***or (2) considering conflicting evidence, the factfinder's verdict is "against the great weight and preponderance of the evidence.***" When a court of appeals conducts a factual sufficiency review, it must defer to the jury's findings. We have set out three "basic ground rules" implementing this standard. First, the court of appeals must consider all of the evidence in a neutral light, as opposed to in a light most favorable to the verdict. Second, the court of appeals may only find the evidence factually insufficient when necessary to "prevent manifest injustice." Although the verdict is afforded less deference during a factual sufficiency review, the court of appeals is not free to override the verdict simply because it disagrees with it. Third, the court of appeals must explain why the evidence is too weak to support the verdict or why the conflicting evidence greatly weighs against the verdict. This requirement serves two related purposes. First, it supports the court of appeals's judgment that a manifest injustice has occurred. And second, it assists us in ensuring that the standard of review was properly applied.

Laster v. State, 275 S.W.3d 512, 518 (Tex.Crim.App.2009) (Keasler, J., joined by Keller, P.J., Meyers, Womack & Hervey, JJ.) (emphasis added) (internal citations omitted).

In regard to appellate challenges based on the factual insufficiency of the evidence in Texas courts of appeals, the Factual–Conclusivity Clause of the Texas Constitution provides in no uncertain terms that:

> [T]he decision of [the Texas Courts of Appeals] shall be conclusive on all ***questions of fact*** brought before them on appeal or error.

Tex. Const. art. V, § 6(a) (emphasis added). The original intent of the drafters of the clause is clear. The clause "requires" that Texas courts make a "distinction" between questions of law and questions of fact. *Sw. Bell Tel. Co. v. Garza,* 164 S.W.3d 607, 621 (Tex.2004). As clearly explained, again by the Texas Court of Criminal Appeals, in *Laster.*

> Unlike our jurisdiction over legal sufficiency decisions, our jurisdiction over the court of appeals's factual sufficiency decisions is limited. ***The Factual Conclusivity Clause gives final appellate jurisdiction to the court of appeals on questions of fact brought before the court.*** We review the court of appeals's factual sufficiency analysis to ensure that the court applied the correct legal standard and considered all of the relevant evidence. We do not conduct a de novo factual sufficiency review. If we determine that the court of appeals applied the wrong standard or misapplied the correct standard, the case must be remanded to the court of appeals to conduct a proper factual sufficiency review.

275 S.W.3d at 518–19 (emphasis added) (internal citations omitted).

Thus, under the Factual–Conclusivity Clause, this Court has a duty to address appellant's question of fact as a question of fact, i.e., by neutrally considering and weighing all the evidence in the record, including that which is contrary to the jury's verdict. *Id.*; *Cain v. State,* 958 S.W.2d 404, 408 (Tex.Crim.App.1997); *Ex parte Schuessler,* 846 S.W.2d 850, 852 (Tex.Crim.App.1993); *Meraz v. State,* 785 S.W.2d 146, 153 (Tex.Crim.App.1990); *see also Pool v. Ford Motor Co.,* 715 S.W.2d 629, 633–35 (Tex.1986); *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661–62 (1951). Moreover, the Texas Legislature has expressly directed, consistent with the Factual–Conclusivity Clause, that Texas Courts of Appeals "may reverse the judgment ***167** in a criminal action ...

upon the facts." Tex.Code Crim. Proc. Ann. art. 44.25 (Vernon 2006). Indeed, it is well-settled that it is reversible error for a court of appeals to address a question of fact as a question of law. *In re King's Estate,* 244 S.W.2d at 661–62; *see also Ex parte Schuessler,* 846 S.W.2d at 852; *Meraz,* 785 S.W.2d at 153.

However, the Texas Court of Criminal Appeals, disregarding the plain language of Article V, Section 6 of the Texas Constitution, the plain language of Article 44.25 of the Texas Code of Criminal Procedure, decades-old precedent of the Texas Supreme Court, and its own well-established precedent, has purported to "abolish[ ]" factual-sufficiency review in criminal cases in Texas. *Howard v. State,* 333 S.W.3d 137, 138 n. 2 (Tex.Crim.App.2011). In two separate opinions, the court concluded that in criminal cases, "a legal-sufficiency [appellate] standard [of review is] 'indistinguishable' from a factual-sufficiency [appellate] standard" of review. *Brooks v. State,* 323 S.W.3d 893, 901 (Tex.Crim.App.2010) (Hervey, J., joined by Keller, Keasler & Cochran, JJ.); *see id.* at 912–26 (Cochran, X, joined by Womack, X, concurring) (overruling use in criminal cases of factual-sufficiency appellate standard of review, which was consistent with Texas Supreme Court precedent and articulated in *Clewis v. State,* 922 S.W.2d 126 (Tex.Crim.App.1996)).

Subsequently, this Court, in light of the Texas Court of Criminal Appeal's plurality opinions in *Brooks,* decided to answer questions of fact in criminal appeals as pure questions of law by applying the legal-sufficiency appellate standard of review to fact questions and viewing the evidence in the light most favorable to the prosecution, not neutrally reweighing it. *See Ervin,* 331 S.W.3d at 52–56. Although the majority in *Ervin* erred in doing so, this Court did have jurisdiction to so err, and, until this Court or a higher court overrules *Ervin,* we must accept it as binding precedent. *See Swilley v. McCain,* 374 S.W.2d 871, 875 (Tex.1964).

Given the express language of Article V, Section 6 of the Texas Constitution and Article 44.25 of the Texas Code of Criminal Procedure, it is readily apparent that answering appellant's question of fact as a purely legal question violates the United States Constitution's guarantee of due process of law, as well as its guarantee of the equal protection of the laws, because it, in fact, deprives him of his well-established Texas appellate remedy of a new trial, recognized in the Texas Constitution and by the Texas Legislature in Article 44.25. *See* U.S. Const. amends. V, XIV; *Griffin v. Illinois,* 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956) (concluding in states providing for appellate review, criminal defendant entitled to protections afforded under Due Process and Equal Protection Clauses of United States Constitution); *see also M.L.B. v. S.L.J.,* 519 U.S. 102, 111, 117 S.Ct. 555, 561, 136 L.Ed.2d 473 (1996) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (internal quotations omitted)).

Moreover, given that the Texas Supreme Court, in reading Article V, Section 6 of the Texas Constitution, clearly recognizes the right of civil litigants to present intermediate courts of appeals with questions of fact and the remedy of a remand for a new trial, the denial of that right, given that Article V, Section 6 is not in any way limited to civil cases, amounts to a denial of the equal protection of the law. *See* U.S. Const. amend. XIV. "There is no ***168** sound basis for the disparate interpretations of a single constitutional provision based on whether the matter on appeal is civil or criminal in nature." Susan Bleil & Charles Bleil, *The Court of Criminal Appeals Versus the Constitution: The Conclusivity Question,* 23 St. Mary's L.J. 423, 424 (1991).

Although Texas Courts of Appeals have only rarely found evidence factually insufficient to support criminal convictions or findings in civil cases, the right of a defendant in a criminal case or a litigant in a civil case to assert a question of fact on appeal and request a remand for a new trial is critical and in no way interferes with the right to trial by jury. As explained by former Texas Supreme Court Chief Justice Thomas Phillips:

> Appellate courts have the authority to review the sufficiency of evidence in support of the fact finder's determinations for one reason: ***to undo the effect of an unjust trial.*** This traditional judicial function, now exercised only by our intermediate appellate courts, neither conflicts with nor infringes upon the right of trial by jury. No appeals court in Texas has ever been given, or has ever exercised, the authority to *find* any fact. ***The extent of an appellate court's power is, as it has always been, to remand for new trial if more than a scintilla of probative evidence exists to support the result reached by the jury.***
>
> This authority exists regardless of whether the court of appeals is reviewing a jury's finding or its "non-finding," that is, the failure of a jury to find a fact. ***In either case, the court is not substituting its own finding for the jury's; it***

> ***is merely ordering a new trial before another jury for a new determination.***
>
> ***The court of appeals must have this authority in order to do justice.*** Trials may be just as unfair when the party with the burden of proof unjustly loses as when the party with the burden of proof unjustly wins. ***To fulfill its constitutional responsibilities,*** the court of appeals must have authority to review both findings and non-findings.

Herbert v. Herbert, 754 S.W.2d 141, 145 (Tex.1988) (Phillips, C.J., concurring) (emphasis added) (internal citations omitted).

In sum, the Factual–Conclusivity Clause of the Texas Constitution provides a much-needed and critical fail-safe against manifestly unjust convictions that are based on evidence that is factually insufficient, although legally sufficient. And, respectfully, neither this Court, nor the Texas Court of Criminal Appeals has the legitimate power to "abolish" this constitutionally guaranteed right. *See Ex parte Schuessler,* 846 S.W.2d at 852–53 (court of criminal appeals does not have authority to "create[ ] a standard of review for the courts of appeals that contravene[s] the Texas Constitution"); *see also M.L.B.,* 519 U.S. at 111, 117 S.Ct. at 561 ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (internal quotations omitted)). As previously explained by the court of criminal appeals:

> The court of appeals is ... constitutionally given the authority to determine if a jury finding is against the great weight and preponderance of the evidence and if this is improper it is up to the people of the State of Texas to amend the Constitution.

Meraz, 785 S.W.2d at 154.

All Citations

497 S.W.3d 147

Footnotes

1 *See* Tex. Penal Code Ann. § 22.02(a)(2), (b)(2)(D) (Vernon 2011); appellate cause no. 01–15–00416–CR; trial court cause no. 1353154.

2 *See* Tex. Penal Code Ann. § 29.03(a)(2) (Vernon 2011); appellate cause no. 01–15–00417–CR; trial court cause no. 1443321.

3 *See* Tex. Penal Code Ann. § 46.04(a) (Vernon 2011); appellate cause no. 01–15–00418–CR; trial court cause no. 1443322.

4 Madrazo explained that the lobby was a "tight space," approximately "3 × 3" feet or "4 × 4" feet.

5 Deputy Rincon further noted that Madrazo had reported that "some suspects" had been "hiding behind" the car when "they were shooting at him."

6 A "selfie" is "a photograph that a person takes of himself ... with a cell phone for posting on social media." *Selfie,* Webster's New World College Dictionary (5th ed.2014).

7 "Metadata" is "a set of data that describes and gives information about other data." *Metadata,* New Oxford American Dictionary (3d ed.2010).

8 "Facebook Messenger is a mobile tool that allows users to instantly send chat messages to friends on Facebook. Messages are received on [users'] mobile phones." *Facebook Messenger,* Techopedia, https://www.techopedia.com/definition/28490/facebook-messenger (last visited May 5, 2016); *see generally* Facebook, https://www.facebook.com (last visited May 5, 2016).

9 Other text messages received to the cellular telephone stated: "Hw r u doin today mr Travis?"; "Ok Mr. Edwards"; "I got ur child. The lady at the daycare say was actin up and sayin bad words Mr. Edwards"; "She say she miss u. I told her u came by today Mr. Edwards"; "I'm serious Mr. Edwards"; and "Will u b attending her first say of skool ths yr? Mr. Edwards."

10 Pham testified that “strap” is a slang term for a “[f]irearm.”

11 Pham testified that “scrill” is a slang term for “[m]oney.”

12 Tex. Const. art. V, § 6(a).

13 U.S. Const. amends. V, XIV; Tex. Const. art. I, § 19.

14 Deputy Clayton recovered from “the rear deck, the rear trunk lid” of the Dodge Stratus, a handprint that matched appellant's known handprint.

15 To the extent that appellant asserts that this Court cannot consider the text messages retrieved from the cellular telephone recovered by Deputy Clayton from the top of the Dodge Stratus, we note that when conducting a sufficiency review, we “must evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible.” *Dewberry v. State,* 4 S.W.3d 735, 740 (Tex.Crim.App.1999); *see also Conner v. State,* 67 S.W.3d 192, 197 (Tex.Crim.App.2001) (“When conducting a sufficiency review, we consider all the evidence admitted, whether proper or improper.”).

16 We also note that law enforcement misconduct could not have caused appellant to abandon the cellular telephone because by the time the “first [law enforcement] officer” arrived at the scene, the shooting had stopped and appellant had already left the premises. *Cf. Bernard v. State,* No. 01–03–00188–CR, 2004 WL 396449, at *3 (Tex.App.–Houston [1st Dist.] Mar. 4, 2004, no pet.) (mem. op., not designated for publication) (“Police misconduct could not have caused [defendant] to abandon the bag[, placed behind the car's backseat headrest,] because the officers ... had not yet arrived at the car.”).

17 The trial court also admitted into evidence several photographs of the cellular telephone sitting on top of the front-passenger side of the Dodge Stratus.

18 Having concluded that appellant has not shown that he had a reasonable expectation of privacy in the cellular telephone, we need not address his argument that the search warrant obtained by law enforcement officers was “general” and allowed for an “overbroad” search of the cellular telephone's contents. *See Valtierra v. State,* 310 S.W.3d 442, 447–48 (Tex.Crim.App.2010) (“We will sustain the trial court's ruling if that ruling is reasonably supported by the record and is correct on any theory of law applicable to the case.” (internal quotations omitted)); *see also* Tex. R. App. P. 47.1.

19 We note that State's Exhibit 203 contains “MMS Messages,” rather than “SMS Messages,” and was discussed at trial only in regard to the e-mails that it contained. However, out of an abundance of caution, we will address this exhibit in conjunction with the other text-message exhibits in the record.

20 State's Exhibits 202, 204, 206, and 207 do not contain text messages.

21 We also note that some of the text messages contained in State's Exhibits 203 and 205, particularly those from June 21, 2012, the day of the shooting, are also contained in State's Exhibits 200, 201, and 208, to which appellant did not object on the basis of improper authentication. *See Hudson v. State,* 675 S.W.2d 507, 511 (Tex.Crim.App.1984) (“[A]n error in admission of evidence is cured where the same evidence comes in elsewhere without objection.... ”).

1 Tex. Const. art. V, § 6(a).

2 *See Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

939 S.W.2d 607
Court of Criminal Appeals of Texas,
En Banc.

Kenneth Allen McDUFF, Appellant,

v.

The STATE of Texas, Appellee.

No. 71872.
|
Jan. 22, 1997.
|
Rehearing Denied Feb. 26, 1997.

Synopsis

Defendant was convicted in the District Court, Guadelupe County, Wilford Flowers, J., of capital murder and was sentenced to death. On appeal, the Court of Criminal Appeals, Overstreet, J., held that: (1) nonaccomplice evidence sufficiently connected defendant to murder to corroborate testimony of accomplice witness; (2) evidence was legally and factually sufficient to support conviction; (3) defendant lacked standing to contest reasonableness of search of automobile which he abandoned; (4) trial court did not abuse its discretion in denying defendant's proffered evidence about accomplice witness's knowledge of time of parole eligibility on life sentence; (5) prior consistent statements were admissible; (6) defendant's request to represent himself at punishment was not timely; (7) trial court was within its discretion in admitting victim impact testimony; (8) trial court was not required to define "society".

Affirmed.

Baird, J., filed concurring opinion in which McCormick, P.J., joined.

Mansfield, J., filed concurring opinion.

Attorneys and Law Firms

***610** Bill Barbisch, Austin, for appellant.

Phillip A. Nelson, Jr., Asst. Dist. Atty., Matthew Paul, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

OVERSTREET, Judge.

A Travis County grand jury indictment accused appellant of committing capital murder, specifically intentionally causing death in the course of committing and attempting to commit aggravated sexual assault and aggravated kidnapping, alleged to have occurred on or about the 29th day of December, 1991. After a change of venue, resulting in the trial being conducted in Guadalupe County, on February 23, 1994 appellant was convicted in a trial by jury of capital murder. Thereafter on March 1, 1994, based upon the jury's answers to the special issues of Article 37.071, V.A.C.C.P., appellant was sentenced ***611** to death.[1] Appellant raises 23 points of error.

I.

EVIDENCE SUFFICIENCY

In four points of error, appellant attacks the sufficiency of the evidence to support his conviction. Specifically, point of error number one claims error in overruling his motion for directed verdict. Point number two avers that the evidence is legally insufficient to support his conviction, while point three alleges factual insufficiency. Point number four claims the evidence is insufficient to corroborate accomplice testimony. These points revolve around appellant's claims that the State has not demonstrated: the corpus delicti of murder, his connection with such a crime, nor the corpus delicti of aggravated kidnapping or aggravated sexual assault.

A. TRIAL TESTIMONY

At trial, an accomplice witness testified as to appellant in late December of 1991 abducting the complainant from an Austin car wash and forcing her into the car that he and the accomplice were riding around in. The accomplice testified in some detail about appellant sexually assaulting the complainant in the backseat while the car was being driven and again on the hood of the car when they stopped the car. He testified that this even included burning her with a lit cigarette several times. The accomplice even admitted to switching places with appellant and sexually assaulting her himself. The accomplice also testified that after they had

stopped and gotten out, with appellant continuing his sexual assault, appellant slapped the complainant real hard and said something about killing her, and that after the slap she fell back and bounced on the ground; whereafter appellant picked her up and put her in the trunk of the car. The accomplice thought that the complainant was moaning, but when she was placed in the trunk and the lid closed she did not make any noise. He indicated that the slap sounded something like a crack, a tree limb or something breaking, but did not think that it broke her neck. The accomplice testified that he was then dropped off at his house and never saw the complainant again. He also testified that on the way to being dropped off appellant asked for a pocketknife and shovel and said that "he was going to use her up."

Four witnesses testified about hearing a woman's scream followed by the sound of a car door or trunk slamming coming from the same Austin car wash mentioned above on the night of December 29, 1991, and that a car then drove out of the car wash onto a one-way street the wrong way. Some of those witnesses had previously seen that same car in that same area with two men inside a few minutes earlier that night driving the wrong way on another nearby one-way street. One of the witnesses identified appellant as the driver of that car leaving the car wash. The complainant's unoccupied soap-sudded car was then found at the otherwise deserted car wash with her keys and purse and some perishable groceries inside.

The complainant's boyfriend testified that on the night of December 29, 1991, he spoke with her on the phone and she said that she wanted to go wash her car that night. Her sister testified that since that night, there had been no activity in the complainant's bank and charge accounts that could be attributed to the complainant. The sister also indicated that there was no indication from the items remaining in her apartment that she was going on a trip. She was unaware of any problems that the complainant might have been going through that would possibly cause her to disappear or just walk off and leave everything.

A Department of Public Safety (DPS) serologist testified that appellant's car, which he had been seen pushing into and leaving in a Waco motel parking lot on March 1, 1992, and some items therein were found to contain small amounts of human blood. There was also testimony from a DPS criminologist that five hairs recovered from appellant's car matched up microscopically to the known ***612** hair of the complainant, i.e. each of the five hairs had the same microscopic characteristics as the hair that was known to be the complainant's.

A minister/supervisor for a Kansas City, Missouri rescue mission shelter for homeless men testified that appellant had checked into the shelter on March 17, 1992 using an alias name. There was testimony that appellant was arrested on May 4, 1992 in Kansas City, Missouri as he was working using an alias name with alias identification.

B. ACCOMPLICE WITNESS INSUFFICIENCY CLAIM

Point of error number four avers that "the evidence is insufficient to corroborate accomplice testimony." Article 38.14, V.A.C.C.P., provides, "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." The test for sufficient corroboration is to eliminate from consideration the accomplice testimony and then examine the other inculpatory evidence to ascertain whether the remaining evidence tends to connect the defendant with the offense. *Burks v. State,* 876 S.W.2d 877, 887 (Tex.Cr.App.1994), *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995). In order to determine whether the accomplice witness testimony is corroborated, we eliminate all accomplice evidence and determine whether the other inculpatory facts and circumstances in evidence tend to connect appellant to the offense. *Munoz v. State,* 853 S.W.2d 558, 559 (Tex.Cr.App.1993). We shall accordingly eliminate the accomplice witness testimony from our consideration and then conduct such an examination without considering the accomplice witness testimony.

Appellant points to the lack of non-accomplice eyewitness testimony to the alleged killing, and the absence of a body or definite cause of death. He insists that absent the accomplice testimony, there is no evidence of the complainant's death, "except that she was abducted and has not returned." He also points out that hearsay from an accomplice cannot corroborate the accomplice's trial testimony, i.e. an accomplice cannot corroborate himself by his own statements made to third persons. *Reynolds v. State,* 489 S.W.2d 866, 872 (Tex.Cr.App.1972); *Brown v. State,* 167 Tex.Crim. 352, 320 S.W.2d 845 (1959); and *see also Beathard v. State,* 767 S.W.2d 423, 429 (Tex.Cr.App.1989).

As noted above, there was trial testimony from a nonaccomplice witness that on the evening of December 29, 1991 appellant was seen driving a car out of the car wash shortly after a woman's scream and the sound of a car door or trunk slamming had been heard coming from the car wash. Non-accomplice witnesses also testified that shortly thereafter the complainant's unoccupied soap-sudded car was found abandoned at the otherwise deserted car wash with her keys and purse and some perishable groceries inside. Non-accomplice testimony also indicated that the same car that appellant was identified as driving out of the car wash after the scream and door or trunk slam had been seen, occupied by two men, driving around in the neighborhood shortly before the incident at the car wash.

Motel employees testified about appellant pushing his car into the motel parking lot and that it was left there. A DPS criminologist testified that five hairs recovered from appellant's car matched up microscopically to the known hair of the complainant, i.e. each of the five hairs had the same microscopic characteristics as the hair that was known to be the complainant's. One of those hairs was recovered from the carpet in the trunk, while the others were recovered from the backseat area and a back floorboard mat. Also several items found inside appellant's car, including carpeting on the back floor area, a cowboy hat, bed sheets, and a shirt, were found to contain small amounts of human blood; however, based upon the blood the complainant could not be included nor excluded from having been in the car.

One of the accomplice's sisters, with whom the accomplice had been staying in 1991, testified that on an evening between Christmas and New Year's Eve of 1991, a car that ***613** appeared to be appellant's pulled up at her home in Belton and that the accomplice left with the explanation that he and appellant were going to have a couple of drinks. She further testified that the accomplice returned home after midnight that night but she could not describe the vehicle that dropped him off there. An acquaintance of appellant's testified about them riding around Austin on Christmas Day of 1991 looking for a particular prostitute, whereupon appellant suggested just taking a young girl who was outside roller-skating.

The non-accomplice evidence does not have to directly link appellant to the crime, nor does it alone have to establish his guilt beyond a reasonable doubt; but rather, the non-accomplice evidence merely has to tend to connect appellant to the offense. *Burks v. State,* 876 S.W.2d at 888. Thus there must simply be *some* non-accomplice evidence which *tends* to connect appellant to the commission of the offense alleged in the indictment. *Gill v. State,* 873 S.W.2d 45, 48 (Tex.Cr.App.1994). The accomplice witness testimony in a capital murder case does not require corroboration concerning the elements of the aggravating offense, i.e. the elements which distinguish murder from capital murder. *Gosch v. State,* 829 S.W.2d 775, 777 n. 2 (Tex.Cr.App.1991), *cert. denied,* 509 U.S. 922, 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993); *May v. State,* 738 S.W.2d 261, 266 (Tex.Cr.App.1987), *cert. denied,* 484 U.S. 1079, 108 S.Ct. 1059, 98 L.Ed.2d 1020 (1988); *Anderson v. State,* 717 S.W.2d 622, 631 (Tex.Cr.App.1986), *cert. dismissed,* 496 U.S. 944, 110 S.Ct. 3232, 110 L.Ed.2d 678 (1990); *Romero v. State,* 716 S.W.2d 519, 520 (Tex.Cr.App.1986), *cert. denied,* 479 U.S. 1070, 107 S.Ct. 963, 93 L.Ed.2d 1011 (1987). Evidence that the defendant was in the company of the accomplice at or near the time or place of the offense is proper corroborating evidence. *Cockrum v. State,* 758 S.W.2d 577, 581 (Tex.Cr.App.1988), *cert. denied,* 489 U.S. 1072, 109 S.Ct. 1358, 103 L.Ed.2d 825 (1989); and *Burks v. State,* 876 S.W.2d at 887–88.

After eliminating the accomplice witness testimony from our consideration and conducting an examination of the non-accomplice evidence, we conclude that such non-accomplice evidence does indeed tend to connect appellant to the offense sufficiently to corroborate the testimony of the accomplice witness. Accordingly, we overrule point four.

C. GENERAL INSUFFICIENCY CLAIMS

Point of error number three avers that "the evidence is factually insufficient to support appellant's conviction." Appellant generally discusses the evidence for points one through four together in his brief, but does not propose a standard of reviewing factual sufficiency in a capital case or specifically argue how the evidence is insufficient under any standard of reviewing factual sufficiency. *See, e.g., Clewis v. State,* 922 S.W.2d 126 (Tex.Cr.App.1996); *White v. State,* 890 S.W.2d 131 (Tex.App.—Texarkana 1994, pet. pending); *Stone v. State,* 823 S.W.2d 375 (Tex.App.—Austin 1992, pet. ref'd, untimely filed). He simply begins his discussion of points one through four by stating, "In reviewing for factual sufficiency the court considers whether the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust[,]" and concludes by stating, "In the alternative, appellant asserts that his conviction is against the great weight and preponderance of the evidence and that his conviction should be reversed and a new trial ordered."

We conclude that point number three is insufficiently briefed, presents nothing for review. Tex.R.App.Pro. 74(f) and 210(b). Also, after reviewing the evidence under the *Clewis* standard, we conclude that the verdict is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. Point three is hereby overruled.

Point number one claims error in overruling his motion for directed verdict, while point two alleges that the evidence is legally insufficient to support his conviction. Since a complaint about overruling a motion for directed/instructed verdict is in actuality an attack upon the sufficiency of evidence to sustain the conviction, we shall address and dispose of points one and two together. *Cook v. State,* 858 S.W.2d 467, 469–70 (Tex.Cr.App.1993).

***614** Appellant insists that there are no prosecutions for murder in the absence of 1) a body or remains, 2) a confession, and/or 3) non-accomplice testimony of death and cause of death; i.e. where there is no body, no confession, and no non-accomplice testimony of the death and cause of death, there is a failure of proof of the corpus delicti of homicide. He also insists that the State has failed to show the corpus delicti of either murder, aggravated kidnapping, or aggravated sexual assault.

The corpus delicti of a crime simply consists of the fact that the crime in question has been committed by someone; specifically, the corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another, and the State is not required to produce and identify the body or remains of the decedent. *Fisher v. State,* 851 S.W.2d 298, 303 (Tex.Cr.App.1993). Thus, in the instant cause, the State must show the death of the named complainant caused by the criminal act of appellant.

Appellant insists that in the absence of a body or remains or a confession, such mandatory showing of corpus delicti must be made via non-accomplice testimony of death and cause of death. He opines that since there is no body to autopsy, a definitive determination of death and cause of death is not possible. He also suggests that if accomplice testimony can be utilized to establish the cause of death, such must be corroborated, though he acknowledges that the standard for corroboration of accomplice testimony to prove corpus delicti is unknown.

We do not find appellant's assertions persuasive. We see no reason to exclude accomplice witness testimony in determining whether the corpus delicti has been established. Appellant is unable to cite any constitutional, statutory, or caselaw requirement that accomplice witness testimony be corroborated before it can be considered in determining whether the corpus delicti has been established, thus we decline to require such corroboration in making such a determination. Accordingly, in resolving appellant's points of error claiming legal insufficiency of evidence to prove corpus delicti, we shall consider all of the evidence, including accomplice witness testimony. We note that in evaluating the legal sufficiency of evidence of guilt, we must consider *all* of the evidence. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). This includes the accomplice witness testimony. In making such evaluation, we must view *all* of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Accordingly, we evaluate appellant's legal insufficiency claims in view of *all* of the evidence in such requisite light.

The indictment in the instant cause included a count alleging capital murder via murder in the course of committing and attempting to commit aggravated sexual assault and aggravated kidnapping. The jury charge authorized conviction of capital murder if it found that appellant intentionally caused the death of the complainant in the course of committing or attempting to commit aggravated sexual assault or aggravated kidnapping.[2] The jury returned a general verdict of "guilty of the offense of capital murder." When a general verdict is returned and the evidence is sufficient to support a finding of guilt under any of the paragraph allegations submitted, the verdict will be upheld. *Rabbani v. State,* 847 S.W.2d 555, 558 (Tex.Cr.App.1992), *cert. denied,* 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 731 (1993); *Fuller v. State,* 827 S.W.2d 919, 931 (Tex.Cr.App.1992), *cert. denied,* 509 U.S. 922, 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993). Thus if the evidence is sufficient to support the allegation of murder during the course of aggravated kidnapping, then the guilty verdict shall be upheld.

***615** As discussed above, the corpus delicti of a crime simply consists of the fact that the crime in question has been committed by someone; specifically, the corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another. As also discussed above, the accomplice witness testified about being present in late December of 1991 when appellant

forcibly abducted the complainant from an Austin car wash, and then sexually assaulted her, while the complainant's unoccupied soap-sudded car was found abandoned at the otherwise deserted car wash with her keys and purse and some perishable groceries inside shortly after witnesses testified that they had heard a woman's scream and a car door or trunk slamming sound coming from the car wash and a witness had seen a man, subsequently identified as appellant, driving out of the car wash. Viewing the evidence in the requisite favorable light, we conclude that such establishes the corpus delicti of aggravated kidnapping. V.T.C.A. Penal Code, § 20.04. We also note that the jury charge, pursuant to the indictment and V.T.C.A. Penal Code, § 19.03(a)(2), authorized conviction of capital murder for murder in the course of committing "or attempting to commit" aggravated kidnapping.

As discussed above, the corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another, and the State is not required to produce and identify the body or remains of the decedent. The accomplice witness testified as to appellant striking the complainant with such force that it bounced her on the ground and sounded something like a crack, a tree limb or something breaking, and placed her limp body in the trunk of his car; and that after striking that blow appellant burned her two or three times with a cigarette but got no response other than perhaps moaning. He also indicated that appellant mentioned killing her and using her up, and asked for a pocketknife and shovel. Another witness testified that while riding around appellant had pointed out places, like around a bridge or tree or gully or oil well, that would be good to bury somebody or dump a body or get rid of somebody, though it was understood that he was referring to getting revenge against a guy who had killed appellant's brother some years before.

The accomplice witness testified as to the difference in stature between appellant, at over six-feet tall, and the complainant, appearing to be a good foot shorter. An exhibit admitted into evidence, a flier announcing the complainant's disappearance, described her as five-foot three-inches tall and weighing one-hundred fifteen pounds. A forensic pathologist testified that a blow from the hand of a person of some size delivered to the head of a person five-foot three-inches tall and weighing one-hundred fifteen pounds which sounded like a tree limb breaking, which resulted in the recipient of the blow being knocked back and bouncing off the ground and being carried limp with legs and feet dangling, indicates that something major has broken with the limpness indicating that there was probably spinal cord damage as well; and not appropriately responding to cigarette burns thereafter further indicates neurological pathway damage without possible recovery such that life is going to be lost very quickly.

As discussed earlier, the complainant's sister indicated that since the complainant had disappeared, she had not seen or heard from the complainant and there had been no activity in her bank and charge accounts that could be attributed to the her, nor was there any indication from the items remaining in her apartment that she was going on a trip. The sister was unaware of any problems that the complainant might have been going through that would possibly cause her to disappear or just walk off and leave everything. The sister also indicated that she and the complainant tried to talk on the phone once or twice a week or at least leave messages on each other's answering machines.

Viewing this evidence and the previously discussed evidence of blood and hairs found in appellant's car in the requisite light, we conclude that there is sufficient evidence of the corpus delicti of murder, i.e. evidence showing the death of a human being caused by the criminal act of another. We conclude that a rational trier of fact could have found ***616** the essential elements of the crime beyond a reasonable doubt. Accordingly, points one and two are overruled.

II. EVIDENCE ADMISSIBILITY

A. SEARCH AND SEIZURE

Points ten, eleven and twelve claim error in failing to suppress evidence seized in three separate searches of appellant's car. These items included personal papers bearing appellant's name, a wallet, hairs, clothing, and bloody spots on the car's carpeting. Point ten refers to the March 12, 1992 search; point eleven refers to the April 2, 1992 search; and point twelve refers to the May 19, 1992 search. Appellant unsuccessfully sought to suppress various items seized from his car during the three searches; his pretrial suppression motions were overruled.

The State suggests that appellant had abandoned the car and forsaken any reasonable expectation of privacy therein. Appellant claims that since this abandonment argument was not made by the State in the trial court, such should not now be heard. However, a reviewing court "may properly sustain

the trial court's denial on the ground that the evidence failed to establish standing as a matter of law, even though the record does not reflect that the issue was ever considered by the parties or the trial court." *Wilson v. State,* 692 S.W.2d 661, 671 (Tex.Cr.App.1984) (op. on reh'g). There is a lack of standing to contest the reasonableness of the search of abandoned property.

At the pretrial hearing, there was testimony that motel employees had first noticed the car in the early morning hours of March 1, 1992 and subsequently contacted the sheriff's department wanting it removed because it was partially blocking their truck parking area—it was parked out in the middle of the lot. At police direction, it was towed from the motel parking lot on March 6, 1992. Thus it had been there unattended for 6 days. An affidavit supporting the April 2 search warrant, which was offered and admitted into evidence for purposes of the hearing, indicated that appellant had been positively identified as the man seen using another car in pushing this car into the parking lot of the motel during the early morning hours of March 1, 1992, and that as a result of the car being left there for several days and no one moving it, the motel owners wanted it moved off the property.

Abandonment of property occurs if the defendant intended to abandon the property and his decision to abandon it was not due to police misconduct. *Brimage v. State,* 918 S.W.2d 466, 507 (Tex.Cr.App.1996), *cert. filed,* May 29, 1996; *Comer v. State,* 754 S.W.2d 656, 659 (Tex.Cr.App.1986). When police take possession of property abandoned independent of police misconduct there is no seizure under the Fourth Amendment. *Hawkins v. State,* 758 S.W.2d 255, 257 (Tex.Cr.App.1988); *Clapp v. State,* 639 S.W.2d 949, 953 (Tex.Cr.App.1982). This Court has spoken approvingly of language in *U.S. v. Colbert,* 474 F.2d 174 (5th Cir.1973) (en banc), which discussed how abandonment is primarily a question of intent to be inferred from words spoken, acts done, and other objective facts and relevant circumstances, with the issue not being in the strict property-right sense, but rather whether the accused had voluntarily discarded, left behind, or otherwise relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. *Sullivan v. State,* 564 S.W.2d 698 (Tex.Cr.App.1978) (op. on reh'g); *Smith v. State,* 530 S.W.2d 827, 833 (Tex.Cr.App.1975).

Appellant pushed the car into the motel parking lot. There is no evidence that there was any police involvement at all in his doing so. Thus we must determine whether appellant's pushing the car there and leaving it for several days evidences an intent to abandon it.

We note that TEX.REV.CIV.STAT.ANN. art. 4477–9a, § 5.01(2) (Vernon Supp.1992), *repealed* effective September 1, 1995, and *replaced by* V.A.T.C. Transp. Code, § 683.002, defines "Abandoned motor vehicle" to include "a motor vehicle that has remained on private property without the consent of the owner or person in control of the property for more than 48 hours[.]" Such definition applies specifically to the ***617** Texas Abandoned Motor Vehicles Act and is thus not dispositive on general search and seizure issues, but can be instructive in our determination of appellant's intent in leaving his car.

As discussed above, appellant had left the car in the motel parking lot for several days, apparently voluntarily and without any police involvement. Leaving it for six days, nearly a week from March 1 through March 6, is some evidence of intent to not retrieve the car. Also appellant driving another car to push this car into the parking lot is some indicia that appellant had possession of another operable vehicle. The affidavit supporting the May 18 search warrant indicated that appellant did not return to his school classes on March 2, 1992 and was subsequently found living under alias names in Kansas City, Missouri on May 4, 1992. The Abandoned Motor Vehicles Act includes provisions for police to take an abandoned vehicle into custody, and for police department use and auction of such vehicles. Such statutory potential disposition of a vehicle contemplates possible loss of possession and ownership and concomitant privacy interests.

We point out that leaving a car unattended such as to be included within the Art. 4477–9a, § 5.01(2) definition does not automatically mean "abandonment" in terms of a Fourth Amendment privacy interest. Each situation must be analyzed and evaluated on a case-by-case basis, with the particular facts of each situation determinative. In the instant case, we conclude that there is sufficient evidence of abandonment, i.e. that appellant intended to abandon the car and his decision to abandon it was not due to police misconduct. Accordingly, the trial court did not err in denying appellant's motions to suppress the evidence obtained from the car. Accordingly, we overrule points ten, eleven and twelve.

B. EVIDENCE EXCLUSION

Point number thirteen alleges that "the trial court erred in barring defense counsel from cross[-]examining the accomplice witness on his knowledge of the 35 year mandatory minimum sentence applicable to life for capital murder." Appellant insists that the accomplice's knowledge of the mandatory minimum sentence that he would have to serve on a life sentence for aggravated kidnapping, 15 years, as opposed to the mandatory minimum on a life sentence for capital murder, 35 years, was necessary in order to inquire into his incentive to testify favorably for the State against appellant.

While exposing a witness's motivation to testify against a defendant is a proper and important function of the constitutionally protected right to cross-examination, and the defendant is allowed great latitude to show any fact which would tend to establish ill feeling, bias, motive, and animus on the part of the witness testifying against him, this right does not prevent a trial court from imposing some limits on the cross-examination into the bias of a witness. *Miller v. State,* 741 S.W.2d 382, 389 (Tex.Cr.App.1987), *cert. denied,* 486 U.S. 1061, 108 S.Ct. 2835, 100 L.Ed.2d 935 (1988). Of course, within reason, the trial judge should allow the accused great latitude to show any relevant fact that might affect the witness's credibility. *Virts v. State,* 739 S.W.2d 25, 29 (Tex.Cr.App.1987).

Appellant sought to question the accomplice witness about his knowledge of the difference between the parole eligibility time period on a life sentence for one convicted of capital murder versus one convicted of aggravated kidnapping or aggravated robbery; however he made no showing that that witness had been convicted of, or made a plea agreement for conviction of, any offense. Appellant also failed to show that the accomplice witness had made any type of plea agreement for any sentence, life or otherwise. Appellant was permitted to question him about any possible agreements, and the accomplice witness insisted that no one had made any offers to him and that there were no agreements or deals for his testimony, other than testimonial immunity, i.e. that his testimony in appellant's trial could not be used against the accomplice witness in his own trial.

The parameters of cross-examination for a showing of witness bias rests within the sound discretion of the trial court. ***618** *Chambers v. State,* 866 S.W.2d 9, 27 (Tex.Cr.App.1993), *cert. denied,* 511 U.S. 1100, 114 S.Ct. 1871, 128 L.Ed.2d 491 (1994). In *Carroll v. State,* 916 S.W.2d 494 (Tex.Cr.App.1996), we held that a trial court erred in precluding a defendant's cross-examination inquiring into a witness's incarceration, pending charge, and possible punishment as a habitual criminal, because such cross-examination was appropriate to demonstrate the witness's potential motive, bias or interest to testify for the State, and to show that the witness had a vulnerable relationship with the State at the time of his testimony.

In this case, as noted above, appellant was permitted to question the accomplice witness about any possible agreements, and the accomplice witness insisted that no one had made any offers to him and that there were no agreements or deals for his testimony, other than testimonial immunity. Thus, appellant was permitted to demonstrate the accomplice's vulnerable relationship with the State and potential motive, bias or interest. Therefore appellant was able to show that since the accomplice witness had the serious pending charges, he was at least potentially beholden to some extent to the State for the disposition of those charges and that such situation might have affected his testimony as a witness for the State. Allowing him to elicit the accomplice witness's knowledge or lack of knowledge of the difference in parole eligibility minimum time periods would not have any further shown his vulnerable relationship with the State or his potential motive, bias or interest.

In the instant case, based upon the cross-examination that was allowed, we conclude that the trial court did not abuse its discretion in denying appellant's proffered evidence about the accomplice witness's knowledge of the time of parole eligibility on life sentences. Accordingly, we overrule point number thirteen.

C. EVIDENCE ADMISSION

Points five and six aver error in allowing certain testimony of witnesses Pierce and Smith over objections that such testimony was irrelevant on an issue other than character conformity and that the testimony was more prejudicial than probative. Point five deals with Pierce's testimony about appellant suggesting that they take a young 12 or 13–year old girl who was outside roller-skating, while point six involves Smith's testimony about appellant pointing out places that would be good to bury somebody or dump a body or get rid of somebody.

Appellant insists that such testimony from these two witnesses was inadmissible character conformity evidence

as being outside the scope of Tex.R.Crim.Evid. 404(b) and is more prejudicial than probative in contravention of Tex.R.Crim.Evid. 403. The State points out that it had a compelling need to meet its legal burden of corroboration of the accomplice witness's testimony. Rule 404(b) explicitly precludes admission of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith; however, it does allow for the admission of such evidence for other purposes.

After opening statements, outside the presence of the jury the trial court announced it was having "a hearing on the motion in limine." Four witnesses testified, including Pierce and Smith. Appellant made his objections to the various witnesses and the trial court overruled the objections. One of the prosecutors had even commented, "We kind of ran through several of the motions in limine." Then in the presence of the jury, when witnesses Pierce and Smith testified, appellant failed to object to their testimony.

It is well-settled that the denial of a motion in limine is not sufficient to preserve error for review, but rather there must be a proper objection to the proffered evidence. *Basham v. State,* 608 S.W.2d 677, 679 (Tex.Cr.App.1980); *Romo v. State,* 577 S.W.2d 251 (Tex.Cr.App.1979). Thus, appellant by failing to object to the proffered testimony of Pierce and Smith failed to preserve his claims for review. Accordingly, we overrule points five and six.

Points seven, eight, eight-A, and nine allege error in admitting, over objection, hearsay testimony from four witnesses regarding statements that the accomplice had made to them. Point seven, refers to testimony of witness Dupuis; point eight refers ***619** to testimony of witness Mr. Bedrich; and point eight-A refers to testimony of witness Mrs. Bedrich. At a New Year's Eve 1991 party, these three witnesses testified that the accomplice had made a statement to them wondering what they would do if they saw someone being mistreated but couldn't do anything about it. He also complains about testimony from Mr. Bedrich about the accomplice having asked about whether he had heard about the woman missing from the Austin car wash and saying that appellant had done it, but that he was afraid to tell anybody for fear of being killed, and that there were noises coming from the trunk of a car that were inconsistent with a new car. Point nine deals with testimony from Officer Steglich as to the accomplice having told him about having been with appellant when he took the girl from the car wash, spent time with appellant in a secluded area, and appellant having dropped him off at his trailer park.

The objected-to testimony was elicited after the accomplice witness had testified. The State suggests that such was admissible pursuant to Tex.R.Crim.Evid. 801(e)(1)(B) as prior consistent statements. Appellant responds that since such was proffered at trial under the Tex.R.Crim.Evid. 803(24) statement against interest hearsay exception the State should not be allowed to bring forth a new theory for admissibility on appeal. However, it is well-settled that a trial court's decision will be sustained if it is correct on any theory of law applicable to the case, especially with regard to the admission of evidence. *Romero v. State,* 800 S.W.2d 539, 543 (Tex.Cr.App.1990).

Rule 801(e)(1)(B) provides that a statement made by a declarant who testifies at trial and is subject to cross-examination concerning the statement is not hearsay if it is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. It also requires that a prior consistent statement be made before the alleged improper influence or motive arose. *Haughton v. State,* 805 S.W.2d 405, 408 (Tex.Cr.App.1990). Appellant's brief and supplements do not argue that the requirements of Rule 801(e)(1)(B) have not been met. After reviewing the accomplice witness's testimony, we conclude that the above-described complained-of testimony is within the parameters of Rule 801(e)(1)(B). We therefore overrule points seven, eight, eight-A, and nine.

III.

PUNISHMENT CLAIMS

Point number fourteen avers error in refusing appellant's request to represent himself at the punishment phase. At the beginning of the punishment phase, prior to the presentation of evidence and the reading of the enhancement allegations, appellant stated that wanted to represent himself at punishment. The stated reason was because of a dispute with trial counsel over strategy in cross-examining and presenting witnesses. After extensive discussions and consideration, the trial court denied appellant's request for self-representation.

An accused's right to self-representation must be asserted in a timely manner, namely, before the jury is impaneled. *Ex parte Winton,* 837 S.W.2d 134, 135 (Tex.Cr.App.1992); *Blankenship v. State,* 673 S.W.2d 578,

585 (Tex.Cr.App.1984). Since appellant's request was long after the jury had been impaneled, such request was not timely. We therefore overrule point fourteen.

Point fifteen claims error in admitting victim impact evidence at punishment. Upon the State announcing that the complainant's sister would be the next witness for victim impact evidence, outside the presence of the jury it made such a proffer and appellant objected to the introduction of such evidence. The trial court stated that it was going to allow the testimony in, and approved of appellant not having to object again in the presence of the jury if the testimony was substantially the same.

Before the jury the complainant's sister testified about the effects of this offense on her children and her sisters, including how her recent marriage had broken up shortly after the complainant disappeared. She described how she now had a lot of fears, ***620** especially to go out at night alone. She also described what she missed most about the complainant—not being able to talk to her, and her acceptance and love. She also stated that it was very important to her and her family to get the complainant's remains back and to have a proper funeral and bury her in sacred ground on their family plot.

We have recently discussed the admissibility of so-called "victim impact" evidence. *Ford v. State,* 919 S.W.2d 107, 112–16 (Tex.Cr.App.1996); *Smith v. State,* 919 S.W.2d 96, 97–103 (Tex.Cr.App.1996), *cert. filed,* July 9, 1996. Admissibility is determined by the terms of the Rules of Criminal Evidence, particularly whether such evidence is relevant to the statutory special issues. Such questions of relevance should be left largely to the trial court, to be reviewed under an abuse of discretion standard. *Ford, supra.*

The jury was required to answer a punishment special issue which asked about appellant's moral culpability. Committing a murder and disposing of the body such that it is not located and thus depriving the surviving family of the ability to bury the decedent certainly seems to be a factor in assessing one's moral culpability. Also, the effects of a murder causing the decedent's sister to have fears, particularly going out at night alone, would also appear to be a legitimate factor in assessing one's moral culpability. These effects arising from such a murder are certainly foreseeable and to commit such a murder in disregard of these effects on survivors seems to go to the perpetrator's moral culpability for such acts. The other testimony, regarding how the decedent's sister's marriage broke up after the disappearance and missing the decedent's love and not being able to talk to her, seems to be more tenuously tied to appellant's moral culpability. Such seem to be less foreseeable after-effects of such a murder and it is more questionable whether such fall within the parameters of admissible "victim impact" evidence.

We also note that the decedent's sister's testimony in this case did not go to the decedent's character, i.e. the testimony did not attempt to show that appellant was more deathworthy because of who he killed and the character of the decedent. As in *Ford,* we conclude that the trial court was within its discretion in admitting such evidence as relevant to the punishment special issues. Accordingly, we overrule point number fifteen.

Points sixteen, seventeen, and eighteen allege Eighth and Fourteenth Amendment constitutional violations for failure to define "society." Appellant suggests that since the jury charge included an instruction on the fact that a person assessed a life sentence for capital murder would have to serve 35 years before being eligible for parole, in order to be guided in its deliberations on future dangerousness the jury needed to be informed that society includes not only free citizens but also inmates in the penitentiary. He also points out that during deliberations the jury inquired with a note explicitly asking for a definition of society. We have repeatedly held that there was no error in refusing to define such a term. *Burks v. State,* 876 S.W.2d 877, 910–11 (Tex.Cr.App.1994), *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *Camacho v. State,* 864 S.W.2d 524, 536 (Tex.Cr.App.1993), *cert. denied,* 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994). We find no cause to depart from our prior holdings. Accordingly points sixteen, seventeen, and eighteen are overruled.

Point twenty avers error in barring evidence of the 35 year mandatory minimum parole eligibility statute. The trial court did include a jury charge instruction stating, "A prisoner serving a life sentence for a capital felony is not eligible for release on parole until the actual calendar time the prisoner has served equals 35 calendar years." Since such constituted precisely the same information via legal instruction rather than testimonial evidence, we find no error in the trial court's decision to exclude the proffered evidence but include the above-quoted instruction. Point twenty is hereby overruled.

In point nineteen appellant complains of the unduly restrictive definition of mitigating evidence in Article 37.071, V.A.C.C.P. He insists that such definition unduly narrows

the range of evidence that may be taken into ***621** account in determining whether to assess a life or death sentence. Appellant challenges Art. 37.071, § 2(f)(4)'s provisions that jurors shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness. He insists that such definition limits what may be considered by the jury to evidence that a juror might regard as reducing the defendant's blameworthiness and "excluded from consideration that the defendant will have to serve the balance of his life in prison if given a life sentence." However, as noted by the above-quoted instruction, appellant would have been eligible for parole on a life sentence in 35 years rather than being *required* to serve the balance of his life in prison. Other than this claim, appellant merely states generally that the jury's consideration of mitigating evidence was restricted, but he does not specify what other evidence he presented which was mitigating but the jury was unable to consider. We find appellant's claim unpersuasive. Point nineteen is overruled.

Point number twenty-one claims that his conviction and death sentence violate the double jeopardy protections of the U.S. and Texas Constitutions because the facts of the instant case were admitted into evidence as unadjudicated offense evidence at the punishment phase of a previous capital murder trial to secure the death penalty against him. This Court has held that in such a situation the double jeopardy provisions are not implicated and not violated because the previous punishment was for the charged offense rather than the extraneous offense. *Ex parte Broxton,* 888 S.W.2d 23, 28 (Tex.Cr.App.1994), *cert. denied,* 515 U.S. 1145, 115 S.Ct. 2584, 132 L.Ed.2d 833 (1995). Accordingly, point twenty-one is overruled.

Point twenty-two asserts that allowing evidence of kidnapping to prove both murder and the aggravating element to raise it to capital murder is an improper use of the capital murder statute. He insists that using evidence of kidnapping twice, once to prove murder and again to show capital murder, i.e. a double use of kidnapping, is an improper application of the capital murder statute. Appellant does not present any constitutional or statutory authority against murder in the course of committing or attempting to commit kidnapping being "elevated" to capital murder. We find such to be inadequately briefed and overruled point twenty-two. Tex.R.App.Pro. 74(f) and 210(b).

Point twenty-three asserts that the use of evidence of kidnapping to prove both murder and the aggravating element raising it to capital murder violates the Eighth Amendment in failing to limit the class of "death eligible" offenders. He acknowledges that the V.T.C.A. Penal Code, § 19.03(a)(2) "in the course of" offenses "perform the necessary function of narrowing those class of murders which can merit a capital conviction and sentence." However, he insists that in the present case murder is proved by evidence of kidnapping and no return, while kidnaping is then proved again to raise the murder to a capital offense, with kidnapping performing no narrowing of the class of death eligible offenses, thus resulting in a violation of the Eighth Amendment of the U.S. Constitution. The Texas capital murder scheme sufficiently narrows the class of death-eligible defendants. *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Appellant's argument that it is not sufficient in his case is not persuasive. Point twenty-three is overruled.

After reviewing and overruling all of appellant's points of error, his conviction and sentence are hereby affirmed.

BAIRD, Judge,[*] concurring.

I write separately to more fully discuss the sufficiency of the evidence to establish murder in the absence of the victim's body. In points of error one and two, appellant contends the evidence is legally insufficient to prove the *corpus delicti* of the murder since no body was produced and there was neither a confession by appellant nor non-accomplice testimony establishing the death. Appellant further contends that if accomplice witness testimony is utilized to establish *corpus delicti,* it must be corroborated.

***622** I.

The *corpus delicti* of any crime "simply consists of the fact that the crime in question has been committed by someone." *Fisher v. State,* 851 S.W.2d 298, 303 (Tex.Cr.App.1993). The *corpus* delicti essentially embraces all of the elements of the crime except the participation of the defendant:

> the *corpus delicti* [of a crime] embraces the fact ... that somebody did the required act or omission with the required mental fault, under the required (if any) attendant circumstances, and producing the required (if any) harmful consequence, without embracing the further fact (needed for conviction) that the defendant was the one who did or omitted that act or was otherwise responsible therefor.

Id. (quoting 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.4 at 24 (2nd ed. 1986)). Proof of the *corpus delicti* may not be made by the defendant's extrajudicial confession alone, but proof of the *corpus delicti* need not be made independent of the extrajudicial confession. If there is some evidence corroborating the confession, the confession may be used to aid in the establishment of the *corpus delicti*. *Self v. State,* 513 S.W.2d 832, 835 (Tex.Cr.App.1974). On the other hand, a conviction may not be based upon an accomplice witness' testimony unless corroborated by other evidence tending to connect the defendant with the offense committed. Tex.Code Crim.Proc.Ann. art. 38.14.

In the context of murder, the State was previously required to produce and identify a body or remains in order to prove the *corpus delicti.* Article 1204 of the 1925 Penal Code provided:

> No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed.

This provision can be traced to the first codification of criminal and civil laws of the Republic of Texas, and was founded upon a desire to avoid the swift execution of a potentially innocent person, particularly on the rugged frontier where the alleged deceased might have simply moved on to another place, never to be seen again. *See,* Walter W. Steele, Jr. & Ruth A. Kollman, *The Corpus Delicti of Murder After Repeal of Article 1204,* Voice for the Defense 10, 11 (June 1991) (drafters apparently concluded "that the vicissitudes of life on an enormous frontier required particular safeguards against the conviction and execution of innocent persons" and one of such safeguards was the body requirement). *See also, Puryear v. State,* 28 Tex.App. 73, 11 S.W. 929, 931 (1889) (Texas provision inspired by desire to avoid conviction and punishment of innocent persons, stating "we could cite hundreds of cases in which the innocent have been punished under the old rule, which did not require the body or a portion of it, to be found.").

This view was never adopted by the English common law. *See e.g., Puryear,* 11 S.W. at 931 (a common law conviction for murder could be sustained upon testimony of witness without production of body); Wheeler, *Invitation to Murder,* 30 S. Tex.L.Rev. at 276 (circumstantial evidence sufficient to establish death in common law). And Texas appears to have been the only state to have enacted such a provision. While some states adopted less radical rules, requiring "direct proof" of the *corpus delicti* of death, even those provisions have long been repealed. Wheeler, *Invitation to Murder,* 30 S.Tex.L.Rev. at 276 (Montana, New York, North Dakota identified as having statutes requiring proof of death by direct evidence, but those provisions now repealed).

Article 1204 was repealed by the Texas Legislature with the passage of the 1974 Penal Code. *Fisher,* 851 S.W.2d at 303. While we have referred a number of times to its repeal, we have never purported to know the impetus therefor. *Id., Streetman v. State,* 698 S.W.2d 132, 134–35, n. 1 (Tex.Cr.App.1985); *Easley v. State,* 564 S.W.2d 742, 747 (Tex.Cr.App.), *cert. denied,* 439 U.S. 967, 99 S.Ct. 456, 58 L.Ed.2d 425 (1978); *Valore v. State,* 545 S.W.2d 477, 479 n. 1 (Tex.Crim.App.1977). Nevertheless, the demise of article 1204 is consistent with prevailing legal views.

The notion that the careful and meticulous murderer might escape punishment by destroying ***623** or forever concealing the body of his victim is a distasteful one:

> The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal. That is one form of success for which society has no reward.

Epperly v. Commonwealth, 224 Va. 214, 294 S.E.2d 882, 891 (1982) (quoting *People v. Manson,* 71 Cal.App.3d 1, 139 Cal.Rptr. 275, 298 (1977), victim's body never found); *see also, State v. Zarinsky,* 143 N.J.Super. 35, 362 A.2d 611, 621 (App.Div.1976) (concealment or destruction of victim's body should not preclude prosecution where proof of guilt can be established beyond reasonable doubt), *aff'd,* 75 N.J. 101, 380 A.2d 685 (1977); *and, People v. Lipsky,* 57 N.Y.2d 560, 457 N.Y.S.2d 451, 456, 443 N.E.2d 925, 930 (1982) (no hesitancy overruling common law rule requiring direct proof of death in murder case as such rule rewards professional or meticulous killer). *See generally,* Wheeler, *Invitation to Murder,* 30 S. Tex.L.Rev. at 278 (axiomatic that society built on respect for law should not grant immunity to killer who through calculation or fortuitous events completely destroys or conceals victim's body). In addition, it is less likely in today's mobile and technological society that a person might vanish and never be heard from again. In a case before the Virginia Supreme Court, a defendant made a similar argument to the one presented by appellant. *Epperly, supra.* Epperly was convicted of first degree murder even though the victim's body was never recovered. Epperly contended that proof of *corpus delicti* is only sufficient if (1) there was an eyewitness to the killing, (2) identifiable remains were found or (3) the accused confesses to the crime. *Epperly,* 294 S.E.2d at 890. The Virginia Supreme Court rejected his argument, expounding upon life in modern society where it

is exceedingly rare that a person can vanish of their own volition:

> ... there is less reason for strictness in the proof of *corpus delicti* now than in earlier times. In Sir Matthew Hale's day,[1] a person might disappear beyond all possibility of communication by going overseas or by embarking in a ship. It would have been most dangerous to infer death merely from his disappearance. Worldwide communication and travel today are so facile that a jury may properly take into account the unlikelihood that an absent person, in view of his health, habits, disposition, and personal relationships would voluntarily flee, "go underground," and remain out of touch with family and friends. The unlikelihood of such a voluntary disappearance is circumstantial evidence entitled to weight equal to that of bloodstains and concealment of evidence.

Id.

Finally, dispensing with the body requirement is consistent with the increasingly accepted view that direct and circumstantial evidence are equally valuable. *Id.* (emphasizing that direct and circumstantial evidence are "entitled to the same weight"). *See, Hankins v. State,* 646 S.W.2d 191, 198–199 (Tex.Cr.App.1981) (Op'n on rehearing). The State may prove its case by direct or circumstantial evidence so long as it shoulders its burden of proving all of the elements of the charged offense beyond a reasonable doubt. *See, Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (enunciating single standard of review for assessing sufficiency of evidence). *See also, State v. Lerch,* 63 Or.App. 707, 666 P.2d 840, 849 (1983) (rejecting argument that higher standard applies when circumstantial evidence relied upon to prove *corpus delicti*), *aff'd,* 296 Or. 377, 677 P.2d 678 (1984); *Geesa v. State,* 820 S.W.2d 154, 156–59 (Tex.Cr.App.1991) (since circumstantial and direct evidence judged by same standard at trial, should therefore be subject to same standard of review on appeal); *and, State v. Rebeterano,* 681 P.2d 1265, 1267 (Utah 1984) (recognizing ***624** that jurisdictions have uniformly held production of body not necessary to prove murder and death can be established by circumstantial evidence). As one state court explained:

> ... circumstantial evidence, like direct evidence, must indicate guilt to the extent that there is no reasonable doubt of that conclusion. In essence, circumstantial and direct evidence is to be analyzed the same in determining its sufficiency to establish a disputed issue.... It would be inconsistent to require more from circumstantial evidence to establish the *corpus delicti* than is required to establish guilt beyond a reasonable doubt.

State v. Smith, 31 Or.App. 321, 570 P.2d 409, 411 (1977). Retention of a body requirement would contradict our holdings that circumstantial evidence and direct evidence are of equal value.

Whatever the reason for the repeal of article 1204, the State is no longer required, in proving murder, to produce a body and identify it as the alleged victim. *Fisher,* 851 S.W.2d at 303. Rather, *corpus delicti* of murder is now shown if the evidence proves (1) the death of a human being; (2) caused by the criminal act of another. *Id.*

II.

Appellant further contends an accomplice witness' testimony must be corroborated in proving the *corpus delicti.* While a conviction may not be had upon accomplice witness testimony unless corroborated, no such requirement applies to *corpus delicti* (except in cases where the defendant's extrajudicial confession is the only evidence offered to prove *corpus delicti.*). *Self, supra.* Since appellant did not make an extrajudicial confession in this case, there is no need to require corroboration in proving the *corpus delicti.* Appellant was charged with murder committed in the course of aggravated kidnaping or attempted aggravated kidnaping.[2] Tex. Penal Code Ann. § 19.03(a)(2). The State was required to prove that appellant intentionally or knowingly caused the death of the alleged victim in the course of intentionally or knowingly abducting her.[3]

Appellant's accomplice, Hank Worley, testified he was with appellant when they abducted the victim on the evening of December 29, 1991. He testified that following the abduction, appellant tortured and repeatedly sexually assaulted the victim. Worley testified they drove into the country and appellant pulled the victim from the car by her hair and continued to sexually assault her. At one point appellant struck the victim. Worley stated the blow caused the victim to "bounce off the ground" a couple of times, and that she could not brace herself for the fall as her hands were tied behind her back. In describing appellant's blow to the victim, Worley testified that "it sounded like a tree limb or something breaking." Even though appellant burned the victim two or three times thereafter, Worley testified the victim did not protest or scream as she had done when burned by appellant

earlier. He stated the victim's body "was limp" and, when picked up by appellant, her feet and legs "were dangling." Appellant put the victim in the trunk. Worley stated the victim did not make any noise while in the trunk. Worley told appellant to let the victim go, but appellant refused. Worley further testified appellant asked him for a pocketknife and a shovel.

Forensic pathologist, Hubbard Fillinger, testified that a single blow to the head can cause death. He further explained:

> ... The kind that you and I are most familiar with is the boxer-type punch to the head where the person sustains a concussion ***625** that is a shaking of the brain causing it to swell very rapidly inside the skull. When it swells, the person loses consciousness extremely rapidly and death can follow in a very short period of time thereafter.

Fillinger also answered a hypothetical question tracking the facts of the instant case:

> [Prosecutor]: Doctor Fillinger, hypothetically speaking, if a single blow was made to the head of an individual, from one individual to another with a person of some size and stature standing over a person of approximately five feet, three inches in height and 115 pounds, one blow from hand to—whether it be open or closed fist—to the had of that individual, on that person's knees, 5'3", 115=pound [sic] person, on that person's knees, the other one standing, the blow sounding like a tree limb breaking, like a break, not a pop sound, the description of the individual that was hit having been knocked back and bouncing off the ground a time or two, being carried after that by the head and being described as limp with her legs and feet dangling, could—could that be compatible with life?
>
> [Fillinger]: Well, the description that you give to me suggests, number one, a blow of a great deal of force that makes a cracking or snapping sound. That tells me that something major has broken, in all probability. Either facial bones, neck bone, jawbone or something.... The loud cracking noise, the fact that the person is limp thereafter would be consistent with brain and/or spinal cord damage. The snapping noise would make it more than likely that we have either facial fractures or damage to the jaw or neck, should again, render a person limp, unconscious and probably not responding as it's described the way she was picked up. Hanging limp, that would indicate to me that there's probably spinal cord damage.

As to the victim's failure to respond, or minimal response, to the burning after being struck, Fillinger stated:

> ... The fact that there is no apparent response or very minimal response after the blow was struck would tell me, number one, that person is not only rendered incapable of perceiving it, but has probably had the nerve tracks in the spine so damaged that they can't even feel it .... if we generate that much pain to a very sensitive part of the anatomy and there's no response, that leads us to believe that the neurological pathways that sent that message up, ouch, are damaged to the point where we don't have any possible recovery. *And that's an indication that life is going to be lost very quickly.*

(Emphasis added.)

Worley testified they abducted the victim from a carwash. Witnesses near the carwash at the time of the abduction heard a woman scream and car doors slam and saw a car matching the description of appellant's car leaving the carwash. The victim's soaped car was found abandoned at the carwash, her keys and purse inside. The victim's apartment was unlocked and there was no evidence she had packed or made arrangements for a trip. The victim never reappeared despite massive efforts on the part of her family and friends to locate her. Her bank accounts and credit cards have remained inactive.

Hair found in the backseat and the trunk of appellant's car had microscopic characteristics similar to hair recovered from the victim's clothing. Worley's sister testified that Worley left with appellant on an evening between Christmas and New Year's, 1991. Another witness testified to driving around Austin with appellant four days before the abduction in this case, looking for a certain prostitute. They stopped to ask a 12 or 13–year–old girl if she knew the woman. According to the witness, as they drove away from the young girl, appellant said, "Why don't we just take her?" Appellant was arrested in Kansas City on May 4, 1992, where he was living under an assumed name.

Reviewing the record evidence in a light most favorable to the verdict, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Worley's testimony as to appellant's forcible abduction of the victim, appellant's beating, sexual assault, and torture of the victim, appellant's statement that he would not release ***626** her and appellant's request for a knife and shovel, together with the victim's sudden and unexplained disappearance established the *corpus delicti* of murder and aggravated kidnaping.[4] The evidence supports the jury's verdict.

With these comments, I join the remainder of the majority opinion.

McCORMICK, P.J., joins this opinion.

MANSFIELD, Judge, concurring.

I join the opinion of the majority but write separately as to the disposition of point of error number fifteen. Appellant avers, in this point of error, the trial court erred in admitting victim impact evidence at the punishment phase. After the trial court overruled appellant's timely objection, the complainant's sister testified as to the effects of the complainant's death on her, her children and her sisters. She testified she was now afraid to go out alone, especially at night, and how much she missed her sister's love and companionship. Finally, she testified it was important to her and her family to have the complainant's remains recovered and buried in the family plot.

In *Smith v. State,* 919 S.W.2d 96 (Tex.Crim.App.1996), a plurality of the Court concluded that testimony by the sister of the victim concerning the victim's good nature, hobbies and work ethic was not relevant to sentencing and, therefore, should not have been admitted. This evidence concerned primarily the character of the victim, not the effect of her death on her family and friends. However, the Court also held that the erroneous admission of such "victim character" evidence in *Smith* was harmless because the evidence:

(1) comprised a relatively miniscule portion of the evidence presented at punishment; and

(2) was not emphasized by the State at closing argument; and

(3) given the overwhelming evidence presented that supported the jury's answers as to the special issues, we concluded the victim impact/character evidence made no contribution to punishment. Tex.R.App.Proc. 81(b)(2).

Smith, supra, 919 S.W.2d at 103.

The evidence in the present case is more akin to that which we found admissible in *Ford v. State,* 919 S.W.2d 107 (Tex.Crim.App.1996). Rather than being evidence of the character of the complainant, the evidence in the present case related to the impact her death has had on her sister and other persons. Such evidence was found by this Court in *Ford* to be arguably relevant to the defendant's moral culpability contained in the mitigation special issue. We concluded the trial court's decision to admit this testimony was not an abuse of discretion in that such testimony was within the zone of reasonable disagreement as to what constituted evidence relevant to sentence. *Id.*

In my opinion, the danger of undue prejudice inherent to a defendant in the introduction of "victim impact" evidence is the same, whether the evidence relates to the victim's character or to the impact his or her death has had on her family and friends.[1] Therefore, I believe the admission of the complainant's sister's testimony in the present case, given *Smith,* was error and should have been subjected to a harm analysis under Tex.R.App.Proc. 81(b)(2). Given the extensive evidence presented at punishment, which overwhelmingly supported the jury's answers as to the special punishment issues, and the fact the State did not emphasize the sister's testimony at closing argument, I conclude beyond a reasonable doubt this evidence made no contribution to punishment and its admission was therefore harmless. *Harris v.* ***627** *State,* 790 S.W.2d 568, 587–588 (Tex.Crim.App.1989); *Smith, supra.*

With these comments, I join the opinion of the Court.

All Citations

939 S.W.2d 607

Footnotes

1 The indictment also charged appellant with aggravated sexual assault and aggravated kidnapping. The jury found him guilty of both offenses and sentenced him to life imprisonment for each.

2 Although the indictment alleged the differing methods of committing capital murder in the conjunctive, i.e. in the course of aggravated sexual assault and aggravated kidnapping, it is proper for the jury to be charged in the disjunctive. *Kitchens v. State,* 823 S.W.2d 256, 258 (Tex.Cr.App.1991), *cert. denied,* 504 U.S. 958, 112 S.Ct. 2309, 119 L.Ed.2d 230 (1992).

* This opinion was prepared by Judge Frank Maloney prior to his leaving the Court.

1 Matthew Hale is often credited with the notion that a body should be produced in order to support a murder conviction. Hale is quoted as writing, "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead." Steele & Kollman, *The Corpus Delicti of Murder,* Voice at 11; Michael E. Wheeler, *Invitation to Murder?: Corpus Delicti, Texas–Style,* 30 S.Tex.L.Rev. 267, 273 (1989); *Epperly v. Commonwealth,* 224 Va. 214, 294 S.E.2d 882, 890 (1982).

2 Appellant was charged in the alternative with murder committed in the course of an aggravated sexual assault. The jury found appellant guilty of capital murder. In a capital murder case where a general verdict is returned, the evidence is sufficient if it supports any of the alternatively submitted theories. *Cook v. State,* 741 S.W.2d 928, 935 (Tex.Cr.App.1987), *judgment vacated and remanded on other grounds,* 488 U.S. 807, 109 S.Ct. 39, 102 L.Ed.2d 19 (1988).

3 "Abduct" was defined in the charge as meaning "to restrain a person with intent to prevent her liberation by secreting or holding her in a place where she is not likely to be found." "Restrain" was defined as "restrict[ing] a person's movements without consent, so as to interfere substantially with her liberty, by moving her from one place to another or by confining her."

4 Worley's testimony was corroborated by other evidence tending to connect appellant to the crime, such as the testimony of Worley's sister, hair recovered from appellant's car and trunk, and the witnesses who saw appellant's car around the carwash at the time of the abduction. *See,* art. 38.14.

1 In my concurrence in *Smith,* I stated my opinion, citing *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), that victim impact evidence is relevant within the context of the mitigation special issue. Therefore, such evidence should always be admissible, subject to an abuse of discretion standard.

908 P.2d 931
Supreme Court of Wyoming.

Alexander Lewis MORRIS,
Appellant (Defendant),
v.
The STATE of Wyoming, Appellee (Plaintiff).

No. 94–187.
|
Dec. 14, 1995.

Synopsis

After denial of his motion to suppress evidence, defendant conditionally pled guilty in the District Court, Campbell County, Dan R. Price, II, J., to conspiracy to deliver controlled substances and possession with intent to deliver controlled substance. Defendant appealed. The Supreme Court, Lehman, J., held that: (1) defendant's Fourth Amendment rights were implicated by deputy sheriff's warrantless search of defendant's wallet; (2) deputy's warrantless search of wallet after retrieving it for defendant, who had misplaced it, was not justified by deputy's community caretaker function; and (3) under fruit-of-the-poisonous tree doctrine and exclusionary rule, illegal search of wallet barred from trial physical tangible materials obtained either during or as a direct result of unlawful invasion, including all evidence that became accessible to prosecution only as result of illegal initial search.

Reversed and remanded.

Thomas, J., dissented and filed opinion.

Attorneys and Law Firms

***933** Leonard D. Munker, State Public Defender; Diane Lozano, Assistant Public Defender; Gerald M. Gallivan, Director, Defender Aid Program; and Frederick Dethlefsen, Student Intern. Argument by Mr. Dethlefsen, for Appellant.

Joseph B. Meyer, Attorney General; Sylvia Lee Hackl, Deputy Attorney General; D. Michael Pauling, Senior Assistant Attorney General; and Mark T. Moran, Assistant Attorney General. Argument by Mr. Moran, for Appellee.

Before GOLDEN, C.J., and THOMAS, MACY, TAYLOR and LEHMAN, JJ.

Opinion

LEHMAN, Justice.

Pursuant to a plea agreement, Appellant Alexander L. Morris (Morris) pled guilty to charges of conspiracy to deliver controlled substances and possession with intent to deliver a controlled substance, while reserving the right on appeal to seek review of the district court's ruling on his motion to suppress. The issue we decide is whether the district court erred in determining that the search of Morris' wallet by a deputy sheriff (Deputy) was a reasonable search and thus the fruits derived from the search were admissible evidence.

We reverse.

ISSUES

Morris phrases the issue as:

> Whether the trial court erred by denying Appellant's motion to suppress all physical and testimonial evidence directly and indirectly derived from the illegal search of Appellant's wallet.

The State of Wyoming rephrases the issue as:

> Whether the trial court properly denied Appellant's motion to suppress evidence obtained as a result of searching his wallet.

FACTS

On August 15, 1993, a deputy sheriff responded to a report that Morris was sleeping in the backyard of a private residence in Dayton, Wyoming. The Deputy awoke Morris, asked if he was okay, and requested identification. Morris could not find his driver's license but produced a MSHA mine safety card and a social security card, neither of which bore a photograph or home address.

Morris was not arrested but, because he was unsteady and disoriented, the Deputy suggested that they return to the sheriff's office so that Morris could contact someone to come and get him. Morris agreed to this suggestion. Upon arrival at the office, Morris gave the Deputy the telephone number and name of a person to contact; however, the call was received

by an answering machine. The Deputy then inquired whether Morris might have any phone numbers of friends in his wallet. It was at this time that Morris discovered he had lost his wallet. The Deputy recalled seeing Morris with his wallet in the patrol vehicle and offered to search the vehicle for it. Morris did not reply to the Deputy's offer.

After locating the wallet on the floorboard of his patrol vehicle, the Deputy proceeded to search the wallet. Found therein was a tightly folded piece of paper containing a white powdery substance. The Deputy confronted Morris with the powdery substance and inquired whether Morris had anything else on his person that he should know about. Morris produced from his pocket a bag of marijuana and a pipe. Morris was then arrested for possession of a controlled substance; and, during the booking process, 15 bindles of the white powdery substance were ***934** found on his person. The substance was later identified as methamphetamine.

The district court denied Morris' motion to suppress all evidence derived from the Deputy's warrantless search of his wallet. Timely pursuit of this appeal followed Morris' conditional plea of guilty.

MOTION TO SUPPRESS

A. Standard of Review

Generally, evidentiary rulings of a district court are not disturbed on appeal unless a clear abuse of discretion is demonstrated. *Wilson v. State,* 874 P.2d 215, 218 (Wyo.1994); *Armstrong v. State,* 826 P.2d 1106, 1111 (Wyo.1992); *Garcia v. State,* 777 P.2d 603, 607 (Wyo.1989). " 'An abuse of discretion has been said to mean an error of law committed by the court under the circumstances.' " *Wilson,* 874 P.2d at 218 (*quoting Martinez v. State,* 611 P.2d 831, 838 (Wyo.1980)). It is well established that when reviewing a district court's ruling on a motion to suppress,

> [f]indings on factual issues made by the district court considering a motion to suppress are not disturbed on appeal unless they are clearly erroneous. *Hyde v. State,* 769 P.2d 376, 378 (Wyo.1989); *Roose v. State,* 759 P.2d 478, 487 (Wyo.1988). * * * Since the district court conducts the hearing on the motion to suppress and has the opportunity to: assess the credibility of the witnesses; the weight given the evidence; and make the necessary inferences, deductions and conclusions, evidence is viewed in the light most favorable to the district court's determination. *United States v. Werking,* 915 F.2d 1404, 1406 (10th Cir.1990).

Wilson, 874 P.2d at 218. *See also Murray v. State,* 855 P.2d 350, 354 (Wyo.1993); *United States v. Soto,* 988 F.2d 1548, 1551 (10th Cir.1993) (*citing United States v. Horn,* 970 F.2d 728, 730 (10th Cir.1992) and *United States v. Evans,* 937 F.2d 1534, 1536 (10th Cir.1991)). The issue of law before us, whether an unreasonable search or seizure occurred in violation of constitutional rights, is reviewed *de novo. Guerra v. State,* 897 P.2d 447, 452 (Wyo.1995); *Wilson,* 874 P.2d at 218. *And see Lopez v. State,* 643 P.2d 682, 683–85 (Wyo.1982); *Cook v. State,* 631 P.2d 5, 7–8 (Wyo.1981); and *United States v. Walker,* 941 F.2d 1086, 1090 (10th Cir.1991).

B. Discussion

Appellant contends that his constitutional rights were violated by the Deputy's initial search of his wallet; by the seizure of a folded piece of paper contained within his wallet; by the subsequent search of that folded paper; and by the seizure of the contents contained within the folded paper. Appellant claims that this alleged illegal and unreasonable search and seizure requires the suppression of all evidence, direct and indirect, derived therefrom and requires the voiding of his initial arrest.

Article 1, § 4 of the Wyoming Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.

See Goettl v. State, 842 P.2d 549, 558–75 (Wyo.1992), Urbigkit, J., dissenting (arguing search and seizure provisions of the state constitution provide stronger protection than the federal constitution). The Fourth Amendment to the United States Constitution grants

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The protection of the Fourth Amendment is applied to state action under the due process clause of the Fourteenth Amendment to the United States Constitution. *Wilson,* 874 P.2d at 219 (*citing Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684,

6 L.Ed.2d 1081 (1961), and *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949)).

***935** The State argues that because the encounter between the Deputy and Morris was a consensual, non-coercive, non-custodial contact for the purposes of ensuring Morris' welfare, Fourth Amendment rights were not implicated. We agree that the encounter between the Deputy and Morris was a consensual encounter, and we also agree that the Deputy was performing his community caretaker function, as discussed in *Wilson,* when he offered to help Morris contact someone to come and get him and when he transported Morris to the sheriff's office. However, we disagree that Fourth Amendment rights were not implicated. Searches and seizures made without a warrant or outside the judicial process are per se unreasonable under both the Fourth Amendment to the United States Constitution and Art. 1, § 4 of the Wyoming Constitution, subject only to a few clearly articulated exceptions. *Mickelson v. State,* 906 P.2d 1020, 1022 (Wyo.1995); *Guerra,* 897 P.2d at 452; *Roose v. State,* 759 P.2d 478, 481 (Wyo.1988).

In *State v. Paasch,* 117 Or.App. 302, 843 P.2d 1011 (1992), a citizen found a wallet and delivered it to the police. A policeman searched the wallet, finding drugs. On appeal, the defendant argued that the search was illegal and the evidence should have been suppressed. The Oregon Court of Appeals agreed, stating:

> Article I, section 9, of the Oregon Constitution protects "the right of people to be secure in their persons, houses, papers and effects against unreasonable search, or seizure." A government action that invades a protected property or privacy interest is a search. *State v. Faulkner,* 102 Or.App. 417, 420, 794 P.2d 821, *rev. den.* 310 Or. 422, 799 P.2d 151 (1990). People have a privacy interest in wallets and other personal effects that ***does not disappear because the personal effect has been lost or mislaid.*** *See State v. Pidcock,* 306 Or. 335, 759 P.2d 1092, *cert. den.* 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 183 (1988); *State v. Morton,* 110 Or.App. 219, 822 P.2d 148 (1991). The deputy's intrusion into the compartments of the wallet was a search.

Id., 843 P.2d at 1012 (emphasis added). The court went on to hold the search unreasonable and unlawful. Similarly, in *State v. Morton,* 110 Or.App. 219, 822 P.2d 148 (1991), the court held that although the police could search a lost or mislaid purse for identification purposes only, the search had to end once identification was found. The police found seven pieces of identification and still continued to search the purse, whereupon drugs were found. The court ruled that the continuation of the search after identification had been found was unreasonable and unlawful. *Id.,* 822 P.2d at 150. The court went on to hold that the police lacked probable cause to conduct an investigative search of the cigarette case for contraband, which was contained within the purse, and stated that in a non-emergency, non-investigative situation, it is unreasonable for an officer to open any closed container. *Id.* Additionally, in *State v. May,* 608 A.2d 772 (Me.1992), a defendant's wallet was found in the back of a police car and was taken into the station after the defendant had been released from custody. The wallet was searched, and cocaine was found. On appeal, the court found that the sealed wallet was a " 'repository for personal, private effects' " and thus was inevitably associated with an expectation of privacy. *Id.,* at 774 (*citing Arkansas v. Sanders,* 442 U.S. 753, 762 n. 9, 99 S.Ct. 2586, 2592 n. 9, 61 L.Ed.2d 235 (1979)). The court held that the defendant had not abandoned his wallet and, therefore, the officer's warrantless search of the wallet had to comply with or find exception to the warrant requirement of the Fourth Amendment. *Id.* The court concluded the search was unlawful. *Id.,* at 776.

Morris likewise had an expectation of privacy regarding his wallet. The record discloses that Morris did not abandon his expectation of privacy; rather the wallet was mislaid or lost. Once the Deputy searched the wallet without a warrant, Fourth Amendment rights were implicated. Thus, to find the search justified, the State must establish the existence of an exception to the warrant requirement. *Mickelson,* 906 P.2d at 1022.

In *Dickeson v. State,* 843 P.2d 606, 610 (Wyo.1992), we stated that the recognized ***936** exceptions to warrantless searches and seizures that may be invoked include:

> 1) search of an arrested suspect and the area within his control; 2) a search conducted while in hot pursuit of a fleeing suspect; 3) a search and/or seizure to prevent the imminent destruction of evidence; 4) a search and/or seizure of an automobile upon probable cause; 5) a search which results when an object is inadvertently in the plain view of police officers while they are where they have a right to be; 6) a search and/or seizure conducted pursuant to consent; and 7) a search which results from an entry into a dwelling in order to prevent loss of life or property.

(*Quoting Ortega v. State,* 669 P.2d 935, 940–41 (Wyo.1983).) The record discloses that none of these exceptions apply to this case. Morris was never under arrest. The Deputy testified at the suppression hearing that he had no intention of making

an arrest but was only trying to help Morris. Accordingly, no probable cause or reasonable suspicion existed to search Morris' wallet. Furthermore, the plain view exception does not apply because, to invoke this exception, the items being searched or seized must appear to the officer to be possible evidence. *Starr v. State,* 888 P.2d 1262, 1265 (Wyo.1995); *Jones v. State,* 902 P.2d 686, 692 (Wyo.1995). Here the Deputy testified that his sole justification for searching the wallet was to see if anything was missing and to see if he could find any information to aid Morris. The folded piece of paper containing the illegal drug was contained within the wallet and thus was not in plain view to the Deputy. Additionally, the record establishes that Morris did not consent to the Deputy searching his wallet; the only consent that can be said to have been given by Morris was the consent, via acquiescence, to the Deputy retrieving the wallet. This consent was limited in purpose and scope. *Amin v. State,* 695 P.2d 1021, 1025 (Wyo.1985).

Having found none of these exceptions applicable, we address the State's argument that the search of the wallet was justified by the Deputy's community caretaker function, *i.e.,* to ensure Morris' safety and welfare due to his disoriented condition and incapacity to provide meaningful assistance in finding someone to come to his aid. In *Wilson v. State,* 874 P.2d at 221, we discussed an officer's community caretaker function, stating that this function, as outlined in *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973), permits police to act in a manner that enhances public safety. To justify this community caretaker function and establish the reasonableness of any search and seizure that results, specific and articulable facts must be present. *Wilson,* 874 P.2d at 221. Therefore, the totality of the circumstances must be examined at the inception of the officer's action to determine whether the search and/or seizure was reasonably related in scope to the circumstances.

In *Dombrowski,* the Court approved the search of a car trunk after the drunken driver had been involved in an accident which left him comatose. The Court reasoned that the local police were justified in searching the trunk pursuant to their community caretaking function because the driver was an off-duty police officer from another jurisdiction and local police reasonably believed the officer's service revolver would be a hazard if left in the trunk of the abandoned car. 413 U.S. at 446–47, 93 S.Ct. at 2530–31. Under the circumstances, with the driver comatose and the possibility of his revolver being in the trunk, the search of the trunk was reasonable to ensure public safety.

In *Wilson,* we held that the police officer's initial encounter with Wilson was reasonable and justified. We stated that the police officer's observation of specific and articulable facts, Wilson's lunging walk with a severe limp, reasonably justified a brief inquiry into his condition and the possible cause, such as whether Wilson was a victim of criminal conduct. 874 P.2d at 221. However, we also held that the police officer's community caretaker function did not justify the officer seizing Wilson for the purpose of completing a NCIC and local warrants check. *Id.,* at 224–25. We found that the officer admitted in his testimony that at no time did he possess any articulable facts sufficient to create a reasonable suspicion of past or present criminal conduct, and therefore the seizure was impermissible ***937** as a matter of law and Wilson's Fourth and Fourteenth Amendment rights were violated. *Id.*

The analysis of the community caretaker function is fact based, with the emphasis on what is reasonable under the circumstances. In this case the record discloses that Morris was alert and conscious enough to ask questions, answer questions, and keep his faculties about him. In fact, Morris was functioning well enough to give the Deputy a phone number to call and the name of the person he was calling. The Deputy testified that he reached an answering machine with the same name as that given by Morris. The Deputy also testified that Morris was sitting in a chair in the interview room smoking a cigarette when the Deputy left him. Thus, the record is devoid of evidence that Morris was incapacitated or unconscious when the Deputy left to retrieve Morris' wallet.

The Deputy testified that when he found Morris' wallet on the floorboard of his patrol vehicle, he opened the wallet to see if Morris' fifty dollar bill had fallen out. It was neither reasonable nor necessary for the Deputy to search the wallet pursuant to his community caretaker function to ensure Morris' money was in the wallet. The Deputy further testified that after verifying that Morris' money was in the wallet, he decided to search the rest of the wallet to see if Morris had mistakenly passed over his driver's license and to see if he could find any other information that would aid Morris. Unlike *Dombrowski,* the record fails to show that an emergency situation existed or to establish any specific and articulable facts to justify the search pursuant to an officer's community caretaker function.

We hold that, under the totality of the circumstances, it was unreasonable and unnecessary for the Deputy to have searched Morris' wallet without first obtaining a warrant.

Accordingly, Morris' Fourth and Fourteenth Amendment rights were violated.

Having found that the warrantless search of Morris' wallet was unreasonable and illegal, we need not address whether the search of the folded piece of paper contained within the wallet was an unreasonable and illegal search.

C. Fruit of the poisonous tree and the exclusionary rule

The methamphetamine discovered by the Deputy during his illegal search of Morris' wallet provided reasonable suspicion and probable cause to confront Morris and inquire whether Morris had anything else illegal on his person. This confrontation, under color of authority, prompted Morris to produce a pipe and bag of marijuana. Subsequently, Morris was arrested and, during booking, additional packets of methamphetamine were discovered. Based upon this discovered evidence, a search warrant to search Morris' residence was executed. Morris sought to have all of this evidence suppressed.

In *Roose v. State,* 759 P.2d at 481, we stated that

> if the initial search is held improper, not only the evidence obtained by such search but everything which becomes accessible to the prosecution by reason of the initial search would be inadmissible as "a fruit of the poisonous tree."

(*Quoting Goddard v. State,* 481 P.2d 343, 345 (Wyo.1971).) In this case, all of the evidence obtained became accessible to the prosecution only as a result of the illegal initial search and, therefore that evidence constitutes fruit of the poisonous tree. *Id.; Brown v. State,* 738 P.2d 1092, 1097 (Wyo.1987). The illegal search of Morris' wallet, " 'bar[s] from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.' " *Wilson,* 874 P.2d at 225 (*quoting Wong Sun v. United States,* 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963)).

We conclude that the exclusionary rule must be applied in this case. *See Brown,* 738 P.2d at 1097; *Wilson,* 874 P.2d at 225. The conduct of the Deputy in this case amounted to an attempt to circumvent Art. I, § 4 of the Wyoming Constitution, and we find the exclusionary rule to be particularly appropriate here.

CONCLUSION

The search of Morris' wallet was an unreasonable and illegal search, in violation of ***938** Morris' Fourth and Fourteenth Amendment rights. Accordingly, the district court was clearly erroneous in denying Morris' motion to suppress.

Reversed and remanded.

THOMAS, Justice, dissenting.

I cannot discern that anything the deputy sheriff did in this case was unreasonable or was not sanctioned by sound legal authority. Consequently, I would affirm Morris' conviction, and I must dissent from the contrary ruling by the majority of the Court. The focus in this case must be upon Morris' condition and the situation confronting the deputy sheriff, not simply upon the fact that a wallet was examined.

The approach of the Illinois Supreme Court is far more sound:

> We cannot agree with this line of reasoning, for as indicated by the great number of search and seizure cases before the courts today there is no iron-bound rule that governs all such cases regardless of circumstances. The constitutional prohibition is against unreasonable searches and seizures and what is reasonable or unreasonable is dependent upon the facts of each individual case. We have no quarrel with any of the cases cited by the defendant but no one of them meets the facts of this case. Here the officers were summoned to investigate the circumstances involving a distressed person. They found him in a stupor, not intoxicated apparently, for there was no odor of alcohol. But he was totally disoriented and incoherent, unable to answer their questions as to his condition or identity. For all they knew he may have been a diabetic in shock or a distressed cardiac patient. The officers were faced with an entirely different set of facts requiring different guide lines. This was an emergency situation where the welfare of the individual was at stake.
>
> This court has recently discussed a similar emergency situation in *People v. Smith,* 44 Ill.2d 82, 254 N.E.2d 492 [(1969)]. Though not determinative of the case, we commented that it was reasonable and appropriate for the police to remove a wallet from the clothing of a seriously wounded and semiconscious person and that the damaging evidence contained therein was admissible in evidence at his later trial. We stated that it was reasonable to consider that the wallet might provide information of value in the handling of the wounded man, *e.g.,* information concerning his blood type, being a diabetic, being unable to tolerate certain medications or anesthetics, religious affiliation, and

that, in fact, had the officer failed to secure the wallet, a criticism of his professional conduct could not be lightly dismissed. We concluded that under such circumstances the constitutional rights of defendant would not be infringed.

Other jurisdictions have determined the specific point here at issue. In *People v. Gonzales,* 182 Cal.App.2d 276, 5 Cal.Rptr. 920 [(1960)], a case involving a charge of illegal possession of narcotics, it was held that where defendant was found either unconscious or nearly so with a knife wound, a search made for identification of defendant was reasonable and lawful and that the seizure of a package of marijuana from his pants pocket was not a violation of his constitutional rights. The court stated that after finding a man in defendant's condition any alert and conscientious officer would be put on inquiry and the first step in the inquiry would be to clearly identify the victim, and that failure to do so would subject him to sever censure. **It was stated further that reasonableness is not a mere matter of abstract theory but a practical question to be determined in each case in the light of its own circumstances.** In *United States v. Hickey,* D.C., 247 F.Supp. 621 [(1965)], it was held that where an accused was so drunk when found in an alley that it was impossible for the police to be certain that he had even given them his correct name and address, a search of defendant to obtain his wallet was justified. The court stated that it was not only the right but the duty of the arresting officer to search an arrested person if necessary to determine his true identity and that where evidence of a greater offense is uncovered in such a search incident to his arrest for ***939** intoxication such evidence is admissible against him in his trial on the greater offense.

People v. Smith, 47 Ill.2d 161, 265 N.E.2d 139, 140–41 (1970) (emphasis added).

In that case, the officers were seeking identification on the defendant's person and discovered marijuana in his back pocket. The court refused to suppress the evidence.

Other courts have ruled consistently. *Vauss v. United States,* 370 F.2d 250 (D.C.Cir.1966); *People v. Gomez,* 229 Cal.App.2d 781, 40 Cal.Rptr. 616 (1964); *State v. Auman,* 386 N.W.2d 818 (Minn.Ct.App.1986); *Missouri v. Miller,* 486 S.W.2d 435 (Mo.1972); *Perez v. State,* 514 S.W.2d 748 (Tex.Crim.App.1974). *See United States v. Wilson,* 524 F.2d 595 (8th Cir.1975), *cert. denied,* 424 U.S. 945, 96 S.Ct. 1415, 47 L.Ed.2d 351 (1976); *Gilbert v. State,* 289 So.2d 475 (Fla.Dist.Ct.App.1974), *cert. denied,* 294 So.2d 660 (Fla.1974).

There can be no question that the community caretaking function is an appropriate role for law enforcement officers. In the American Bar Association Standards for Criminal Justice, the function is described:

Complexity of police task

* * * * * *

(b) To achieve optimum police effectiveness, the police should be recognized as having complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses. Such other police tasks include protection of certain rights such as to speak and to assemble, participation either directly or in conjunction with other public and social agencies in the prevention of criminal and delinquent behavior, maintenance of order and control of pedestrian and vehicular traffic, resolution of conflict, and assistance to citizens in need of help such as the person who is mentally ill, the chronic alcoholic, or the drug addict.

AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 1–1.1(b) (2d ed. 1986 Supp.).

Major current responsibilities of police

In assessing appropriate objectives and priorities for police service, local communities should initially recognize that most police agencies are currently given responsibility, by design or default, to:

* * * * * *

(c) aid individuals who are in danger of physical harm;

* * * * * *

(f) assist those who cannot care for themselves;

* * * * * *

(k) provide other services on an emergency basis.

American Bar Association Standards for Criminal Justice § 1–2.2 (2d ed. 1986 Supp.).

After quoting from the Standards, LaFave states the proposition unequivocally:

If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime discovered thereby is admissible in court.

2 Wayne R. LaFave, Search and Seizure § 5.4(c), at 525 (2d ed. 1987) (footnote omitted). If the person of a defendant can be searched under these circumstances, a wallet in the person's possession and casually left in the police vehicle surely enjoys no greater protection. This must be especially true when the defendant apparently acquiesced in the examination by the officer.

The foregoing authorities, following what is sometimes referred to as the emergency doctrine, are far more persuasive to me than the two cases from the Oregon Court of Appeals relied upon by the majority. *State v. Paasch,* 117 Or.App. 302, 843 P.2d 1011 (1992), and *State v. Morton,* 110 Or.App. 219, 822 P.2d 148 (1991), both involved lost property, a wallet and a purse, and both involved a continuation of the search after identification had been found. The same factual discrepancy is found in *State v. May,* 608 A.2d 772 (Me.1992).

The facts of this case involve far more than a lost wallet. If we accept the view of the facts most favorable to the State, as we are bound to do, Morris was far less competent ***940** and coherent than the majority depicts him. He kept lapsing in and out of consciousness; was startled and confused when he recovered consciousness; was confused and disoriented; and even stated he thought he had lost the T-shirt he was wearing some two years previously. More pertinent to these facts is the case of *State v. Newman,* 49 Or.App. 313, 619 P.2d 930 (1980), in which the Court of Appeals of Oregon reversed a pretrial order suppressing evidence obtained from a search of the defendant's purse. The defendant was discovered in an apparently intoxicated condition, but the court concluded there was no medical emergency. It held, however, that in evaluating one of his options, that of taking Newman home, the officer needed her home address, or the name and number of someone to call. The Supreme Court of Oregon reversed the Court of Appeals, limiting the question to: "Can the police without a warrant in a noncriminal and nonemergency situation search the property of an intoxicated person for identification at the time the person is taken into custody *for transportation to a treatment or holding facility?* " *State v. Newman,* 292 Or. 216, 637 P.2d 143, 145–46 (1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1982). I find LaFave's critique of this decision to be apt:

> The curious approach of the Oregon Supreme Court in reversing does not cast any doubt upon the wisdom of the language quoted in the text. Ignoring the fact that the officer acted for the purpose of gaining facts upon which he could decide which alternative disposition would be appropriate, the court misstated the issue as being whether "it was necessary for the police officer to know the name of the person that he was going to transport to the treatment or holding facility."

2 Wayne R. LaFave, Search and Seizure § 5.4(c), at 526 n. 37 (2d ed. 1987).

Similarly, in this case, after articulating the fact that the deputy sheriff asked Morris whether there might be found in his wallet any phone numbers of friends, the majority simply ignores the reason for looking for the wallet in the vehicle was so that prospect might be investigated. Instead, the majority treats the case as simply a lost-wallet case from that point forward. The majority acknowledges the community caretaker function, but does not go forward with that analysis as the courts upon which I rely have done.

We recognized the very function at issue here in *Roose v. State,* 759 P.2d 478, 483 (Wyo.1988), when we said:

> While it is clear the inspection of an arrestee's wallet may be proper under an incident-to-arrest rationale, the examination also may be properly conducted under an inventory search rationale or to provide assistance to the police in ascertaining or verifying the arrestee's identity. *Illinois v. Lafayette* [462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983)], supra; *State v. Brown,* 291 Or. 642, 634 P.2d 212 (1981); 2 LaFave, Search & Seizure, supra. As stated in the case of *State v. Brown,* 291 Or. 642, 634 P.2d at 219, the Oregon Supreme Court stated that "[a] search of person is construed to include clothing and the opening of small closed containers like cigarette boxes and wallets." Therefore, it was reasonable for the officer to take appellant's wallet and search its contents.

Even though there might be inventory justification for the examination of Morris' wallet, I am satisfied that the examination was accomplished "to provide assistance to the police in ascertaining or verifying" Morris' identity and to identify a friend or relative who might assist him. *Roose,* 789 P.2d at 483.

No error was committed by the trial court in admitting the evidence taken from Morris' wallet, and his conviction should be upheld.

All Citations

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510 P.2d 793
Supreme Court of Alaska.

Judith SMITH, Appellant,

v.

STATE of Alaska, Appellee.

No. 1587.
|
May 25, 1973.

Synopsis

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, C. J. Occhipinti, J., of unlawful and felonious possession of heroin, and she appealed. The Supreme Court, Connor, J., held that where dumpster, into which defendant deposited garbage, accommodated several apartments, all municipal pickups were made from the dumpster, and dumpster was located outside building in parking area, defendant could not have harbored a reasonable expectation of privacy in the dumpster, and thus protection afforded by Fourth Amendment did not extend to the dumpster and warrantless search was not illegal.

Affirmed.

Rabinowitz, C. J., dissented and filed opinion.

Fitzgerald, J., did not participate.

Attorneys and Law Firms

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Stephen G. Dunning, Asst. Dist. Atty., Seaborn J. Buckalew, Dist. Atty., Anchorage, John E. Havelock, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., and CONNOR, ERWIN and BOOCHEVER, JJ.

OPINION

CONNOR, Justice.

Appellant was convicted by a superior court jury of unlawful and felonious possession of heroin in violation of AS 17.10.010. Three days prior to trial, appellant moved to suppress as evidence all property seized during execution of a search warrant issued September 4, 1970, by district court Judge Dorothy O. Tyner. In that motion appellant alleged that the search ***794** warrant was issued upon information obtained by three illegal searches. This appeal is based on the denial of that motion.

On or about August 22, 1970, appellant and one Charles Smith occupied Apt. No. 409 of the Caye Ann Apartments, located at 731 B Street in Anchorage. Having received information that Charles Smith was involved in narcotics activities, Investigator Dean Bivens of the Alaska State Troopers instituted on August 22, 1970, a ‘stakeout’ giving 24-hour coverage of the Caye Ann Apartments. This surveillance lasted approximately 12 days.

Investigator Bivens and the state troopers who worked with him operated from a camp trailer across B Street from the Caye Ann Apartments. This vantage point afforded them a view both of the apartment building and of the dumpster garbage receptacle located outside the building, adjacent to the northwest corner of the building, closet to B Street. Bivens specifically assigned the troopers manning the stakeout to remove garbage placed in the dumpster by either Charles Smith or the appellant.

In addition to the dumpster located outside the apartment building, the facilities of the Caye Ann Apartments included an indoor garbage room located on the ground floor, equipped with a 20-gallon garbage hand cart. At the time in question, it was the practice of the resident manager of the apartment building to empty the contents of the 20-gallon hand cart into the dumpster whenever the hand cert became filled up. The dumpster itself was slightly sheltered by an overhang of the building. Municipal refuse collection was made exclusively from the dumpster and not from the indoor garbage room.

On August 22, 1970, Trooper Wes Taylor removed two bags of garbage which he had seen Charles Smith place in the dumpster. On August 31, Trooper Casper Johnson removed a ten colored plastic garbage bag, which he had seen appellant place in the dumpster. On September 2, Trooper Taylor again removed items from the dumpster which he had seen Charles Smith, accompanied by appellant, place there. Each of the bags or other containers thus obtained was opened by Investigator Bivens and the contents of each provided

evidence that occupants of Apt. No. 409 were involved with unlawful drugs.

On the basis of the evidence taken from the dumpster, a search warrant was subsequently issued, and a number of drug-related items were found in the apartment, including marijuana, cigarette papers, hypodermic syringes and, in a paper 'slip', approximately one gram of a brownish powder which chemical analysis proved to be unusually pure heroin. In addition, the troopers found and seized a can of 'milk sugar', a substance commonly used to dilute heroin before use.

Appellant contends that the police activity outlined above constitutes an illegal search. Specifically, she argues that official removal and examination of the contents of various bags and other garbage receptacles placed in the dumpster by hereself and Charles Smith violates both the Fourth Amendment of the United States Constitution[1] and Article I, Section 14, of the Alaska Constitution.[2] In short, appellant reads both constitutions to require that the police should have demonstrated probable cause to an independent magistrate and secured a search warrant before undertaking the search of Smith's garbage.[3]

***795** We disagree, and we hold that the trial court's failure to grant appellant's motion to suppress does not constitute error. However, inasmuch as we are profoundly committed to the preservation of personal privacy and deeply sensitive to the dependence of our most cherished rights upon judicial vindication, we are unwilling to announce a general rule sanctioning official gathering and analysis of an individual's refuse. Accordingly, we limit our holding to the particular facts of the case at bar.[4]

We commence our analysis with the observation that the protection of the Fourth Amendment does not extend to abandoned property.[5] Using traditional property law concepts, we find it difficult to avoid the conclusion that any items of garbage placed in a receptable outside the dwelling-and certainly the items removed from the dumpster in the case at bar-are abandoned. In the words of one recent scholar:[6]

'In the law of property, it has been recognized that the act of abandonment is demonstrated by an intention to relinquish all title, possession, or claim to property, accompanied by some type of activity or omission by which such intention is manifested. As one court has stated:
'The abandonment of property is the relinquishing of all title, possession, or claim to or of it-a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away.'' (Emphasis added by Mascolo).[7]

***796** We view the sequence of an individual's placing an article in a receptacle, from which routine municipal collections are made, and then withdrawing from the area[8] as activity clearly indicative of 'an intention to relinquish all title, possession, or claim to property.'[9]

A determination that the refuse retrieved by the state troopers in this case was abandoned, however, is not conclusive of the reasonableness of their search. As the United States Supreme Court said in Katz v. United States:
'(T)he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312, 315; United States v. Lee, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202, 1204. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See ***797** Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688; Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877, 879.' 389 U.S. at 351-352, 88 S.Ct. at 511, 19 L.Ed.2d at 582.

Expanding on this theme in Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889, 899 (1968), the Court added:
'. . . and whether an individual may harbor a reasonable 'expectation of privacy,' (389 U.S.) at 361, 88 S.Ct. at 516 (19 L.Ed.2d at 588) (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion.' (Citation in brackets added.)

The nourishment we derive from these two propositions is this: if appellant can be said to have harbored a 'reasonable expectation of privacy' in the dumpster, then the protection afforded by the Fourth Amendment extends to that receptacle and the warrantless search is illegal.

The question presented by this case, in short, in how to determine whether a reasonable expectation of privacy exists here. Our touchstone is Justice Harlan's separate concurrence in Katz:

'My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'. Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.' 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 587-588.

On the record before us, we are not satisfied that their test has been met.

First, appellant's and Charles E. Smith's activities of depositing garbage in the dumpster and withdrawing from the area, described in Investigator Biven's Affidavit for Search Warrant,[10] were clearly exposed to plain view. The dumpster was located outside the building, appurtenant to the corner of the building nearest the street. The trips were made during daylight hours. Any passerby could have easily observed appellant's or Smith's various trips. No attempt was made to empty the bags or boxes or to commingle their contents with the collective mass of garbage. Any person later emptying refuse in the dumpster could easily segregate the items placed therein by the Smiths. Had they wished to keep their activities to themselves, the Smiths could easily have left any items of garbage in the 20-gallon hand cart located in the indoor garbage room. On these facts, we are satisfied that appellant harbored no 'actual (subjective) expectation of privacy'.[11]

But even assuming arguendo that the facts overwhelmingly indicated appellant's subjective expectation of privacy, this court is unable to hold that 'society is prepared to recognize (such an expectation) as 'reasonable,'' at least in the case at bar.

To be sure, the question is very close. A review of several recent garbage can search cases[12] reveals a basic core of factors to be considered in determining whether a reasonable expectation of privacy exists. These factors are:

1. Where the trash is located,
2. Whether the dwelling is multiple or single unit,

***798** 3. Who removed the trash,

4. Where the search of the trash takes place.

One may readily arrange these factors to form a continuum. At one end of the continuum is trash located close to a single-family dwelling, on the same property as the dwelling, and searched by police officers at that location. We observe, without so deciding, that this would be a strong case for holding the expectation of privacy to be reasonable. At the other end of the continuum is trash located off the premises of a mulitple-unit dwelling, and searched by a person authorized to remove it. In such a case we would be unable to hold that the expectation of privacy was reasonable.

The instant case presents an on-premises search by police officers of a multiple-dwelling trash receptacle from which municipal collections were made. We note at the outset that almost every human activity ultimately manifests itself in waste products and that any individual may understandably wish to maintain the confidentiality of his refuse. As the California Supreme Court stated in People v. Edwards:

'We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, . . . Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash.' 80 Cal.Rptr. 633, 638, 458 P.2d 713, 718 quoted in, 96 Cal.Rptr. 62, 68, 486 P.2d 1262, 1268.

Understandable as this desire for confidentiality may be, it is not conclusive of society's willingness to recognize an expectation of privacy in a garbage receptacle as reasonable. Turning to the dumpster in the case at bar, we are impressed with the combination of several factors. To begin with, this dumpster accommodated several apartments. Therefore many people living in the building-and certainly the superintendent-would conceivably have occasion to look into it and scavenge about in the collective heap. Secondly, all municipal pickups were made from this dumpster. Therefore, any tenant in the Caye Ann Apartments could be sure that periodically a group of third persons would look into the dumpster and possibly scavenge items therefrom. Thirdly, the dumpster was located outside the building in the parking area. Therefore, it would be reasonable to expect trash to be accidentally removed from the dumpster by running children, passing cars, stray dogs, or even a visitor of another tenant in the building. Taking these various factors together, we are unable to conclude that appellant could have harbored an objectively reasonable expectation of privacy in the dumpster.[13]

We are urged, however, to adopt a concept of differential expectations of privacy. We are cited to State v. Stanton, 490 P.2d 1274 (Or.App.1971), in which the Court of Appeals of Oregon stated:
'We recognize that while it may not be objectively reasonable for a person to expect privacy as to one class of persons or persons with one purpose, he may reasonably expect privacy as to the same or other classes with other purposes. A person may not expect privacy in his open filed or backyard as against children at play or parents looking for lost or tardy children. Yet he may subjectively expect and objectively be entitled to expect privacy as against policemen making a 'dragnet' search of a whole group of private fields or a whole neighborhood of backyards in the assumption that if they search long enough and far enough they will find some evidence of some crime.' 490 P.2d at 1279.[14]

***799** That view we decline to adopt in this case. In our opinion, the reasoning which would openly countenance scavenging in the dumpster by an indeterminate number of third persons, freely admit a constant invitation to the public authorities of the municipality to remove the contents, yet require the police to secure a search warrant before pursuing their investigation is too attenuated. Accordingly, we hold that the trial court's denial of defendant's motion to suppress did not constitute error.

Affirmed.

FITZGERALD, J., did not participate.

RABINOWITZ, Chief Justice (dissenting).

I cannot agree with the majority's conclusion that appellant did not possess a reasonable expectation of privacy from governmental intrusion into her garbage which was deposited in the dumpster. In my view, her expectation was both reasonable and protected by the fourth amendment to the United States Constitution[1] and article I, section 14 or article I, section 22 of the Alaska constitution.[2] Thus, I would hold that the warrantless search conducted in the instant case was unreasonable and unconstitutional, and would therefore reverse the trial court's denial of appellant's motion to suppress.

At the outset, I think it is essential to recognize that a free and open society cannot exist without the right of the people to be immune from unreasonable interference by representatives of their government. In order to preserve and protect this right of privacy, our Founding Fathers promulgated the fourth amendment to the United States Constitution. As the United States Supreme Court has repeatedly observed:

The basic purpose of (the Fourth) Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.[3]

Fourth amendment rights of the people, as well as the rights of Alaskan citizens under article I, section 14 or article I, section 22 of our constitution, are to be jualously guarded by the courts, and any governmental invasion of individuals' privacy is to be authorized only when reasonable ***800** and undertaken in accordance with the strict requirements of judicial process pertaining to the issuance of a search warrant. In regard to situations where a search warrant is not necessary, the Supreme Court of the United States in Coolidge v. New Hampshire,[4] cautioned that:
The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '(T)he burden is on those seeking the exemption to show the need for it.' (Footnotes omitted.)[5]

With few exceptions, the well-recognized rule is that governmental searches may be constitutionally conducted only pursuant to valid search warrants. As the United States Supreme Court stated in Katz v. United States:[6]
Searches conducted without warrants have been held unlawful[6] notwithstanding facts unquestionably showing probable cause,' . . . for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . ..' . . . 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions. (Footnotes and citations omitted.)[7]

In my judgment, it is preferable to entrust the decision to invade citizens' privacy to the scrutiny of neutral judicial officials rather than police officers-even police officers operating under great self-restraint. As the United States Supreme Court noted in McDonald v. United States:[8]

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed to precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.[9]

Here, the troopers failed to comply with the warrant rule. That is, without possessing a valid search warrant, they inspected and seized portions of appellant's garbage which were deposited in the dumpster. Accordingly, unless the present warrantless search falls within one of the narrow exceptions to the warrant-requirement rule, I would hold that the search was unconstitutional under both the federal and state constitutions.

I commence my analysis by noting that the fourth amendment and Alaska's constitution protect persons rather than physical locations. I note further that the 'private' or 'public' nature of the physical surroundings in which the claim to privacy is asserted is irrelevant for purpose of constitutional ***801** analysis. As the United States Supreme Court stated in Katz:

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutonally protected. . . . (Citations omitted.)[10]

More precisely, the constitutions afford protection to personal 'expectations of privacy' which are reasonable. In Terry v. Ohio,[11] the United States Supreme Court stated:

We have recently held that 'the Fourth Amendment protects people not places,' . . . and wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion. (Citations omitted.)[12]

In this regard, I find little utility in the majority's references to the physical location of the dumpster; to a 'core of factors' which includes the location of the trash; and to its importation into the realm of constitutional analysis of 'traditional property law concepts' such as 'abandonment' and 'relinquishment of title, possession or claim to property.' In the case at bar, we are concerned with the determination of constitutional rights rather than spatial relationships or property interests. According significance to these factors, in my view, led the court to adopt an unworkable test which imposes upon appellant an impossible burden. That is, the court employs the test laid down by Justice Harlan in his separate concurring opinion in Katz.[13] Under that formula, appellant must meet two requirements: he must establish 'an actual (subjective) expectation of privacy,' and he must show that this expectation is 'one that the society is prepared to recognize as 'reasonable.'' In my opinion, establishing a person's subjective expectations or mental attitudes will be extremely difficult, if not impossible, in most cases. It seems to me to be preferable to consider the external, behaviorial manifestations of an individual in order to ascertain his or her expectations of privacy. In this regard, I would adopt and apply the two-pronged test set forth by the California Supreme Court in People v. Edwards.[14] In Edwards, the court articulated the following formula:

. . . (W)e believe that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion.[15]

In that case, two defendants were convicted of possession of marijuana for sale. The evidence relied upon at their trial had been obtained in a warrantless trash can search. There, two policemen, acting upon information provided by defendants' neighbor, 'walked down the railroad tracks behind defendants' residence and entered into 'the open back yard area' of that residence.' The policemen then conducted an unauthorized search of three trash cans located two or three feet away from defendants' back porch, eventually uncovering a bag containing marijuana. There, the California Supreme Court reversed the convictions, holding that defendants possessed a reasonable expectation of privacy in regard to their trash cans, and that such expectation had been violated by an unreasonable governmental intrusion. Two years later, ***802** Edwards was followed by the California Supreme Court in People v. Krivda.[16] In Krivda, the defendants had set

several trash barrels 'on the parkway adjacent to the sidewalk' in front of their single family residence. Police officers halted approaching refuse collectors, requested them to first empty their truck well, next pick up defendants' trash, and then permit the officers to inspect the contents of the defendants' garbage shortly thereafter. During such warrantless search, the police found quantities of marijuana. Acting at a 'reopened' suppression hearing, the trial court granted defendants' motion to suppress and dismissed the action. The California Supreme Court denied the prosecution's appeal from the dismissal order, holding that 'defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant,' and that such expectation had been violated by an 'unreasonable governmental intrusion.'

Several factual similarities exist between Krivda and the case at bar. In both cases, the occupants of their respective dwelling units deposited their trash in the only receptacles available for their living facility. In both cases, the seized contraband could not have been seen or discovered without the police actively rummaging through the contents of the refuse containers. In both cases, the identity of the source of the trash had not yet been destroyed through the commingling of the deposited garbage with the other trash; police could and did clearly trace particular pieces of garbage back to the defendants. In both cases, it is reasonable to infer from the defendants' conduct that while they may have anticipated some inadvertent inspection of their trash by third persons, such as garbage collectors, children or passersby, they did not necessarily expect that law enforcers would be picking through each scrap of their refuse. And while in Krivda the trash cans were set immediately adjacent to the street in preparation for pick-up and removal, the dumpster in the case before us was located close to the apartment building, 'just under cover' of the overhang of the structure. According to the majority's physical-locaton analysis, the positioning of the garbage cans in Krivda would seem to suggest an even greater intention to 'abandon' the property on the part of the defendants than exists here.

Like the California Supreme Court in Krivda, I am persuaded that in the instant case, appellant exhibited a reasonable expectation of privacy with respect to the garbage she deposited in the dumpster. The refuse was not strewn openly onto the public streets, sidewalks, or into a public dump, where it could be sorted through and examined by anyone. Rather, the trash was deposited into a dumpster: the apartment building waste receptacle whose very sides, shape and structure would seem to discourage rather than invite human inspection of the materials deposited therein. Appellant's garbage was not 'commingled' or mixed together with the other trash so as to destroy the identity of its source.[17] Nor were the contents of the garbage bag tossed casually upon the top of the stack of existing refuse 'in plain view' of any passerby. Rather, they were wrapped up inside of closed containers: two yellow grocery bags; a tan colored ***803** plastic garbage bag; a Schlitz beer box and a brown paper bag. Indeed, Inspector Bivens and the state troopers were obliged to first open the containers and remove the contents in order to examine and seize the contraband. Additionally, appellant's garbage had not been dropped into the interior hand cart and left there for the apartment manager to dump into the larger, exterior waste receptacle. Rather, appellant and her husband personally deposited the containers into the dumpster, arguably to ensure that their garbage would not be handled by third persons. These facts suggest to me that appellant did not intend to knowingly expose to the public the contents of her garbage bags; that she possessed a reasonable expectation of privacy, at least from government officials, with respect to her trash.

Rather than focusing upon the physical location of the dumpster and property law notions of abandonment of ownership interests, I would focus upon appellant's behavior in an effort to determine whether or not she intended to knowingly disclose to the public, publicly communicate, or publicize the contents of her garbage. For instance, when one enters a public telephone booth, closes the door behind him and conducts a telephone conversation, that person demonstrates a reasonable expectation that the nature of the discussion will remain confidential; the caller does not behaviorally manifest an intention to publicize or publicly disclose the contents of the telephone conversation. In such an instance, the fourth amendment as well as Alaska's constitution extend protection to the contents of the telephone call.[18] By analogy to the instant case, one who inserts refuse into a garbage bag, seals the bag and personally deposits the bag into the only waste facility available for his dwelling place does not manifest an intention to publicly communicate or disclose the contents and identity of the garbage. Here too, the protection afforded by the fourth amendment and Alaska's parallel constitutional provision should obtain.

Without elaborating, the court rejects as being 'too attentuated' appellant's theory of 'differential expectations of privacy' and in so doing fails to recognize that citizens might expect a few, infrequent invasions of their privacy by third persons, but might simultaneously expect their

privacy to remain immune from governmental intrusion. I disagree. A telephone caller, for example, who conducts a conversation on a 'party line' might reasonably expect brief interruptions from others who were attempting to ascertain if the line were in use. It does not necessarily follow, however, that the same caller would also expect that government agents might be conducting a full-scale warrantless 'search' or tap of his conversations. Similarly, one who deposits refuse into a dumpster might expect some minor, inadvertent examination by garbagemen or other third persons, but such expectations would not necessarily include a detailed, systematized inspection of the garbage by law enforcement personnel. As the California Supreme Court correctly observed in Krivda:

Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children may rummage through one's trash barrels and remove some of its contents. However, as stated in People v. McGrew, 1 Cal.3d 404, 412, 82 Cal.Rptr. 473, 478, 462 P.2d 1, 6, 'The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police on a search of his room.'[19]

***804** Further, such differential expectations of privacy would seem to exist regardless of where the trash receptacle was located. The court contends that it is reasonable to expect that refuse deposited in the dumpster in the case at bar might be 'accidentally removed' or inadvertently observed 'by running children, passing cars, stray dogs or even a visitor . . ..' It seems to me that it is equally reasonable to expect that garbage deposited in a trash can servicing a single family dwelling might also be seen by passing children, dogs or strangers. Yet, in both instances, the expectation of privacy against governmental invasion would remain undiminished. Indeed, the majority seems to impliedly acknowledge this by conceding that 'trash located close to a single family dwelling' would present 'a strong case for holding the expectation of privacy to be reasonable.' Here, appellant's reasonable expectation of privacy from governmental intrusion would not be defeated by her expectation that some inadvertent examination of the sealed garbage bags by the collectors might occur in the process of garbage removal.

A contrary conclusion is not compelled by Hoffa v. United States.[20] In that case, the United States Supreme Court held that the introduction into evidence of incriminating statements made by the defendants to or in the presence of a paid informer did not violate defendants' fourth amendment rights. Specifically, Justice Stewart, speaking for four members of the Court stated:

Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.[21]

Hoffa and the instant case, however, are distinguishable. There, the defendants knowingly and voluntarily communicated certain incriminating information to a third person who turned out to be a paid informer;[22] a communication to another was intentionally initiated and undertaken. Having intentionally conducted such communication, the defendants were obliged to assume the risk that the recipient of the communication might turn out to be a governmental agent. Their expectation of privacy, under such circumstances, was necessarily diminished. Here, the facts suggest that no such knowing or voluntary disclosure of the contents of the closed garbage bag to the collectors or any other person was initiated or attempted by appellant. If anything, the facts would seem to suggest that appellant and her husband expected the refuse collectors to 'commingle' or destroy the garbage. If appellant had deposited personal letters rather than contraband into the dumpster, it could not be seriously maintained that she voluntarily and knowingly meant to communicate the contents of such letters to the collectors or police. It is more reasonable to infer that she expected the contents of her garbage to be interingled with other refuse in the well of the truck, and ultimately dumped into a central collection place where the forces of nature would destory them. In short, without some attempt at knowingly communicating to a third person or knowingly disclosing to the public, appellant did not ***805** have to assume the risk that such third persons might be paid informers or agents of the police. Her reasonable expectation of privacy against governmental intrusion remains intact.

I am also of the view that appellant's expectation of privacy was violated by an unreasonable governmental intrusion. The search was undertaken without a validly issued warrant. The state troopers occupied a camp-trailer and kept the dumpster and appellant's dwelling place under 24-hour surveillance for approximately twelve days. In other words, for almost two weeks, officials of the government observed, retrieved and inspected appellant's waste products without judicial approval

and supervision before discovering the contraband. I find such unauthorized governmental invasion of personal privacy to be 'unreasonable' and decline to join the court in encouraging such police conduct in the future. As the Supreme Court of California wisely cautioned in Krivda:

We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant.[23]

Authorizing warrantless police searches of private citizens' trash cans leaves the continued viability of the fourth amendment to the United States Constitution and article I, section 14 or article I, section 22 of the Alaska constitution dependent upon whether citizens hand mix their garbage with other waste materials in a dumpster, or whether they procure and use private incinerators and paper sharedders. In my view, neither the United States Constitution nor the Alaska constitution should be construed so irrationally and narrowly.

Finally I disagree with the majority's holding insofar as it discriminates between the right to privacy of citizens occupying a single family dwelling, and those living in multiple unit dwelling places. In my opinion, such a distinction is unjustifiable as being either arbitrary or ultimately grounded upon impermissible economic discrimination among living unit dwellers. Nowhere in the text of the fourth amendment, article I, section 14 or article I, section 22 is the proviso, 'for property owners only.' Many, if not most, of our citizens cannot afford to own their own homes and live in single family dwellings. Further, some persons may prefer to live in apartments or condominiums. Moreover, many urban dwellers are obliged to reside in high rise apartment buildings, due to the crowded spatial conditions of our cities. To make the protection of the fourth amendment, article I, section 14 or article I, section 22 depend upon the economic status of an individual, life-stye preferences and urban spatial conditions is, in my opinion, unacceptable. The appropriate analytical focal point should be appellant's reasonable expectation of privacy. In my view, such expectation will remain constant, regardless of whether appellant's living unit is situated by itself on a spacious multi-acre estate or stacked upon others in a multi-unit apartment building. In other words, I am conviced that a resident's expectation that the police will not be scavenging through his or her garbage when such refuse is deposited in the only available waste receptacle for the living unit remains the same, whether the dweller resides in a split-level ranch home in the suburbs or in a crowded tenement in the inner city.

For the reasons mentioned above, I would reverse the trial court's denial of appellant's motion to suppress and grant appellant a new trial.

All Citations

510 P.2d 793

Footnotes

1 The United States Constitution, Fourth Amendment, provides in part:

'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .'

2 The Alaska Constitution, Article I, Section 14, provides in part:

'The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.'

3 See, e. g., Katz v. United States, 389 U.S. 347, 356-357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967).

'It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. . . . 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59, 64, and that searches conducted outside the

judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.' (Footnotes omitted).

4 Although under Baker v. Fairbanks, 471 P.2d 386, 401-402 (Alaska 1970), we may interpret our own constitution more expansively than the comparable federal constitutional provision, we are not persuaded that such should be done in this case.

5 United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972), Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff.L.Rev. 399, 400-01 (1970), and cases cited therein (cited hereafter as Mascolo).

6 Mascolo at 401-02.

7 Foulke v. New York Consol. R. R., 228 N.Y. 269, 127 N.E. 237, 238 (1920), quoted with approval in United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968) (cases cited by Mascolo at 402 n. 14).

We note in passing that Mascolo would rest a finding of abandonment on federal constitutional law rather than on local property concepts in light of the 'conclusive effect of abandonment under the (F)ourth (A)mendment (being) the termination of an individual's right, or expectation, of privacy in a particular piece of property.' Mascolo at 402. We take a somewhat different view. In our opinion, the legality of the search turns not on the nature of the refuse but on whether the receptacle lies within the zone of protection afforded by the Fourth Amendment. Thus property which is abandoned but which rests in a receptacle temporarily maintained inside a dwelling could not be searched or seized by the police unless a warrant had issued.

See, e. g., State v. Purvis, 249 Or. 404, 438 P.2d 1002 (1968). A police officer suspected the defendant of possession of marijuana. He requested maids working in the hotel where defendant resided to bring him the contents of the defendant's wastebasket, which were emptied as part of the maids' normal duties. Of the objects removed from the wastebasket, the court said:

'The objects which defendant deposited in the ash trays and waste baskets can be regarded as abandoned property. During the time the discarded property remained in the room the police were not entitled to seize it, not because defendant claimed a right of privacy in these items, but because the right to the privacy of the room itself would be invaded by such a seizure. However, the removal of the contents of the ash trays and waste baskets into the hallway by the maids, who were privileged to be in the room and were authorized to remove trash in cleaning it, did not constitute an unlawful invasion of defendant's privacy.' (Emphasis added). 438 P.2d at 1005.

8 Investigator Biven's Affidavit for Search Warrant reads in part:

'That on the 22nd day of August 1970, at approximately 5:15 p. m., Trooper Wes Taylor informed me of the following:

(a) That he had observed Charles E. Smith exit the CayeAnn Apartments located at 731 B Street in Anchorage at approximately 11:59 a. m. on the 22nd day of August, 1970.

(b) That Charles E. Smith had in his possession two (2) yellow grocery bags with the name 'CARR's" written on the side.

(c) That Charles E. Smith placed the two (2) yellow 'CARRS's" grocery bags into the CayeAnn Apartments dumpster located at the northwest corner of the apartment building.

(d) That Charles E. Smith entered a black over blue 1970 Cadillac Alaska License #6673 and departed the area.

'That on or about the 31st day of August, 1970, at approximately 9:30 p. m., I conferred with Trooper Casper Johnsen and he indicated the following had transpired on the 31st day of August, 1970:

(a) That he had observed a person known to him as Judy Lee Smith exit the CayeAnn Apartments, located at 731 B Street, Anchorage, Alaska, at approximately 3:55 p. m.

(b) That at that time Judy Lee Smith had in her possession a tan colored plastic garbage bag.

(c) That she proceeded to a dumpster which serves the residents of the CayeAnn Apartments, which is located at the northwest corner of that building.

(d) That Judy Lee Smith deposited the tan colored plastic garbage bag in the dumpster and then re-entered the CayeAnn Apartments.

(e) That Trooper Casper Johnsen had occasion to observe the CayeAnn Apartments dumpster continuously and without interruption from 3:34 p. m., when the tan colored plastic garbage bag was deposited by Judy Lee Smith, until 4:10 p. m., when it was personally removed from the dumpster by Trooper Johnsen.

(f) That during the above interval between 3:34 p. m. and 4:10 p. m., no one approached nor deposited garbage in the dumpster which contained the tan colored plastic garbage bag.'

9 Mascolo at 401. It is, of course, possible that variations on this fact pattern might require a different conclusion. Intentional concealment, for instance, is not an act of abandonment. See State v. Chapman, 250 A.2d 203, 212 (Me.1969), cited in Mascolo at 402 n. 14.

10 See n. 8 supra.

11 While it is unclear on this record whether the various items, as they rested in the dumpster, were exposed to plain view, that is of no consequence to this analysis.

12 United States v. Mustone, 469 F.2d 970 (1st Cir. 1972); United States v. Dzialak, 441 F.2d 212, (2d Cir. 1971); People v. Krivda, 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971), vacated and remanded for a determination of whether the holding has a state or federal basis, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972); Pelple v. Edwards, 71 Cal.2d 1096, 80 Cal.Rptr. 633, 458 P.2d 713 (1969); State v. Purvis, 249 Or. 404, 438 P.2d 1002 (1968).

13 See Work v. United States, 100 U.S.App.D.C. 237, 243 F.2d 660, 663 (1957) (dissenting opinion by Burger, Circuit Judge).

14 See also People v. Krivda, 5 Cal.3d 357, 96 Cal.Rptr. 62, 69, 486 P.2d 1262, 1269 (1971):

'of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children may rummage through one's trash barrels and remove some of its contents. However, as stated in People v. McGrew, 1 Cal.3d 404, 412, 82 Cal.Rptr. 473, 478, 462 P.2d 1, 6, 'The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police on a search of his room.''

1 The fourth amendment to the United States Constitution provides in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

2 Alaska Court. art. I, s 14 provides in pertinent part:

The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . (Emphasis added.)

Alternatively, in accordance with this court's duty 'to develop additional constitutional rights and privileges under our Alaska Constitution . . .,' Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970), I would hold that appellant's reasonable expectation of privacy was protected by the recently adopted article I, section 22 of the Alaska constitution. Specifically, that section provides:

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

3 Camara v. Municipal Court, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930, 935 (1967). The fourth amendment has been made applicable to the states through the fourteenth amendment. Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

4 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, rehearing denied, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed.2d 120 (1971).

5 Id. at 455, 91 S.Ct. at 2032, 29 L.Ed.2d at 576.

6 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

7 Id. at 357, 88 S.Ct. at 514, 19 L.Ed.2d at 585; see also McCoy v. State, 491 P.2d 127, 132 (Alaska 1971); Ferguson v. State, 488 P.2d 1032, 1036-1037 (Alaska 1971); Sleziak v. State, 454 P.2d 252, 256 (Alaska 1969).

8 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

9 Id. at 455-456, 69 S.Ct. at 193, 93 L.Ed. at 158; see also Katz v. United States, 389 U.S. 347, 356, 88 S.Ct. 507, 19 L.Ed.2d 576, 585 (1967).

10 389 U.S. 347, 351-352, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582 (1967).

11 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

12 Id. at 9, 88 S.Ct. at 1873, 20 L.Ed.2d at 899.

13 389 U.S. 347, 360-362, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, 587-588 (1967).

14 71 Cal.2d 1096, 80 Cal.Rptr. 633, 458 P.2d 713 (1969).

15 Id. at 1098, 80 Cal.Rptr. at 635, 458 P.2d at 715; see also, People v. Krivda, 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971), vacated and remanded for determination of whether holding had state or federal basis, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972).

16 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971), vacated and remanded for determination of whether holding had state or federal basis, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972).

17 As the California Supreme Court observed in People v. Krivda, 5 Cal.3d 357, 363, 96 Cal.Rptr. 62, 68, 486 P.2d 1262, 1268 (1971):

‘We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to ‘read’ the contents of another's trash.' (Emphasis in original.) (Citations omitted.)

18 Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

19 5 Cal.3d 357, 364, 96 Cal.Rptr. 62, 69, 486 P.2d 1262, 1269 (1971); see also State v. Stanton, 490 P.2d 1247, 1279 (Or.1971), where the Oregon Supreme Court observed:

We recognize that while it may not be objectively reasonable for a person to expect privacy as to one class of persons or persons with one purpose, he may reasonably expect privacy as to the same or other classes with other purposes. A person may not expect privacy in his open field or backyard as against children at play or parents looking for lost or tardy children. Yet he may subjectively expect and objectively be entitled to expect privacy as against policemen making a ‘dragnet’ search of a whole group of private fields or a whole neighborhood of backyards in the assumption that if they search long enough and far enough they will find some evidence of some crime.

20 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), rehearing denied, 386 U.S. 940, 951, 87 S.Ct. 970, 17 L.Ed.2d 880 (1967).

21 Id. at 302, 87 S.Ct. at 413, 17 L.Ed.2d at 382.

22 Id., 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d at 382.

23 5 Cal.3d 357, 364, 93 Cal.Rptr. 62, 69, 486 P.2d 1262, 1269 (1971).

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386 N.J.Super. 143
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Ernest CARROLL, Defendant–Appellant.

Submitted March 7, 2006.
|
Decided June 12, 2006.

Synopsis

Background: Defendant pleaded guilty in the Superior Court, Law Division, Atlantic County, to second-degree possession of controlled dangerous substance (CDS) with intent to distribute and other offenses. He appealed.

Holdings: The Superior Court, Appellate Division, Sabatino, J.S.C., temporarily assigned, held that:

police officers had probable cause to arrest defendant in parking lot after vehicle pursuit;

officers' warrantless search of vehicle was not justified under the state constitution as a search incident to arrest;

officers' warrantless search of vehicle and seizure of bag inside were justified under automobile exception to warrant requirement;

defendant abandoned vehicle and, thus, had no reasonable expectation of privacy in it; and

defendant abandoned bag and, thus, had no reasonable expectation of privacy in it.

Affirmed.

Attorneys and Law Firms

****999** Yvonne Smith Segars, Public Defender, attorney for appellant (Sylvia M. Orenstein, Assistant Deputy Public Defender, of counsel and on the brief).

Zulima V. Farber, Attorney General, attorney for respondent (Jeanne Screen, Deputy Attorney General, of counsel and on the brief).

Before Judges SKILLMAN, PAYNE, and SABATINO.

Opinion

The opinion of the court was delivered by

SABATINO, J.S.C., temporarily assigned.

***146** This appeal requires us to review an order sustaining an automobile search following a defendant's arrest, and the seizure ****1000** of a plastic bag of narcotics found within the automobile. For reasons slightly different than those posited by the trial court, we uphold the search and seizure. Because defendant's challenge to the search and seizure is the sole basis for his appeal, we affirm his convictions for various offenses predicated on the fruits of that search.

***147** I.

On the afternoon of August 15, 2004, Atlantic City Police Officer Frank Timek observed a brown Buick sedan parked in front of the Endicott Hotel. Officer Timek recognized the sedan driver as defendant Ernest Carroll from a photograph that he had been shown earlier that day by another officer, describing Carroll as a suspected new drug dealer in the area. Carroll had been apprehended for drug dealing twelve days before, on August 3, 2004, and was released.

Officer Timek observed defendant enter the hotel building empty-handed and emerge about ten minutes later carrying a bluish plastic bag. Defendant placed the bag on the passenger seat of the Buick and drove away.

After noticing, among other things, that the Buick lacked a license plate or registration tag and that its middle brake light was not working, Officer Timek pursued the Buick in his patrol car and activated his siren and emergency lights. The Buick did not stop. Officer Timek continued to follow the Buick, with another responding patrol car, driven by Officer Richard Lasko, following behind Officer Timek.

During the course of the pursuit, Officer Timek observed defendant attempt to push the plastic bag through the driver's side window. However, defendant was unsuccessful

in discarding the bag, as it appeared to Officer Timek that the car window was not open wide enough for the bag to fit through. The officer observed that defendant was having difficulty operating the Buick and simultaneously trying to push the bag through the window.

Not heeding the police siren and lights, defendant drove through the city in a southerly direction at a speed between forty and fifty miles per hour, "jumped a curb," and headed east. Defendant then steered into a casino parking lot, where he crashed the Buick into a parked vehicle. He then ran out of the car, leaving the driver's door open and the plastic bag inside, and attempted to flee on foot.

***148** Arriving at the parking lot at the same time as defendant, Officer Timek got out of the patrol car and stood in Carroll's path, shouting at him to turn around and put his hands up in the air. Carroll ignored these police commands, and instead took what Officer Timek described as "a combative stance," raising his hands and clenching his fists.

Officer Timek attempted to place defendant in custody. The two men struggled. Defendant grabbed Timek's shirt and managed to pull the officer, who was on top of him, into the front seat of the Buick. The struggle continued inside of the vehicle for about thirty to forty seconds. At this point Officer Lasko arrived in the second police car. With Lasko's help, Timek was able to handcuff defendant, pat him down for weapons and remove him from the Buick.

After defendant was removed from the Buick and standing, as Officer Timek estimated, about one car length from the vehicle, Officer Timek reached into the Buick. He retrieved the plastic bag, which the officer testified was in plain view on the floor by the front passenger seat. Suspecting that the bag contained a weapon or contraband, Officer Timek looked inside it. The officer found a large white rock, which he suspected was cocaine, wrapped in clear ****1001** plastic, a digital scale, and several smaller plastic bags of the kind commonly used for distributing illegal drugs. The officer also retrieved from the Buick identification information and a key on the front seat. The police later determined that the Buick had been stolen about two hours before defendant was observed driving it.

According to Officer Timek's testimony at the suppression hearing, at that point "numerous units" of police cars, which were never quantified in the record, had arrived, along with an EMS unit. The EMS workers treated Officer Timek for a cut on his hand and also treated defendant for some facial injuries. Thereafter, defendant was placed in a patrol car and driven to police headquarters for processing. Officer Timek radioed a supervisor ***149** and advised him of the situation, and was then transported by Officer Lasko to the hospital.

Based upon these events, the police stationed a detective in the Endicott Hotel. Later that day, the police applied for a warrant to search a room in the hotel registered to a "Ronald and Tina Wilson," which was suspected to be a place where defendant had conducted drug transactions. Their suspicions were based not only upon the police chase and the seizure of the plastic bag of narcotics from the Buick earlier that day, but also upon other information, including defendant's recent arrest for drug dealing on August 3; the hotel desk clerk's observations of defendant carrying plastic bags out of the hotel and repeatedly coming in and out of the hotel; and defendant's use of a false name ("Ronald Wilson") to register a room at a different hotel.

When presented with an affidavit outlining these details, a municipal judge issued the requested search warrant that evening, finding that there was ample probable cause to justify the search. At about 11:00 p.m., the police executed the search warrant and found in the hotel room several white rocky substances later confirmed to be cocaine, other drug paraphernalia, and three photographs of defendant along with prescription medication in his name.

Defendant was subsequently indicted in Atlantic County on seven charges stemming from the events of August 14, 2004. The charged offenses included third-degree possession of a controlled dangerous substance (CDS), cocaine, in violation of *N.J.S.A.* 2C:35–10a(1); second-degree possession of at least one-half of an ounce of cocaine, in violation of *N.J.S.A.* 2C:35–5a(1) and –5b(2); second-degree possession of cocaine with intent to distribute it within 500 feet of a public housing facility, park or building, in violation of *N.J.S.A.* 2C–35–7.1; third-degree aggravated assault on a police officer (Officer Timek), in violation of *N.J.S.A.* 2C:12–1b(5); second-degree eluding police causing a risk of death or injury, in violation of *N.J.S.A.* 2C:29–2b; third-degree resisting arrest by use or threat of physical force against a police officer, in ***150** violation of *N.J.S.A.* 2C:29–2a(1); and third-degree receipt of stolen property, a Buick automobile, in violation of *N.J.S.A.* 2C:20–7. A separate indictment was issued charging defendant with third-degree possession of cocaine, in violation of *N.J.S.A.* 2C:35–10a(1), arising out of the conduct that led to defendant's prior arrest on August 3, 2004.

Defendant moved to suppress the State's evidence derived from the August 15, 2004 police chase, automobile search and hotel room search. On January 21, 2005, the trial court conducted a suppression hearing. The sole witnesses at the hearing were Officer Timek and James Brennan, the police detective who had procured the warrant for the hotel room search.

After hearing the police witnesses and considering the arguments of counsel, the ****1002** motion judge denied the suppression motion. In his oral ruling, the motion judge found that the police officers' testimony was "palpably reasonable" and consistent. The court ruled that the police had a reasonable basis to stop the automobile and that defendant had shown a "particular resolve to avoid apprehension." The judge specifically found, among other things, that Officer Timek's observation of defendant attempting to push the plastic bag out of the Buick window, a point that defense counsel had probed on cross-examination, was credible. The court also found that the police had probable cause to arrest defendant in the casino parking lot, and that the police had used reasonable force in apprehending and in handcuffing defendant.

With specific regard to the seizure of the plastic bag from the stolen Buick, the trial court first determined that the seizure was justified under the automobile exception to the warrant requirement. Specifically, the motion judge found that the police had probable cause to believe that the vehicle contained contraband, that exigent circumstances were present, and that the police were justified in contemporaneously searching the vehicle at the scene and seizing the plastic bag.

Alternatively, the motion judge found that the warrantless search of the vehicle also could be constitutionally sustained as a ***151** search incident to an arrest. The motion judge distinguished the facts here from those described in the Appellate Division's then-unreviewed opinion in *State v. Eckel,* 374 *N.J.Super.* 91, 863 *A.*2d 1044 (App.Div.2004), *aff'd,* 185 *N.J.* 523, 888 *A.*2d 1266 (2006). The judge noted that, given the defendant's "zeal" and "vigor" with which defendant attempted to flee, coupled with the fact that the Buick's door had been left open after the struggle with Officer Timek within the car, there could have been a second attempt by defendant to get back into the vehicle. The judge further described defendant as being within the "wingspan" of the Buick, even if he was not within arm's length of it. Based upon those findings, the trial judge concluded that the search was sustainable under the incident-to-arrest doctrine, notwithstanding this court's opinion in *Eckel.*

Having validated the automobile search and the seizure of the plastic bag, the motion judge found that the warrant for the ensuing police search of the hotel room was amply supported by probable cause. He therefore concluded that the fruits of that ensuing search likewise would be admissible at trial.

Following the suppression hearing, defendant entered into a negotiated plea, conditioned on his right to appeal the trial court's denial of his suppression motion. Specifically, defendant pled guilty to second-degree possession of CDS with intent to distribute, second-degree eluding and third-degree resisting arrest with respect to his conduct on August 15, 2004. Defendant also pled guilty to a single count of the separate indictment charging him with third-degree possession of CDS on August 3, 2004.

In March 2005 the trial court sentenced defendant in accordance with the conditional plea agreement as follows: an eight-year term, with parole ineligibility of four years, on the second-degree CDS offense; another eight-year term, also with parole ineligibility of four years, on the eluding offense; and five years on the resisting arrest offense. All of those sentences were to run concurrently. The court also sentenced defendant to a five-year term for the third-degree CDS possession offense in the separate ***152** indictment regarding the August 3, 2004 incident, that term also to be concurrent with the sentences imposed in the other indictment. Hence, for the two indictments, the aggregate sentence ****1003** imposed upon defendant was eight years with a parole ineligibility term of four years.

II.

On appeal, defendant argues that the search of the Buick and the seizure of the plastic bag found in the car were invalid under the Fourth Amendment and under Article I, paragraph 7 of the New Jersey Constitution, and that the fruits of those searches should have been suppressed. In particular, defendant contends that neither the search-incident-to-arrest doctrine nor the automobile exception to the constitutional warrant requirement justified Officer Timek's reentry into the Buick after defendant had been handcuffed.

The State argues that the motion judge properly invoked both of those exceptions. The State alternatively contends that the

search and seizure may also be sustained on other grounds not raised below,[1] including a claim that defendant lacked any reasonable expectation of privacy in the contents of the stolen Buick and a claim that defendant abandoned the bluish plastic bag. We address these contentions in turn.

A.

As a general matter, a search incident to a valid arrest is constitutional. *Chimel v. California,* 395 *U.S.* 752, 89 *S.Ct.* 2034, 23 *L.Ed.*2d 685 (1969). For decades, the courts of this State construed the incident-to-arrest exception to extend to warrantless ***153** searches of a motor vehicle after one or more of its occupants had been arrested for a significant offense and removed from the vehicle. *See, e.g., State v. Welsh,* 84 *N.J.* 346, 419 *A.*2d 1123 (1980). Such incident-to-arrest searches of automobiles were declared valid under the federal constitution in *New York v. Belton,* 453 *U.S.* 454, 101 *S.Ct.* 2860, 69 *L.Ed.*2d 768 (1981).

However, in *State v. Eckel, supra,* the New Jersey Supreme Court rejected the *Belton* doctrine and determined that Article I, paragraph 7 of the New Jersey Constitution does not permit the police to search a motor vehicle without a warrant after arresting, removing and securing the occupants of that vehicle, unless some other exception to the constitutional warrant requirement applies. 185 *N.J.* at 541, 888 *A.*2d 1266.

Factually, *Eckel* involved a defendant who had an outstanding arrest warrant for failing to appear in municipal court. The police received a report that defendant and his girlfriend were in a car owned by the girlfriend's parents, which the parents had reported as stolen. A police officer who received that report then observed the girlfriend drive the vehicle out of defendant's driveway, with defendant seated in the front passenger seat. *Id.* at 524, 888 *A.*2d 1266. The officer stopped the car, asked defendant to get out, and placed defendant under arrest. Defendant was handcuffed and placed in the police car. The girlfriend then asked the police officer for permission to give defendant clothing he had left in her parents' car. The officer, concerned for his safety, went back to the car to retrieve the clothing himself. *Id.* at 525, 888 *A.*2d 1266. Upon lifting the clothing from the rear of the car, the officer discovered marijuana, cocaine and other drug paraphernalia. *Id.* at 525–26, 888 *A.*2d 1266.

Our Supreme Court in *Eckel* held that under such facts, where the defendant occupying ****1004** the vehicle had been "arrested, removed and secured elsewhere," the justifications supporting the incident-to-arrest exception, i.e., the arresting officer's safety and the preservation of evidence, are absent. *Id.* at 541, 888 *A.*2d 1266. Accordingly, the Court held that the post-arrest search of the ***154** automobile in *Eckel* would be invalid under the New Jersey Constitution, unless some other recognized exception to the warrant requirement applied. *Id.* at 542, 888 *A.*2d 1266. Significantly, the Court in *Eckel* did not reverse defendant's conviction. Instead, it remanded the case to this court to consider alternative doctrines that the trial judge had relied upon to sustain the search, including consent, the plain view doctrine, and the automobile exception to the warrant requirement. *Ibid.*

Similarly, in *State v. Dunlap,* 185 *N.J.* 543, 888 *A.*2d 1278 (2006), the Court rejected the State's reliance on the incident-to-arrest exception where the defendant had left his vehicle and had been arrested and secured away from the vehicle by the police. In *Dunlap,* a mother reported to the police that she had discovered a handgun and illegal drugs in her daughter's bedroom. *Id.,* 185 *N.J.* at 544, 888 *A.*2d 1278. With the mother's permission, the police searched the bedroom and observed a "jail photograph" of defendant on the wall. *Ibid.* Further investigation revealed that defendant was on parole and was believed to be dealing and transporting narcotics and carrying a gun. *Id.* at 545, 888 *A.*2d 1278. The police tracked down the daughter and placed her under arrest for narcotics and weapons violations. She informed the police that the drugs and firearm belonged to defendant. *Ibid.* At the police's request, the daughter telephoned defendant and asked him to come to her house.

About twenty minutes later the defendant in *Dunlap* arrived and parked his vehicle in front of the girlfriend's home. *Ibid.* After he got out of his car and began walking towards the residence, two police officers tackled the defendant. He was then arrested and secured on the front lawn, in the presence of about ten police officers who had gathered at the scene. *Ibid.* The police took defendant's keys, unlocked his car, and entered the passenger compartment, where they smelled burnt marijuana. *Ibid.* The police then searched the car and discovered heroin and a handgun inside. *Id.* at 546, 888 *A.*2d 1278.

***155** Consistent with its reasoning in *Eckel,* the Court in *Dunlap* rejected the State's contention that the search of the defendant's car was authorized under the incident-to-arrest doctrine. *Id.* at 549, 888 *A.*2d 1278. The Court ruled that the exception "cannot be invoked where a defendant has no

capacity to reach the interior of the vehicle to destroy evidence or to endanger the police." *Id.* at 548–49, 888 *A.*2d 1278. Because Dunlap had been removed and secured away from his car on the front lawn by several police officers, the Court found the incident-to-arrest exception inapplicable. *Id.* at 549, 888 *A.*2d 1278. The Court also rejected, for reasons we shall discuss in more detail below, the State's alternative claim that the search of Dunlap's car fell within the automobile exception *Id.* at 549–50, 888 *A.*2d 1278.

Here, there is no question that the police had probable cause on August 15, 2004 to arrest Ernest Carroll in the casino parking lot, given the information it had about his recent involvement in drug dealing; his suspicious retrieval of the bluish bag from the hotel room; his multiple motor vehicle violations observed by Officer Timek; his failure to respond to police commands to stop his vehicle and his subsequent evasive driving; his failed attempt to discard the bag through the car window; and his effort to flee the scene ****1005** after crashing the car into a parked vehicle. Defendant does not challenge the validity of the police chase that led to that arrest, which was consistent with the stop-and-frisk tenets of *Terry v. Ohio,* 392 *U.S.* 1, 88 *S.Ct.* 1868, 20 *L.Ed.*2d 889 (1968). The pertinent question then becomes whether or not the police search of the Buick in the parking lot after Carroll had been apprehended can be justified under the incident-to-arrest exception, in light of *Eckel* and *Dunlap.* We conclude that it cannot.[2]

***156** As in *Eckel* and *Dunlap,* the police in this case had arrested defendant and secured him at a distance from the vehicle before searching the inside of the Buick. As Officer Timek described the events, defendant had been handcuffed, patted down for weapons, removed from the Buick, placed in the custody of at least one other police officer, and was standing near a police car about "one car length" from the Buick when Officer Timek went inside the Buick and retrieved the plastic bag.

Although the motion judge described defendant's location as being within the "wingspan" of the Buick, the record indicates that defendant was secured one car length away from the Buick after he was placed under arrest, and thus the car was not then within his immediate control. We also reject the motion judge's surmise that defendant, while in handcuffs, might somehow have overcome the police and re-entered the vehicle, a proposition that is not reasonably supported by the record given the simultaneous arrival of several other police cars at the scene. Thus guided by the principles announced in *Eckel* and *Dunlap,* we are constrained to reject the trial court's reliance upon the incident-to-arrest exception.

B.

Nonetheless, we find that there are ample independent grounds to sustain the constitutionality of the search of the Buick and the seizure of the plastic bag. One of those grounds is the automobile exception, which indeed was the principal basis for the trial court's denial of the defendant's suppression motion.

The automobile exception to the warrant requirement was first recognized by the United States Supreme Court in *Carroll v. United States,* 267 *U.S.* 132, 45 *S.Ct.* 280, 69 *L.Ed.* 543 (1925). This exception authorizes police officers who have probable cause to believe that an automobile contains evidence of criminal activity to search that vehicle, based upon the exigent circumstance arising from the vehicle's inherent mobility.

***157** In *State v. Cooke,* 163 *N.J.* 657, 751 *A.*2d 92 (2000), the elements of the automobile exception, as applied in our own State's jurisprudence, were explained in detail. First, there must be probable cause to believe that contraband will be found in the vehicle. On this element, certainty is not required; it is sufficient if the police have a "well grounded suspicion" that evidence of a crime will be found in the car. *Cooke, supra,* 163 *N.J.* at 671, 751 *A.*2d 92. Second, there must be exigent circumstances at the time the car is searched. In *Cooke,* the Court illustrated this concept by finding exigency in a situation where it was "impracticable" to post a police officer and guard the vehicle, where ****1006** third parties were aware of the car's location and that it had been used by defendant to store drugs, and where other parties in the area, which was known for drug-trafficking, could have removed the car. *Id.* at 675, 751 *A.*2d 92. *Cooke* instructs that the presence or absence of exigent circumstances requires a case-by-case evaluation. *Id.* at 671, 751 *A.*2d 92.

The automobile exception failed to justify the post-arrest automobile search in *Dunlap* because of a number of factual circumstances cited by the Supreme Court. The searched vehicle was not parked in an open area, but rather on the street in a residential neighborhood. *Dunlap, supra,* 185 *N.J.* at 550, 888 *A.*2d 1278. There was no evidence that third persons were aware of the car's location. *Ibid.* There were at least ten police officers on the scene, and "the State did not establish that an

insufficient number would have been left to guard the car." *Ibid.*

The Supreme Court in *Dunlap* emphasized, however, that its invalidation of the search in that case should not be overread as a general repudiation of the automobile exception in post-arrest situations. As the Supreme Court declared at the end of its opinion:

> Nothing in this opinion should be viewed as a retrenchment from the well-established principles governing the automobile exception to the warrant requirement.... The standards remain the same: probable cause and exigent circumstances, each of which to be determined on a case-by-case basis.
>
> [*State v. Dunlap, supra,* 185 *N.J.* at 551, 888 *A.*2d 1278.]

***158** *Dunlap* is quite different from the case at hand, in that the police in *Dunlap* created the physical context for defendant's arrest by prompting his girlfriend to ask him to drive to her residence. That request afforded the police the time to assemble at the residence, to anticipate defendant's arrival, and to effectuate his planned arrest. There is no indication in *Dunlap* that the defendant attempted to elude his arrest or offer any physical resistance. Indeed, the Court in *Dunlap* stressed that its ruling was based upon the "unique facts" of that case, and that "[p]olice safety and the preservation of evidence remain the preeminent determinants of exigency." *Ibid.*

By contrast, the police pursuit of defendant in this case was spontaneous. The location of defendant's arrest was completely unplanned. Defendant drove the Buick to an unanticipated location, which turned out to be an open parking area used by casino patrons. Defendant had caused a motor vehicle accident by smashing a parked car, presumably causing property damage to both vehicles that the police would need to inspect and address.

Defendant's behavior in avoiding and resisting his arrest also heightened the exigency. He ran from the car, leaving the car door open. He physically resisted Officer Timek when he was caught, managing to pull the officer back into the Buick before he was finally handcuffed. His volatile conduct increased the police's need to secure him and the location promptly.

Defendant's frantic effort to discard the plastic bag during the police pursuit of the Buick also enhanced the emergent character of the situation. Officer Timek had ample reason to suspect that the bag contained drugs, a weapon, or both. Its contents, if they fell into the hands of another, reasonably could have posed a danger to casino patrons or others passing through the open public space in the parking lot. Considering all of these factors, the motion judge had a more than sufficient basis to regard these circumstances as exigent, and to find that Officer Timek possessed ***159** probable cause to believe that the plastic bag contained contraband.

****1007** As the Supreme Court emphasized in *Cooke:*

> "[E]xigent circumstances do not dissipate simply because the particular occupants of the vehicle have been removed from the car, arrested, or otherwise restricted in their freedom of movement." ... That is a sound rule because, until the vehicle is seized by the police and removed from the scene, "it is potentially accessible to third persons who might move or damage it or remove or destroy evidence contained in it."
>
> [*Cooke, supra,* 163 *N.J.* at 672, 751 *A.*2d 92 (quoting *State v. Alston,* 88 *N.J.* 211, 234, 440 *A.*2d 1311 (1981)).]

Those principles equally apply here. The Buick that defendant drove into the casino parking lot was potentially accessible to third persons who might have "remove[d] or destroy[ed] evidence contained within it." His arrest did not eliminate those exigent risks. We note in this regard that Officer Timek was injured by defendant, and that another officer needed to transport him to the hospital shortly after defendant's arrest. Defendant also needed medical attention, requiring police oversight while EMT workers were treating him at the scene. The two vehicles involved in the collision needed to be inspected, secured and possibly repaired.

Hence, the police had a variety of functions to accomplish at the scene of the accident and defendant's apprehension in a very short time. The record does not disclose how many patrol cars and policemen arrived at the scene after Officers Timek and Lasko. Even if multiple officers were present, we do not find that the police needed to "stand guard" over the Buick while concurrently applying to a judge for a search warrant. *See State v. Colvin,* 123 *N.J.* 428, 435, 587 *A.*2d 1278 (1991); *see also State v. Cooke, supra,* 163 *N.J.* at 675, 751 *A.*2d 92 (deeming it impracticable, in the factual context of that case, to require a police officer to leave his surveillance post and stand guard over the vehicle).

For these reasons, we affirm the motion judge's reliance on the automobile exception to validate Officer Timek's search

of the Buick and his seizure of the bluish plastic bag in plain view on the floor of the car's passenger side. We also discern no constitutional ***160** violation, and none is asserted by defendant, in Officer Timek opening the plastic bag once he had secured it. *See State v. Guerra,* 93 *N.J.* 146, 459 *A.*2d 1159 (1983) (permitting the warrantless search of containers found in the course of a valid automobile search where there is probable cause to believe the container holds contraband).

C.

Lastly, although it is not necessary for us to do so, we separately conclude that the motion judge's findings of fact also support a legal inference that defendant had abandoned the plastic bag and had no reasonable privacy interest in it deserving of constitutional protection.[3] For purposes of search-and-seizure analysis, a defendant abandons property "when he voluntarily discards, leaves behind, or otherwise relinquishes his interest in the property in question so that he can no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *State v. Farinich,* 179 *N.J.Super.* 1, 6, 430 *A.*2d 233 (App.Div.1981) (finding abandonment where defendant, after being approached by the police in an airport, dropped his suitcase and started to run away), *aff'd o.b.,* ****1008** 89 *N.J.* 378, 446 *A.*2d 120 (1982); *see also State v. Hughes,* 296 *N.J.Super.* 291, 296, 686 *A.*2d 1208 (App.Div.) (defendant on a bicycle held to have abandoned a container filled with bags of cocaine, because he threw the container against a curb when he noticed a police car approaching, and then continued to bicycle another fifty feet away), *certif. denied,* 149 *N.J.* 410, 694 *A.*2d 195 (1997).

Here, the facts determined by the trial judge indicate that defendant had abandoned both the stolen Buick and the plastic bag left within it, before he was apprehended by Officer Timek. Defendant indisputably ran away from the Buick after crashing it ***161** into a parked vehicle. He left the door of the vehicle open. The Buick had been stolen from its rightful owners. Defendant simply had no legitimate expectation of privacy in a stolen car that he left in a public space, fleeing from the scene of an accident.

Likewise, the evidence amply shows that defendant abandoned the contraband-filled plastic bag by leaving it in plain view on the floor of a stolen car at the accident scene. Defendant's obvious and sustained desire to rid himself of the bag once the police began pursuing him is corroborated by his futile attempts to discard it out the driver's side window of the Buick while being chased. *See also Shackleford v. Commonwealth,* 262 *Va.* 196, 547 *S.E.*2d 899, 906 (2001) (holding that defendant had abandoned a bag containing a gun and drugs, which he had deliberately left behind in a taxi that had transported him to a motel, when he determined that he was being followed by police).

Even if the evidence were not construed to support a finding that defendant had abandoned the plastic bag, his course of conduct surely bespeaks at least a severely diminished expectation of any privacy in the bag and its contents. That diminished privacy expectation, combined with the exigent circumstances surrounding the search, bolsters our conclusion that the police's warrantless seizure of the plastic bag and the immediate inspection of its contents was eminently reasonable. The "touchstone of the Fourth Amendment is [the] reasonableness" of police action. *State v. Bruzzese,* 94 *N.J.* 210, 217, 463 *A.*2d 320 (1983), (citing *Delaware v. Prouse,* 440 *U.S.* 648, 653–55, 99 *S.Ct.* 1391, 1395–97, 59 *L.Ed.*2d 660, 667–68 (1979)), *cert. denied,* 465 *U.S.* 1030, 104 *S.Ct.* 1295, 79 *L.Ed.*2d 695 (1984).

We thus affirm the trial court's denial of the motion to suppress the plastic bag and its contents that Officer Timek seized from the stolen Buick. We also affirm the trial court's denial of the defendant's motion to suppress the evidence found in the search of defendant's hotel room, after the police had discovered contraband in the plastic bag. Such evidence is the fruit of a constitutional search and seizure that led to the issuance of a valid warrant ***162** predicated upon probable cause. *See Wong Sun v. United States,* 371 *U.S.* 471, 484, 83 *S.Ct.* 407, 416, 9 *L.Ed.*2d 441, 453 (1963) (only the fruits of an illegal search are to be excluded); *State v. Evers,* 175 *N.J.* 355, 381, 815 *A.*2d 432 (2003) (a search warrant is presumed to be valid, and defendant has the burden of showing that it was issued without probable cause).

Affirmed.

All Citations

386 N.J.Super. 143, 899 A.2d 998

Footnotes

1 Defendant chose not to file a reply brief addressing these additional legal arguments. Neither counsel requested oral argument, nor did they seek to file supplemental briefs after the Supreme Court's opinions were issued in *State v. Eckel, supra,* and its companion opinion in *State v. Dunlap,* 185 *N.J.* 543, 888 *A.*2d 1278 (2006).

2 For purposes of this analysis we assume for the sake of argument, but do not decide, that *Eckel* and *Dunlap* have pipeline retroactivity to this appeal, which was pending at the time those cases were decided by the Supreme Court. At a minimum, this court's December 2004 opinion in *Eckel,* which was subsequently affirmed by the Supreme Court in January 2006, would control the suppression hearing conducted in January 2005.

3 *See State v. Maples,* 346 *N.J.Super.* 408, 416–17, 788 *A.*2d 314 (App.Div.2002) (upholding trial court's denial of suppression motion for different legal reasons than those identified below, as appellate courts "affirm or reverse judgments and orders, not reasons").

135 N.M. 728
Court of Appeals of New Mexico.

STATE of New Mexico, Plaintiff–Appellee,
v.
Linda CELUSNIAK, Defendant–Appellant.

No. 23973.
|
April 15, 2004.

Synopsis

Background: Defendant pled no contest in the magistrate court to a petty misdemeanor count of possession of marijuana and appealed the denial of her motion to suppress evidence. The District Court, Otero County, Frank K. Wilson, D.J., denied the motion to suppress. Defendant appealed.

Holdings: The Court of Appeals, Pickard, J., held that:

police officer's search of purse found "crammed" under driver's seat exceeded the scope of driver's consent to search vehicle, and

evidence failed to establish that defendant abandoned her purse.

Reversed and remanded.

Attorneys and Law Firms

****11 *729** Patricia A. Madrid, Attorney General, Katherine Zinn, Assistant Attorney General, Santa Fe, for Appellee.

Adam D. Rafkin, Adam D. Rafkin, P.C., Ruidoso, for Appellant.

OPINION

PICKARD, J.

{1} Defendant entered a conditional plea in magistrate court, reserving the right to appeal her motion to suppress. This case is before us on appeal following the district court's decision to deny the motion. The procedural posture of the case gives us the opportunity to clarify the approach for litigating reserved issues when a conditional plea is entered in the magistrate court. The merits of Defendant's challenge of the district court's denial of her motion to suppress give us the opportunity to explore issues of abandonment and consent when a passenger leaves a purse in a car that is searched upon the driver's consent. We reverse.

FACTS AND PROCEDURAL HISTORY

{2} The female Defendant was a passenger in a car that contained two male passengers and a female driver. A state police officer pulled the car over when he observed that the driver was not wearing a seat belt. While speaking to the driver, the officer noticed the strong odor of burnt marijuana. He asked the driver to exit the vehicle and inquired about the odor that he had noticed. The driver did not admit to marijuana use, and she told the officer something to the effect of, "If there is marijuana in the vehicle, please do find it."

{3} The officer began his search of the vehicle in the driver's area. He asked the two male passengers to exit the vehicle while he proceeded clockwise to search the front passenger area and the rear passenger area behind it, where the males were sitting. Finding nothing, he asked Defendant to exit the vehicle while he searched the driver's side rear seat area where Defendant had been seated. In front of where Defendant was sitting, he found a woman's purse "crammed" underneath the driver's seat. He opened the purse and immediately noticed a bag of marijuana. The officer exited the vehicle and asked Defendant if this was her purse. Defendant stated that it was hers. The officer arrested Defendant and released the others with a citation to the driver for the seat belt violation.

{4} Defendant was charged with one petty misdemeanor count of possession of marijuana (one ounce or less), contrary to NMSA 1978, § 30–31–23(B)(1) (1990). With the case proceeding in magistrate court, Defendant filed a motion to suppress the marijuana, which was denied. Defendant entered a plea of no contest. Defendant and the State agree that the plea was conditioned on an appeal of the motion to suppress, although the judgment and sentence issued by the magistrate court does not indicate the condition ****12 *730** in writing. Defendant filed a notice of appeal with the district court. The district court heard the motion de novo and denied it.

{5} Defendant appealed the district court's denial of the motion to suppress to this Court. In our first calendar notice,

we proposed to hold that "the district court should have disposed of the appeal by entry of an order dismissing the appeal and remanding the cause to the magistrate court for enforcement of its judgment and sentence." Defendant prepared such an order and submitted it to the district court. However, the district court refused to sign the order, apparently interpreting our calendar notice as requiring Defendant to dismiss her appeal in this Court before proceeding to straighten out the procedural issues below. Defendant submitted a motion to dismiss to this Court, and we clarified that Defendant was not required to move for dismissal of her appeal to this Court. Instead, we ordered Defendant to "obtain an order from the district court dismissing and remanding to the magistrate court to enforce its judgment and file it with this Court within twenty (20) days." The district court again refused to issue an order dismissing the appeal, stating that its decision on the motion to suppress was not dispositive of the case. On the district court's suggestion, Defendant entered a new conditional plea of no contest in the district court, reserving the right to appeal the denial of the motion to suppress to this Court. The district court also entered a judgment and sentence on the plea which was the same as that entered by the magistrate court. We accepted these documents as the basis of this appeal and assigned the case to the general calendar, asking the parties to brief the procedural issue in the case.

ISSUE ONE: Proper procedure for obtaining a final, appealable order from a magistrate court appeal

{6} In the present case, the magistrate court had original jurisdiction because Defendant was charged with a petty misdemeanor. NMSA 1978, § 35–3–4(A)(1985) (conferring magistrate jurisdiction). Defendant moved for suppression of evidence of the marijuana, arguing that it was obtained through an illegal search. *See* Rule 6–304(C)(1) NMRA 2004 (permitting persons aggrieved by a search and seizure to move for suppression in the magistrate court). When that motion was denied, Defendant entered a no contest plea on the condition that she could appeal the decision on the motion to suppress.

a. Conditional pleas in magistrate court

{7} A voluntary no contest plea ordinarily operates as a waiver of the right to appeal. *See State v. Hodge,* 118 N.M. 410, 414, 882 P.2d 1, 5 (1994). However, New Mexico recognizes the conditional plea as the "proper procedure to enable a defendant to reserve a significant pretrial issue for appeal in a case in which conviction seems certain unless the defendant prevails on the pretrial issue." *Id.* at 416, 882 P.2d at 7. A defendant enters a conditional plea by (1) preserving the error through a pretrial motion, (2) obtaining consent of the prosecution, and (3) obtaining approval of the court. *Id.* Appellate courts can recognize a conditional plea without written evidence thereof when the record reveals that the defendant has fulfilled the spirit of the rule by meeting these three requirements. *Id.* at 417, 882 P.2d at 8.

{8} While our rules have codified the conditional plea in district court and for certain offenses in metropolitan court, New Mexico does not have a rule formally codifying the conditional plea in magistrate court. *See* Rule 5–304(A)(2) NMRA 2004 (conditional plea in district court); Rule 7–502(A)(3) NMRA 2004 (conditional plea for offenses tried on the record in metropolitan court); Rule 6–502(A) NMRA 2004 (pleas in magistrate court). We do not read this as a prohibition against conditional pleas in magistrate court, especially in light of our courts' general approval of conditional pleas as an efficient use of court resources. *See Hodge,* 118 N.M. at 416, 882 P.2d at 7. It is likely that the conditional plea procedure was not written into the magistrate court rules because appeals from magistrate court, as well as appeals from cases in metropolitan court, except those involving domestic violence and driving while intoxicated, are tried de novo. ****13** ***731** Rules 6–703(J); 7–703(J) NMRA 2004. However, we see no reason why the same benefits of efficiency and conservation of resources should not be obtainable in de novo appeals from magistrate court. Conditional pleas in magistrate court should meet the same requirements of issue preservation and reservation, prosecutorial consent, and court approval as those in district and metropolitan courts. Then, whatever issue is reserved should be heard de novo. While there may be cases, as here, in which the State and the defendant agree orally that a conditional plea has been entered, we note that a written conditional plea is preferable in magistrate court because there is no formal record of proceedings to facilitate appellate review.

b. Procedure for appeals following conditional pleas in magistrate court

{9} Generally, when a defendant has been convicted of a crime in magistrate court, he or she has 15 days to appeal to the district court. Rule 6–703(A). The district court hears the appeal de novo. Rule 6–703(J). The district court then enters a judgment or order disposing of the appeal, which may be accompanied by a formal or memorandum opinion. Rule 6–703(O). The parties may appeal the decision of the

district court to this Court at this point. Rule 6–703(Q). After the district court issues an order, if there is no motion for rehearing after 15 days, Rule 6–703(O)(2), and no appeal after 30 days, Rule 12–201(A)(2) NMRA 2004, the district court issues a mandate to the magistrate court to enforce the district court's judgment. Rule 6–703(P). If the parties appeal the district court's decision, the district court does not issue a mandate to the magistrate court until the final disposition of the appeal. Rule 6–703(O)(3). On remand, the magistrate court proceeds with the case in keeping with the mandate of the district court.

{10} The mechanics of this process easily adapt to a case involving a conditional plea. In magistrate court, the defendant may enter a conditional plea of guilty or no contest, reserving one or more issues for appeal. The magistrate court then enters a judgment and sentence that embodies the provisions of the plea agreement. Rule 6–502(D)(3) (plea agreement procedure in magistrate court). The judgment should also expressly set out the issues reserved for appeal. *See* Form 9–408C NMRA 2004 (conditional plea). The defendant has 15 days to file his or her notice of appeal to the district court. The district court hears only the matters reserved, and it hears these de novo. The district court then issues an order resolving the matters before it. For example, on a motion to suppress, if the court rules in the defendant's favor, it will enter an order granting the motion to suppress; if not, it will enter an order denying it and, as it has ruled on all the matters before it, dismissing the appeal.

{11} If the defendant prevails on a motion to suppress at the district court, the State may appeal the decision to this Court within ten days. Rule 12–201(A)(1); *see* Rule 6–703(Q) (authorizing appeals in accordance with the rules of appellate procedure). If the State does not file a timely appeal, the district court remands to the magistrate court where the defendant may withdraw the plea. *See* Rule 7–502(A)(3) (conditional plea agreement procedure in metropolitan court).

{12} If the defendant does not prevail, he or she may appeal to this Court within 30 days. Rule 12–201(A)(2). After the final disposition of the appeal, the district court remands to the magistrate court. Again, if the defendant prevails, he or she may withdraw the plea. If the State prevails, the magistrate court enforces the original judgment and sentence that embodied the disposition of the plea agreement. At this point, the judgment is like any other judgment arising from a guilty or no-contest plea, and no further appeal on the merits of the case is permitted.

{13} In the present case, the district court had trouble reconciling our mandate to dismiss the appeal with the fact that it did not have the entire case before it. The confusion may have been rooted in our past cases, which held that when the district court enters an order of remand to the magistrate court that does not cover sentencing, the order is not final and appealable. *State v. Cordova,* 114 N.M. 22, 23, 833 P.2d 1203, 1204 (Ct.App.1992).

****14 *732** {14} In reviewing a conditional plea from magistrate court, however, the district court does have the power to issue a final and appealable order without exceeding the bounds of its limited review. "A final judgment in a criminal case is one which either (1) adjudicates the defendant to have been convicted of a criminal offense and imposes, suspends or defers sentence or (2) dismisses all of the charges against the defendant." *State v. Garcia,* 99 N.M. 466, 471, 659 P.2d 918, 923 (Ct.App.1983). If the district court finds for the defendant, its order granting the motion to suppress is sufficient for the State to appeal under Rule 12–201(A). If the district court finds against the defendant, there are no issues remaining in the defendant's adjudication. The magistrate court has already entered the judgment and sentence to be enforced should the appeal fail. The district court can, therefore, issue a final and appealable order dismissing the appeal and recognizing the sentence that was agreed upon below.

{15} We reiterate that the district court does not remand the case back to the magistrate court until all appeals have been resolved. Thus, in the present case, it was unnecessary to enter a new conditional plea and judgment and sentence. However, because the parties and the district court were operating without the benefit of guidance from the rules, and because the entry of a new plea agreement together with judgment and sentence in the district court did amount to a final order, although unnecessarily burdensome to the parties and court, we will reach the merits of the appeal.

ISSUE TWO: Motion to suppress

{16} Defendant contends that the district court erred in denying her motion to suppress. In reviewing a motion to suppress, we defer to the district court's findings of fact if they are supported by substantial evidence. *State v. Shaulis–Powell,* 1999–NMCA–090, ¶ 7, 127 N.M. 667, 986 P.2d 463. We review the application of the law to the facts de novo. *Id.*

{17} Defendant does not challenge the validity of the initial traffic stop or of the driver's consent to search the vehicle. Thus, this case presents the narrow question of whether an officer who has obtained a valid consent to search a vehicle can search a purse left in that vehicle when he has not determined whether the consenting party owned the purse and when, in fact, she did not. The district court order found "that the officer's conduct was reasonable in light of the consent given by the driver, or in the alternative, Defendant abandoned her expectation of privacy in the bag when she left the vehicle." We address each basis for the order in turn, although we recognize that, logically, the abandonment rationale should be addressed first inasmuch as Defendant would have no standing to object to the search if she abandoned her expectation of privacy in the bag.

a. Consent

{18} The trial court ruled that the search was valid because it was within the scope of the driver's consent to the search of the vehicle. Under the circumstances of this case, we disagree.

{19} Initially, we note that the State is correct to point out that Defendant does not explicitly declare whether she challenges the search pursuant to the New Mexico or United States Constitution. However, because Defendant's arguments to the district court and to this Court accurately relied on New Mexico cases that announced both federal and state constitutional standards for searches, we will consider both the federal and New Mexico constitutional arguments. Defendant is arguing for the application of an existing New Mexico constitutional standard that exceeds federal protections, rather than the creation of a new state standard, and she adequately asserted these state protections as discussed in *State v. Gomez,* 1997–NMSC–006, ¶ 22, 122 N.M. 777, 932 P.2d 1 (explaining that a state constitutional claim is preserved by asserting the constitutional principle that provides the protection sought and showing the factual basis needed for the trial court to rule on the issue).

{20} Under the New Mexico Constitution, there is no doctrine of "apparent authority" that allows a person without actual ****15** ***733** authority to consent to the search of personal or real property. *State v. Cline,* 1998–NMCA–154, ¶ 17, 126 N.M. 77, 966 P.2d 785. Instead, the person giving consent must have "common authority" to consent to the search. *Id.* (internal quotation marks and citation omitted). Here the State makes no attempt to argue that the driver had common authority over the purse.

{21} Instead, the State suggests that our precedents indicate a requirement that the owner of property must protest the authority of the person who consented to the search. We do not read *Cline, id.* ¶ 16, to suggest this proposition. In *Cline,* the owner of the property was the wife of the man who consented to the search. *Id.* We cited to federal cases that suggest that a wife may overcome the presumption of joint marital ownership by protesting to her husband's authority to consent to a search. *Id.* No such presumption exists in the present case, where Defendant had no familial relationship with the driver, nor did the officer in the present case claim to rely on any familial relationship as a basis for his search.

{22} Furthermore, Defendant may not have been aware that the search was being conducted pursuant to the driver's consent. The officer obtained the consent after questioning the driver while the officer and the driver were standing behind the driver's car. Their discussion, therefore, was presumably out of Defendant's earshot. Even when Defendant was asked to exit the vehicle, the officer instructed her to stand in front of the car, apart from the driver and other passengers who were standing behind the car. Thus, Defendant would not have had the opportunity to learn about the consent from the driver or the other passengers. The State did not introduce evidence that Defendant was aware that the search was pursuant to the driver's consent, leaving open the question of whether Defendant was aware that there was any objection to be made. For these same reasons, we are unpersuaded by cases holding that a search is permissible when an individual is silent while a third party gives consent to search an area that contains that individual's belongings. *See, e.g., State v. Frizzel,* 132 Idaho 522, 975 P.2d 1187, 1190 (Idaho Ct.App.1999). Defendant did not sit silently while the driver gave consent because she was not present when the driver gave consent.

{23} In addition, the cases from other jurisdictions on the issue of consent under circumstances such as those in this case give us pause in relying on the district court's consent rationale. *See State v. Matejka,* 241 Wis.2d 52, 621 N.W.2d 891, 894–95 n. 3 (2001) (collecting cases on the subject of consent of driver to search of car as encompassing passenger's belongings and appearing to draw distinctions based on awareness of passenger that driver consented and knowledge of police regarding to whom the property belonged). Although these cases concern the doctrine of apparent authority, which New Mexico rejects, we believe that they contain language that is useful in guiding our decision in this case. When, as here, the circumstances surrounding ownership of an item are unclear, it is advisable for officers

to err on the side of caution. *See* 3 Wayne R. LaFave, *Search and Seizure* § 8.3(g), at 747 (3d ed.1996) (discussing that "the police must be required to make reasonable inquiries" when there are "ambiguous circumstances" surrounding whether an individual consenting to a search of a place has the authority to consent to the search of a particular item found in that place). For example, a Florida case, in which an officer searched a fanny pack that a passenger took from her lap and placed on the floorboard when ordered out of the car, relied on LaFave in requiring the police to inquire into the ownership of the pack before assuming that it was within the scope of the driver's consent to search the vehicle. *See Brown v. State,* 789 So.2d 1021, 1024 (Fla.Dist.Ct.App.2001). Finally, courts have explained that because "a purse is a type of container in which a person possesses the highest expectations of privacy," officers should be "required, at a minimum, to inquire further before assuming that [the driver's] consent was sufficient to authorize them to open the purse they discovered during their search of the automobile." *United States v. Welch,* 4 F.3d 761, 764–65 (9th Cir.1993).

****16 *734 *135** In sum, the State has not demonstrated that the driver had common authority over the purse so as to bring the search of the purse within the scope of the driver's consent, and we do not see any reason to create a new exception to the common authority doctrine, such as the State argues should be the rule when an owner is present and does not protest. We hold that the search of Defendant's purse was beyond the scope of the driver's consent, and because Defendant was not present when the driver consented to the vehicle search, Defendant was not required to assert her ownership of the purse or her objection to the search.

b. Abandonment

{25} In order for Defendant to contest the search, she must have standing, or a legitimate expectation of privacy in the purse. *State v. Esguerra,* 113 N.M. 310, 313, 825 P.2d 243, 246 (Ct.App.1991). "The question of legitimate expectation of privacy involves two inquiries: (1) has the individual by his conduct exhibited an actual (subjective) expectation of privacy; and (2) is this individual's subjective expectation one that society is prepared to recognize as reasonable." *Id.* (internal quotation marks and citation omitted). While ownership or lawful possession generally gives rise to a legitimate expectation of privacy, *id.,* one can relinquish this expectation if he or she abandons the property. *State v. Clark,* 105 N.M. 10, 12–13, 727 P.2d 949, 951–52 (Ct.App.1986).

{26} "Abandonment is an ultimate fact or conclusion based upon a combination of acts and intent." *Id.* at 13, 727 P.2d at 952. Intent can be inferred from words, actions, and other facts. *State v. Guebara,* 119 N.M. 662, 665, 894 P.2d 1018, 1021 (Ct.App.1995). The party seeking to prove abandonment must show this intent by "clear, unequivocal and decisive evidence." *Clark,* 105 N.M. at 13, 727 P.2d at 952.

{27} Based on these cases, one could conclude that the inquiry is basically a factual one on which we should defer to the trial court's "finding" of abandonment. However, while we are committed to the rule requiring deference to factual findings, the "finding" here was in reality a mixed question of fact and law. *See State v. Attaway,* 117 N.M. 141, 144–46, 870 P.2d 103, 106–08 (1994). The trial court found that "Defendant had abandoned her expectation of privacy in the bag when she left the vehicle." This was supported by the factual findings that Defendant "crammed" the purse under the seat with the intent to hide it in response to the impending search that she saw was coming. However, these factual findings do not answer the legal question of whether Defendant's actions and intent amount to an abandonment. *See State v. Jason L.,* 2000–NMSC–018, ¶ 19, 129 N.M. 119, 2 P.3d 856 (relying on *Attaway* and explaining that historical factual inquiries are reviewed deferentially for substantial evidence while the possible inferential conclusions from those facts are reviewed de novo as legal inquiries so that there can be meaningful review of constitutional issues involving police behavior). We therefore review the conclusions from the facts of this case de novo. *Id.*

{28} Canvassing cases from other jurisdictions, we find that the basic inquiry is whether the defendant either denied ownership of the item or physically relinquished it. *See, e.g., United States v. James,* 353 F.3d 606, 616 (8th Cir.2003). Following from this inquiry, a review of cases from across the nation reveals several general factual scenarios that give rise to a finding of abandonment, including cases where the defendant disclaims ownership of the property, throws the property out a window or from a moving vehicle, unsuccessfully attempts to destroy the property, or leaves the property behind in a vacated premises or vehicle. *See* John P. Ludington, Annotation, *Search and Seizure: What Constitutes Abandonment of Personal Property Within Rule that Search and Seizure of Abandoned Property Is Not Unreasonable—Modern Cases,* 40 A.L.R.4th 381, 388–92, 1985 WL 287415 (1985).

{29} In the present case, there was no disclaimer of ownership. The officer did not see the purse until Defendant had exited the vehicle, and as soon as he asked her whether the purse was hers, she stated that it was. Thus, the question is whether Defendant's conduct indicates a physical relinquishment. We hold that the facts of this case, even in **17 *735 the light most favorable to support the trial court's ruling, depart from our existing abandonment holdings and are too equivocal to support a ruling of abandonment.

{30} In *Esguerra,* 113 N.M. at 312–14, 825 P.2d at 245–47, we affirmed the lower court's decision that the defendant had abandoned his backpack when he left it in a public parking lot while fleeing a hotel room as police searched for him. We cited other abandonment cases that also involved dropping or throwing a package from a hotel or car window, explaining that "[i]t is not a search to observe that which occurs openly in a public place and which is fully disclosed to visual observation." *Id.* at 314–15, 825 P.2d at 247–48 (internal quotation marks and citation omitted). In *Clark,* 105 N.M. at 13–14, 727 P.2d at 952–53, we held that there was enough evidence for the prosecution to meet the "heavy burden" of proving abandonment when the incarcerated defendant appeared to have made arrangements to have his landlady remove his possessions from the residence from which he was being evicted and the landlady gave consent to search the residence.

{31} In contrast, we reversed the trial court's conclusion that the defendant had abandoned his vehicle in *Guebara,* 119 N.M. at 665, 894 P.2d at 1021. We held that the only factor weighing in favor of abandonment was the time lapse between the defendant's last possession of the vehicle and the search and that this alone was insufficient. *Id.* We also noted that other factors, including the fact that the defendant had parked the vehicle on the property with the consent of the property owners, weighed against an abandonment finding. *Id.*

{32} The only fact supporting the abandonment ruling in this case is that Defendant's purse was crammed underneath the driver's seat. Defendant did not toss the purse out the window, leave it in a public place, or otherwise discard it. This is critical, for as LaFave points out, "even an inadvertent leaving of effects in a public place, whether or not abandonment in the true sense of that word, can amount to a loss of any justified expectation of privacy." 1 Wayne R. LaFave, *Search and Seizure* § 2.6(b), at 575–76 (3d ed.1996); *see also State v. Parker,* 399 So.2d 24, 30 (Fla.Dist.Ct.App.1981) (stating that to find abandonment, the property "must be discarded in a place where the person has no reasonable expectation of privacy such as an open field, or public street."); *City of St. Paul v. Vaughn,* 306 Minn. 337, 237 N.W.2d 365, 371 (1975) (explaining and citing to cases that use the public place component of abandonment doctrine).

{33} Furthermore, Defendant was not fleeing police when she left the purse in the car, but rather she was following the officer's request to exit the vehicle. She did not put the purse in a place to which she had no plans to return. *See James,* 353 F.3d at 616 (explaining that abandonment in some circumstances requires leaving the property "in a manner manifesting an intent never to reclaim [it].").

{34} We also note that the officer did not ask Defendant or the driver whether the purse belonged to either female prior to searching it. By not asking anyone about the ownership of the purse prior to the search, the officer did not afford Defendant the opportunity to disclaim the purse or otherwise indicate abandonment. As we discussed in more detail above in the section on consent, we believe that in cases where the issue of ownership of an item to be searched is in question and the police can easily verify ownership without risk to their safety or the integrity of the search, police officers should be required to inquire into ownership before assuming abandonment. In addition, when Defendant claimed ownership of the purse, it did not appear that she knew that the officer had already searched the purse, as she was in front of the car and he was seated in the back seat. This indicates that while Defendant's hope may have been that the officer would not find the purse at all, she did not intend to abandon it even when she knew the officer had discovered it.

{35} We recognize that this issue is not entirely free from doubt. *Compare State v. Westover,* 140 N.H. 375, 666 A.2d 1344, 1348–49 (1995) (majority opinion upholding that the defendant did not permanently abandon his sweatshirt when he gently tossed it on **18 *736 the ground before entering the convenience store and reversing the trial court's determination that the sweatshirt was "temporarily abandoned"), *with id.* at 1350–52 (Thayer, J., dissenting) (suggesting that the court should have found an intent to abandon the sweatshirt because it appeared that the defendant was attempting to dissociate himself from the sweatshirt to avoid police detection of the drugs in it). However, we believe that, under the circumstances of this case, a conclusion of abandonment would impermissibly expand the doctrine beyond the scope of our existing cases and would be inconsistent with commonly held notions about expectations

of privacy. We hold, therefore, that the district court erred in finding that Defendant abandoned her purse. Accordingly, Defendant has standing to challenge the search. Because we have held that there was no consent, the motion to suppress should have been granted.

CONCLUSION

{36} We hold that a conditional plea reserving the right to appeal a limited number of properly raised issues is permissible in magistrate court. We also hold that the preferred procedure for appeal to this Court after such a plea is entered is for the district court to issue a final and appealable order dismissing the appeal or to issue an order granting the motion to suppress. We reverse the district court's denial of Defendant's motion to suppress. We remand to the district court so that it may issue an order of remand to the magistrate court allowing Defendant to withdraw her conditional plea.

{37} **IT IS SO ORDERED**.

CASTILLO and ROBINSON, JJ., concur.

All Citations

135 N.M. 728, 93 P.3d 10, 2004 -NMCA- 070

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12 F.3d 1019
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee
v.
William RAMOS, Defendant–Appellant.
UNITED STATES of America, Plaintiff–Appellee
v.
Richard RAMOS, Defendant–Appellant.

Nos. 92–6849, 92–7087.
|
Jan. 21, 1994.

Synopsis

Defendants were convicted in the United States District Court for the Southern District of Alabama, No. CR–92–00014–CB, Charles L. Butler, Jr., J., on guilty pleas to conspiracy to possess with intent to distribute cocaine. Defendants appealed. The Court of Appeals, Schlesinger, District Judge, sitting by designation, held that: (1) defendant failed to establish any legitimate expectation of privacy in briefcase found in codefendant's rented condominium unit, and (2) mere fact that codefendant failed to remove locked briefcase from condominium unit before check-out time did not establish that he had abandoned his reasonable expectation of privacy in locked briefcase under Fourth Amendment.

Affirmed in part, and vacated and remanded in part.

Attorneys and Law Firms

***1020** William B. Richbourg, Pensacola, FL, for defendant-appellant.

J.B. Sessions, III, U.S. Atty., George A. Martin, Jr., Asst. U.S. Atty., Mobile, AL, for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Alabama.

Before ANDERSON and CARNES, Circuit Judges, and SCHLESINGER*, District Judge.

SCHLESINGER, District Judge:

I. INTRODUCTION

Appellants Richard Ramos and William Ramos each pled guilty to conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. Appellants' respective sentences included the imposition of a term of imprisonment of 120 months. On appeal each argues that the district court erred by denying two different joint motions to suppress, one involving the search of an Orange Beach, Alabama condominium ("the Alabama search"), the other involving the ***1021** search of a trailer and hotel room in Austin, Texas ("the Texas search"). Appellant Richard Ramos also argues that the district court erred by refusing to allow him to withdraw his conditional plea of guilty.

Without discussion, we conclude that the district court did not err in denying the motion to suppress testimony and physical evidence derived from the Texas search. We also conclude that the district court did not err in refusing to allow Richard Ramos to withdraw his guilty plea. However, for the reasons discussed below, we find that the district court incorrectly concluded that William Ramos abandoned his expectation of privacy in the briefcase found during the Alabama search.

II. BACKGROUND

Appellant William Ramos ("William") was the tenant of record for two different condominiums in the Back Bay Resort, located in Orange Beach, Alabama. He lived in these condominiums with his brother Appellant Richard Ramos ("Richard"). On July 28, 1991, William signed a five-month lease for Unit 408, but was transferred to Unit 606 on November 1, 1991, as 408 previously had been rented to someone else beginning November 1. William signed a new agreement for Unit 606 for a two-month period concluding January 1, 1992. Both units were managed by Meyer Realty ("Meyer"), which rented several units at that location on behalf of the individual units' owners. Each of these rental agreements specified on the front page that check-in time was between 2 P.M. and 5 P.M., and that check-out time was 10 A.M. Unit 606 was leased to another party for a period commencing on January 1, 1992.

Meyer had a contract with D.J.'s Cleaning ("D.J's") for the provision of housekeeping and cleaning services during the changeover periods between tenants. Debbie Anding, the owner of D.J.'s, was notified by Meyer on December 31, 1991 that the current tenants of Unit 606 would be leaving the next day. Accordingly, Anding sent two cleaners to Unit 606 on the morning of January 1, 1992. Katie Lester and Jeannie Williams arrived at Unit 606 at approximately 10 A.M., observed that the tenants were not out of the unit, and telephoned Anding with this information. Lester and Williams went to clean another unit, and Anding then met the two at Unit 606 sometime between 11:30 A.M. and 12 P.M.

When Anding arrived the tenants still had not moved out. Accordingly, Meyer instructed the cleaners to pack the personal effects into garbage bags so that the unit could be cleaned before the new tenants arrived. However, as the owner's closet had been opened, the cleaners had some difficulty determining what property belonged to the tenants and what belonged to the owner. The cleaners found two dollar bills, one in the owner's closet and one in the bathroom, each of which, according to Anding, had "white powder substance in it." Anding then found a briefcase on the floor of the master bedroom. Williams, her employee, tried to open the briefcase, but the right side was locked. When Williams peered inside through the unlocked left side she saw pieces of napkins wrapped by rubberbands. However, neither Williams nor Anding could determine what was wrapped inside the napkins, and could not determine whether the briefcase belonged to the owner or renter.

Anding relayed this situation to Kathy Fleming at the Meyer office, and told Fleming that there was "either drugs or money" in the briefcase. Fleming instructed the cleaners to unpack everything, and leave all the unit's items as they had found them. Gail Harris, Meyer's rental manager, notified the state police that her housekeepers had found a briefcase containing "what they thought to be cocaine," and asked them to send a trooper to Unit 606. Early that afternoon, Meyer's maintenance man escorted Trooper Warren Stewart to Unit 606. Stewart located the briefcase, observed some plastic bags while looking through the unlocked left side, and then opened the locked right latch with his pocketknife. Stewart field-tested a powder substance found in one of the bags within the briefcase. The substance ***1022** tested positive for cocaine. He relocked the suitcase, placed it under the bed and telephoned Agent Michael Kirk from the Drug Enforcement Administration task force in Mobile, Alabama. Later that afternoon they obtained a search warrant from an Alabama state judge for the purpose of expanding the search in Unit 606. The following day Harris received a message at the realty office that William Ramos had called.

Appellants and codefendant Christine Adkins were indicted for possession of cocaine with intent to distribute and conspiracy to possess cocaine with intent to distribute. After pleading not guilty, they filed the two joint motions to suppress. William testified briefly at the suppression hearing, and stated that he was the owner of the briefcase.

At the close of the suppression hearing on the Alabama search, the district court stated that this type of rental was a "very definite limited tenancy," and that when the time expires the owner, or the owner's agent (e.g., Meyer), has a right to enter or send agents or state troopers into the condo "to check on that condo." The court, in denying the motion, concluded that:

> And I'm of the opinion that the owner of the briefcase had abandoned his privacy rights in that briefcase because he had not checked out on time, something had to be done with that briefcase, and because it was left partially opened and a cleaning woman saw something in there that was suspicious, and the owner had every right to check to see what that was before they stored that briefcase or moved that briefcase. They did exactly the proper thing. They called the state trooper to come check the contents of that briefcase before they did anything with it.
>
> And I'm of the opinion that there was no privacy right in this briefcase at that time by the owner of that briefcase. So therefore, there could be no invasion of any privacy rights in that briefcase.

Subsequently, the district court entered a summary Order stating that the motion was denied at the hearing. The written Order did not discuss any of the merits of the motion.

By finding that Appellants had abandoned the briefcase, the district court implicitly found that Appellants had no standing to contest the legality of the Alabama search. Thus, the district court never reached any questions concerning the legality of the search itself.

After the court subsequently denied the motion to suppress concerning the Texas search, William and Richard pled guilty to the conspiracy charge. In their respective plea agreements, Appellants expressly reserved the right to appeal the district court's denial of the motions to suppress.

III. DISCUSSION

On appeal, William and Richard argue in part that the district court erroneously denied their motion to suppress the fruits of the Alabama search. As rulings on motions to suppress involve mixed questions of fact and law, the district court's factual findings are reviewed under the clearly erroneous standard, while that court's application of the law is subject to *de novo* review. *United States v. Banks,* 3 F.3d 399, 401 (11th Cir.1993); *United States v. Garcia,* 890 F.2d 355, 358 (11th Cir.1989). Because the concept of abandonment "involves a factual issue," *United States v. McKennon,* 814 F.2d 1539, 1545 (11th Cir.1987), a district court's finding of abandonment is reviewed under the clearly erroneous standard, *United States v. Lehder–Rivas,* 955 F.2d 1510, 1521–22 (11th Cir.), *cert. denied sub nom. Reed v. United States,* 506 U.S. 924, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992).

In determining whether there has been abandonment, the " 'critical inquiry is "whether the person prejudiced by the search ... voluntarily discarded, left behind, or otherwise *relinquished his interest in the property* in question so that he could no longer retain a reasonable expectation of privacy with regard to it *at the time of the search.*" ' " *United States v. Winchester,* 916 F.2d 601, 603 (11th Cir.1990) (quoting *McKennon,* 814 F.2d at 1546 (citation omitted)). Whether abandonment occurred is a ***1023** question of intent which may be inferred from acts, words and "other objective facts." *United States v. Pirolli,* 673 F.2d 1200, 1204 (11th Cir.), *cert. denied,* 459 U.S. 871, 103 S.Ct. 157, 74 L.Ed.2d 131 (1982). While Appellants here bear the burden of proving a legitimate expectation of privacy in the areas searched, *Rawlings v. Kentucky,* 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980), the burden of proving abandonment is on the government. *See United States v. Freire,* 710 F.2d 1515, 1519 (11th Cir.1983), *cert. denied,* 465 U.S. 1023, 104 S.Ct. 1277, 79 L.Ed.2d 681 (1984).

An individual can urge suppression of evidence only if *his* Fourth Amendment rights were violated by the challenged search or seizure. *United States v. Padilla,* 508 U.S. 77, ——, 113 S.Ct. 1936, 1939, 123 L.Ed.2d 635 (1993); *Alderman v. United States,* 394 U.S. 165, 171–72, 89 S.Ct. 961, 965–66, 22 L.Ed.2d 176 (1969). Fourth Amendment rights are personal and cannot be vicariously asserted. *United States v. Payner,* 447 U.S. 727, 731, 100 S.Ct. 2439, 2444, 65 L.Ed.2d 468 (1980). As an initial matter, then, it is apparent that Richard failed to produce evidence at the suppression hearing tending to support his burden in this respect. Unit 606 was rented in William's name, and Gail Harris, the rental manager of the condominiums, testified that Richard's name did not appear on any other documents, nor had she ever seen or known anything about Richard. Furthermore, William testified briefly that the briefcase belonged to *him* (William). While "arcane" concepts of property law do not control an individual's ability to claim Fourth Amendment protection, *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1979), ownership is a factor which may be considered, *Rawlings,* 448 U.S. at 105, 100 S.Ct. at 2561. Richard simply failed to establish any expectation of privacy in the briefcase, and the district court's finding of abandonment as to Richard was superfluous.

The government argues that any conceivable expectation of privacy manifested by William was abandoned by virtue of his failure to timely check out of Unit 606. As noted above, the district court emphasized that this was a "very definite limited tenancy." However, William's characterization of the tenancy as a "five-month rental arrangement," Br. at 20, is not entirely inaccurate. While William's contract for Unit 606 was only for two months, William initially had signed a five-month agreement for Unit 408. That Meyer, in the middle of *that* tenancy, relocated William to Unit 606 does not mean that William's expectation of privacy from the full five-month lease was summarily truncated. For example, had William been relocated on the 29th day of the fifth month—and thus lived in Unit 606 for only one day—he would still possess a far greater expectation of privacy than a individual who appeared at Back Bay that same day asking for a one-night rental (if Meyer even let its condominiums on that basis).

In any event, we do not read the district court's statement as suggesting that William at no time possessed a legitimate expectation of privacy in Unit 606. As noted above, a multi-month condominium rental certainly confers on the lessee a greater interest in the rented premises than would a nightly hotel reservation. And it is well-settled that a person does not forfeit Fourth Amendment protection merely because he is residing in a hotel room. *See, e.g., Hoffa v. United States,* 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966); *United States v. Newbern,* 731 F.2d 744, 748 (11th Cir.1984); *United States v. Bulman,* 667 F.2d 1374, 1383 (11th Cir.), *cert. denied sub nom. Howard v. United States,* 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982). Use of a motel room for lodging provides the same expectation of privacy as does a home. *United States v. Roper,* 681 F.2d 1354, 1357 n. 1 (11th Cir.1982), *cert. denied sub nom. Newton v. United States,* 459

U.S. 1207, 103 S.Ct. 1197, 75 L.Ed.2d 440 (1983). *See also Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) ("Fourth Amendment protects people, not places").

Thus, while William's tenancy may have been more "limited" than, for example, a full ownership in a condominium or even a year-long apartment rental, it was not outside ***1024** Fourth Amendment protection. The question, simply, is whether William relinquished his interest in Unit 606 (and his property therein) so that he could no longer retain a reasonable expectation of property in it *at the time of Trooper Stewart's search. Winchester,* 916 F.2d at 603.

In *United States v. Savage,* 564 F.2d 728 (5th Cir.1977), upon which the government relies, agents seized counterfeit notes and other incriminating evidence from a suitcase found in the defendant's motel room at 12:00 P.M., one hour after the motel's 11:00 A.M. check-out time. The court concluded that the defendant automatically relinquished possession of the room at 11:00 A.M. and, furthermore, he had turned in his key the night before. *Id.* at 733 and 730 n. 5. More evidence than mere possession of a key is necessary to satisfy a claimant's burden of establishing a legitimate expectation of privacy. *See United States v. Rackley,* 742 F.2d 1266, 1270 (11th Cir.1984). *But see Newbern,* 731 F.2d at 748 (defendants had "complete control" over hotel room because no other persons possessed keys to room). Yet *Savage,* while binding on this Court[1], is distinguishable from the instant case for several reasons.

The defendant there was lodging in a motel, and his length of stay is not ascertainable from the facts stated in the opinion. Moreover, he turned in his key the evening before the search and seizure, unmistakably evincing an intention to vacate the motel room at or before the next check-out time. William Ramos, on the other hand, initially signed a *five-month written* rental agreement, subsequently converted to a two-month agreement. Each agreement was for a *specific* condominium. Furthermore, William did not turn in his key to Meyer the day before the briefcase was seized. William's contacts with the place of the search and seizure—Unit 606—were far more "regular or personal," *United States v. Garcia,* 741 F.2d 363, 366 (11th Cir.1984), than were those of the defendant in *Savage.*

The cleaners sent by Meyer certainly had a right to be in William's unit after the check-out time. Meyer personnel themselves had such a right, also. William's counsel conceded at the suppression hearing that even Trooper Stewart had a right to be inside Unit 606 at that time. But the drugs seized by Stewart were located in a *locked briefcase,* and given the "words, acts and other objective facts" surrounding the seizure, *Pirolli,* 673 F.2d at 1204, the district court erroneously concluded that William had abandoned his expectation of privacy in the briefcase.

Another panel of this Court has described the relevance and unique nature of a briefcase as follows:

> A briefcase is often the repository for more than business documents. Rather, it is the extension of one's own clothing because it serves as a larger "pocket" in which such items as wallets and credit cards, address books, personal calendar/diaries, correspondence, and reading glasses often are carried. *Few places outside one's home justify a greater expectation of privacy than does the briefcase.*

Freire, 710 F.2d at 1519 (emphasis supplied). Nonetheless, as with other property subject to Fourth Amendment protection, a briefcase can be abandoned, causing a forfeiture of such rights.

In *Lehder–Rivas,* one defendant left a locked suitcase with a slight acquaintance, promising to retrieve it within three months. After a year passed, two men showed up to retrieve the suitcase, but the acquaintance would not release it absent the defendant's permission. Two months later, the acquaintance turned the suitcase over to the police. The defendant clearly had abandoned the suitcase and, therefore, lacked standing to contest its search. *Lehder–Rivas,* 955 F.2d at 1522. In another case, where the defendant's briefcase was discovered in a pile of trash three days after having been stolen, the defendant no longer had an expectation of privacy in the briefcase. *United States v. O'Bryant,* 775 F.2d 1528, 1534 (11th Cir.1985). Following an airport arrest, where a ***1025** defendant repeatedly disclaimed ownership of a codefendant's carry-on luggage and disassociated himself with the codefendant, the defendant abandoned any privacy interest he may have possessed in the bag prior to the arrest. *McKennon,* 814 F.2d at 1546.

Of course, property other than a briefcase or suitcase is equally subject to abandonment, under the same fact-based intent analysis. In *Winchester,* a defendant drove past a series of marked police cars and two-dozen officers stationed outside the cottage he had just departed, then called a deputy marshal the next day and, after identifying himself as the defendant, asked, "How do you like that Glock?" This court concluded that the district court was not clearly erroneous in finding that the defendant abandoned not only the cottage,

but also the property contained within it, including the seized firearm. *Winchester,* 916 F.2d at 604. Where a defendant told a girlfriend with whom he was sharing a Miami apartment that he was leaving for Houston and not coming back, the defendant was deemed to have abandoned clothing subsequently seized from the Miami apartment. *United States v. DeParias,* 805 F.2d 1447, 1458 (11th Cir.1986), *cert. denied sub nom. Ramirez v. United States,* 482 U.S. 916, 107 S.Ct. 3189, 96 L.Ed.2d 678 (1987). But when, during a *Terry* stop,[2] a suspect attempted to protect from inspection a bag he was carrying by throwing it on the hood of his car, that individual "clearly has not abandoned that property." *Smith v. Ohio,* 494 U.S. 541, 544, 110 S.Ct. 1288, 1290, 108 L.Ed.2d 464 (1990).

"Fourth Amendment search and seizure law is fraught with uncertainties and difficult distinctions." *United States v. Bosby,* 675 F.2d 1174, 1180 (11th Cir.1982). Nearly every case in this area of the law has some feature distinguishable from the next. Determining whether an abandonment has occurred requires a consideration of case-specific facts, and, in the instant appeal, the nature of William Ramos' tenancy in Unit 606 is of particular significance. A rental of a condominium owned by another, through the owner's supervising agent, necessarily confers on the lessee a lower expectation of privacy than that possessed by the owner. Nevertheless, we are not persuaded that an individual who overstays a two-month condominium rental by a few hours forfeits his privacy rights in a locked briefcase found inside the unit.

Initially, William had a five-month lease for Unit 408. The check-out time for all of the units managed by Meyer was 10:00 A.M. When he was re-assigned to Unit 606 on November 1, 1991, cleaners from D.J.'s helped to move his belongings to the new unit. It is not clear from the record whether, on November 1, 1991, William was late in moving out of Unit 408. However, Debbie Anding testified that often "people don't get out right at 10." Three different witnesses stated that when this would occur, the procedure was to pack the personal belongings and *hold* them until the owner of the items—the departing lessee—could be located. It was not unreasonable for William to assume that the cleaners, having previously moved some of his possessions *to* Unit 606, would pack and store these items if he were late *departing* that unit, even if William had *timely* vacated Unit 408.

The government states that William, having been the tenant of record on two different Meyer leases, each providing for a 10:00 A.M. check-out, was "well aware of the checkout time and the implications of missing that deadline." Br. at 21. As conceded by the government at oral argument, however, other than stating that this time would be "strictly enforced," the rental agreement was entirely silent as to what these implications might be. We suspect that the likely implications would be loss of a dwelling place and the incurring of partial or full liability for the next period's rent.

However, considering that the date in question here was New Year's Day, it is quite possible that an individual might "hold over" not intending to abandon everything that was contained within the leased premises. Thus, the loss of a reasonable expectation of privacy in a locked briefcase placed ***1026** beneath a bed is neither an implication nor legal consequence of a four-hour overstay on New Year's Day in a condominium that has been occupied for the previous eight weeks. Based on the surrounding circumstances, including the fact that William telephoned the Meyer office the following day, we conclude that William did not abandon his reasonable expectation of privacy in the briefcase. To this extent, we hold only that he had standing to contest the search conducted by Trooper Stewart, the legality of which the district court never considered.

The district court did not err in denying Appellants' motion to suppress testimony and physical evidence derived from the Texas search. Additionally, the district court did not err in refusing to allow Richard Ramos to withdraw his guilty plea. We find no merit with respect to those arguments. The district court's finding that Richard Ramos abandoned the briefcase was superfluous, because Richard never established that he had a legitimate expectation of privacy that he could abandon.

IV. CONCLUSION

Accordingly, the judgment with respect to Richard Ramos is AFFIRMED.

Because of its erroneous finding that William Ramos abandoned his expectation of privacy in the briefcase, the district court did not reach the other issues concerning the legality of the Alabama search. Those issues should not be addressed for the first time on appeal. Accordingly, we VACATE the judgment as to William Ramos and REMAND the case to the district court so that it may address the remaining issues related to William Ramos' motion to suppress the fruits of the Alabama search.

All Citations

12 F.3d 1019

Footnotes

* Honorable Harvey E. Schlesinger, U.S. District Judge for the Middle District of Florida, sitting by designation.

1 In *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), this Court adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

2 *See Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (permitting brief detention of person and/or property on the basis of only "reasonable, articulable suspicion")

448 F.3d 1281
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Roberto SEGURA-BALTAZAR, Defendant-Appellant.

No. 05-12705.
|
May 12, 2006.

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of Georgia, No. 04-00235-CR-JOF-1, J. Owen Forrester, J., of possession with intent to distribute cocaine and methamphetamine, and possession of a firearm in furtherance of a drug trafficking crime, and was sentenced to 120 months in prison for the drug offenses, and a 60-month prison term of the gun charge. Defendant appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

defendant had no reasonable expectation of privacy in trash placed in garbage bags left near the street curb;

defendant lacked any reasonable expectation of privacy in trash bags left next to garage;

no-knock provision in search warrant for defendant's residence was supported by reasonable suspicion of exigent circumstances; and

1.2 kilograms of methamphetamine and dimethyl sulfone recovered from defendant's residence was a "mixture," for purpose of Comprehensive Drug Abuse Prevention and Control Act, supporting 10-year mandatory minimum sentence.

Affirmed.

Attorneys and Law Firms

***1283** Bruce S. Harvey, Atlanta, GA, for Defendant-Appellant.

Byung J. Pak, Amy Levin Weil, U.S. Atty., Atlanta, GA, for U.S.

Appeal from the United States District Court for the Northern District of Georgia.

Before DUBINA, MARCUS and PRYOR, Circuit Judges.

Opinion

***1284** MARCUS, Circuit Judge:

Roberto Segura-Baltazar ("Segura-Baltazar") appeals his conviction and ensuing sentence for possession with intent to distribute cocaine and methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), and (b)(1)(C), and for possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). Segura-Baltazar was convicted on all counts after a bench trial and was sentenced to concurrent 120-month terms for the drug counts and a consecutive 60-month term for the gun charge. On appeal, the defendant argues that the district court erred in failing to suppress certain evidence seized from his home and in finding evidence of at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine, which is the threshold amount necessary for the mandatory minimum 10-year sentence he received. After thorough review, we affirm.

I.

The essential facts are these. In the course of a drug investigation involving a suspect known only as "Alejandro," police identified numerous incoming calls from a phone number registered to Bernabe Perez, an alias of the defendant, at 480 Sheringham Court in Roswell, Georgia. Based on that information, police began surveillance at 480 Sheringham Court. Officer Ronald Gooden of the City of Roswell Police Department determined that it would be helpful to inspect the trash discarded from the house at 480 Sheringham Court, and he contacted the Roswell sanitation department for assistance.

Gooden learned that trash was normally collected from the suspect's home on Wednesdays. Accordingly, he met with

Jerry Kimbral, the sanitation truck driver for that route, on Wednesday, January 14, 2004, the normal collection day. Officer Gooden and Kimbral drove to 480 Sheringham Court in an empty garbage truck. They found garbage left for collection in front of the house to the left of a mailbox, in an area that was not enclosed by a fence and that was approximately fifty-five to sixty-five feet from the residence and three to six feet from the curb. The garbage was contained in bags which, in turn, were found inside large garbage cans that were covered with lids. Kimbral emptied the bags into the garbage truck and drove to the Roswell police department, where Officer Gooden retrieved the trash and processed it for evidence. The same procedure was repeated on other normal collection Wednesdays-January 21, 2004, February 4, 18, and 25, 2004, and March 3 and 10, 2004.

On two other occasions, the trash-pull procedures were slightly different. The magistrate judge described the events of January 28, 2004, in these terms:

> Gooden was with Kimbral and another sanitation department employee, Luiz Gordado, whom Gooden understood spoke Spanish. On that morning, part of the garbage was located in the garbage cans at the curb. Gooden also observed garbage cans, containing what appeared to be bags of garbage, sitting to the left side of the residence near the garage. *Kimbral informed Gooden that it was customary for him to collect the garbage from the location next to the garage when it was left there and not at the curb.* He asked if Gooden wanted him to collect that garbage. Gooden instructed Kimbral and Gordado to verify with the resident that the garbage was to be collected. Kimbral and Gordado walked up and knocked on the door of the residence. After conferring with a female at the door, they collected the garbage located next to the garage. That garbage, along with the garbage located next to the curb, was placed in ***1285** the truck, and Gooden retrieved the garbage at the police department where he examined it for evidence.

(citations and footnotes omitted) (emphasis added). Similarly, on Wednesday February 11, 2004, Gooden and Kimbral retrieved trash from cans that were sitting to the left of the residence near the garage. They followed the same procedures they employed on January 28; the only difference was that there was no trash at the curb on February 11.

The police recovered many inculpatory items from the trash pulls indicating that the residents of 480 Sheringham Court were involved in illegal drug activity. Specifically, they found 42 grams of methamphetamine; 41 grams of marijuana; plastic wrappings that field-tested positive for cocaine; and numerous bags containing residue that field-tested positive for cocaine, marijuana, and methamphetamine. Additionally, the police found papers depicting names with numerical amounts listed next to each name (which they believed were drug ledgers); financial documents indicating the presence of large amounts of currency, including evidence of wire transfers exceeding $10,000; and boxes that had contained wireless surveillance cameras and monitors that would enable a user to see in low light conditions. Officer Gooden testified that, based on his experience, devices such as these are often used by drug dealers as countersurveillance tools. Finally, the police recovered two types of magazines for semiautomatic handguns, an empty box of 12-gauge shotgun shells, and one live round of .45-caliber ammunition.

Based on the evidence obtained through the trash pulls and information provided by a confidential informant, Gooden obtained a federal search warrant for the house located at 480 Sheringham Court. Because of the "exigent circumstances of potential bodily injury to law enforcement officers," the warrant was issued by the magistrate with a "no-knock" provision. The search warrant was executed on March 25, 2004, and the officers entered the residence without knocking or announcing their presence. During the ensuing search police recovered approximately 1200 grams of methamphetamine, 130 grams of cocaine, two semiautomatic handguns, two .22-caliber rifles, one shotgun, $19,631 in U.S. currency, and numerous forms of identification bearing several different names matched with the defendant's picture.

On appeal, Segura-Baltazar argues that the district court fatally erred by (1) refusing to suppress the evidence recovered from the trash pulls, (2) upholding the validity of the search warrant with a "no-knock" provision, and (3) using the total weight of the methamphetamine mixture to calculate the base offense level for sentencing purposes. We consider each argument in turn.

II.

In reviewing an order denying a motion to suppress, we review findings of fact for clear error and the application of the law to those facts *de novo*. *United States v. Muegge*, 225 F.3d 1267, 1269 (11th Cir.2000) (per curiam). To prevail on a Fourth Amendment claim, a defendant must show two things:

> First, there must be a search and seizure of that individual's person, house, papers or effects, conducted by an agent of the government; stated differently, there must be an invasion of the claimant's reasonable expectation of privacy. Second, the challenged search and seizure must be "unreasonable," as not all searches and seizures are proscribed by the fourth amendment, but only those that are "unreasonable."

United States v. Bachner, 706 F.2d 1121, 1125 (11th Cir.1983) (citations omitted). ***1286** The party alleging an unconstitutional search must establish both a subjective and an objective expectation of privacy. *United States v. Robinson,* 62 F.3d 1325, 1328 (11th Cir.1995). "The subjective component requires that a person exhibit an actual expectation of privacy, while the objective component requires that the privacy expectation be one that society is prepared to recognize as reasonable." *Id.* (internal quotation marks and brackets omitted); *see also California v. Greenwood,* 486 U.S. 35, 39, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) ("The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable.").

The Supreme Court has addressed a case raising similar Fourth Amendment issues and with similar facts in *Greenwood.* There, the police received information that a suspect might be involved with drug transactions, and they enlisted the help of the local trash collector to retrieve "plastic garbage bags that Greenwood had left on the curb in front of his house." *Id.* at 37, 108 S.Ct. 1625. The evidence found in the defendant's garbage was then used as the basis for obtaining a search warrant for his house, where police found drugs. The Supreme Court held that even if Greenwood had an actual (subjective) expectation of privacy in the contents of the opaque trash bags he left on the street, it was not an expectation society was willing to accept as objectively reasonable:

> Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

Id. at 40-41, 108 S.Ct. 1625 (citations, internal quotation marks, and footnotes omitted). Thus, the Court held, there was no Fourth Amendment violation, and the evidence recovered from Greenwood's trash could be used to support a search warrant application.

We readily affirm the district court's denial of the motion to suppress the evidence recovered from trash left at the curb in front of Segura-Baltazar's house. Indeed, the facts of this case are strikingly similar to those considered in *Greenwood.* The only apparent distinctions-that the garbage in *Greenwood* was placed on the curb (as opposed to three to six feet from the curb) and was in only an opaque garbage bag (as opposed to a garbage bag that was placed inside a garbage can)-are insufficient to warrant any different outcome. Having placed the garbage near the curb for the purpose of conveying it to third parties, the trash collector, or other members of the public, we cannot find that appellant had a reasonable expectation of privacy in the inculpatory items discarded.

Whether there was a reasonable expectation of privacy in the trash left at the left side of the residence near the garage is a closer question, the obvious ***1287** distinction being that trash left near the curb is more exposed to the public than is trash left closer to the house. Segura-Baltazar urges that the trash near the garage was within the curtilage (generally the land or yard adjoining a house) of his home and therefore well within the protections of the Fourth Amendment. The district court never made a specific finding that the trash near the garage was inside or outside the curtilage, and we find it unnecessary to decide that question on appeal. Indeed, *Greenwood* instructs us to consider the extent to which the garbage was exposed to the public, and that analysis does not require a "curtilage" determination.[1] *See Greenwood,* 486 U.S. at 40, 108 S.Ct. 1625 (concluding that "respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection"); *United States v. Hall,* 47 F.3d 1091, 1096 (11th Cir.1995) (noting that *Greenwood* "demonstrates that one indicator of the objective reasonableness of an expectation of privacy in discarded garbage is the degree to which persons expose their garbage to the public"); *see also United States v. Long,*

176 F.3d 1304, 1308 (10th Cir.1999) ("Even if we were to conclude that the trash bags were within the curtilage, Defendant would not prevail .... In garbage cases, Fourth Amendment reasonableness turns on public accessibility to the trash."); *United States v. Comeaux,* 955 F.2d 586, 589 (8th Cir.1992) ("[E]ven assuming that the garbage cans were within the curtilage, we find [defendant's] claim to be without merit. We believe that the proper focus under *Greenwood* is whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable." (internal quotation marks omitted)).

The district court here found that the trash was sufficiently exposed to the public to defeat a reasonable expectation of privacy because it was left in a location where the sanitation workers regularly would, on Wednesdays, remove it along with trash left by the street; indeed, nothing was done to prevent the removal of the garbage; and the garbage remained within the public view. We agree.

First, the district court found as a fact that the "customary location" for trash collection was the area by the street. However, after an evidentiary hearing, the magistrate judge explicitly found that it was also "the practice to collect garbage left next to the residence," and that "[i]f Gooden had not been present on those mornings, the garbage next to the residence would have been collected." Thus, the district court found, the trash next to the house was "left for collection" because it was placed in an area where it was customarily collected by sanitation employees and at a time when the garbage collectors made their normal rounds. *See Greenwood,* 486 U.S. at 41, 108 S.Ct. 1625 (finding no reasonable expectation of privacy in trash "*left for collection* in an area accessible to the public" (emphasis added)). We agree that placing trash in a location where it is *routinely* removed by trash collectors, on the day designated for trash collection, lessens the reasonableness of a homeowner's expectation of privacy. *See, e.g., id.* at 40, 108 S.Ct. 1625 (considering the fact that the refuse was left "for ***1288** the express purpose of conveying it to a third party"); *Long,* 176 F.3d at 1309 (considering the fact that defendant had "purposefully placed the trash bags ... for collection" in the course of finding no reasonable expectation of privacy); *United States v. Redmon,* 138 F.3d 1109, 1113 (7th Cir.1998) (en banc) (noting that the "garbage cans were purposefully placed by [the defendant] outside his garage for collection and could not be considered some sort of personal safety deposit boxes designed for his illegal purposes"); *United States v. Hedrick,* 922 F.2d 396, 400 (7th Cir.1991) (affirming denial of motion to suppress in part because the garbage was left in the designated collection location).[2]

Next, the district court found that the garbage closer to the house was plainly visible to the public. The district court concluded that this weighed in favor of denying the motion to suppress. That finding was correct, too. Although a member of the public would have had to access Segura-Baltazar's property to gain access to the trash, that fact alone does not provide him with a reasonable expectation of privacy. As the Seventh Circuit explained:

> The willingness of members of the public to trespass upon private property in order to search through garbage cans cannot automatically defeat the Fourth Amendment expectation of privacy any more than a series of burglaries could eliminate any expectation of privacy in the home. Where, however, the garbage is readily accessible from the street or other public thoroughfares, an expectation of privacy may be objectively unreasonable because of the common practice of scavengers, snoops, and other members of the public in sorting through garbage. In other words, garbage placed where it is not only accessible to the public but likely to be viewed by the public is "knowingly exposed" to the public for Fourth Amendment purposes.

Hedrick, 922 F.2d at 400. Even though the trash was located on Segura-Baltazar's property, near his garage, there was no reasonable expectation of privacy because the trash was sufficiently exposed to the public.

The district court made no factual finding concerning exactly how far the garbage next to the house was from the public sidewalk or street. However, there was testimony that the trash near the curb was three to six feet from the sidewalk, and fifty-five to sixty-five feet from the house. So, we can assume that the house was no more than sixty or seventy feet from the sidewalk. Regardless of the exact distance, however, the facts we find most relevant and persuasive are that the garbage was plainly visible and accessible from the street. *See Redmon,* 138 F.3d at 1114 (concluding that there was no reasonable expectation of privacy in garbage left outside a garage, at the head of a driveway, in part because it was "publicly exposed and accessible"); *United States v. Shanks,* 97 F.3d 977, 980 (7th Cir.1996) (finding no reasonable expectation of privacy because garbage cans placed next to a garage, and facing an alley, "were readily accessible and visible from a public thoroughfare"); *Hedrick,* 922 F.2d at 400 (finding no reasonable expectation of privacy in part because "the garbage cans were clearly visible from the sidewalk").

***1289** Taken together, the facts of this case lead us to the conclusion that Segura-Baltazar did not have a reasonable expectation of privacy in the trash that he left in the usual course of events for collection outside but near his home. The trash was placed in a location where it was customarily retrieved by sanitation employees, it was left there at the designated time for trash collection, and it was clearly visible and accessible from the street. Unfortunately, we can offer no bright-line rule to fit all future garbage suppression cases. *See Redmon,* 138 F.3d at 1111 (noting that a "convenient rule to fit all situations" is simply not practical). These inquiries are highly fact-intensive, and we simply find that on the particular facts of this case, Segura-Baltazar had no reasonable expectation of privacy in either the trash near the curb or the trash near his house.[3]

III.

The police officers used the fruits of the garbage pulls to support their application for a warrant to search 480 Sheringham Court. The warrant was issued by a federal magistrate judge, and the search uncovered significant quantities of illegal drugs. Segura-Baltazar contends that the magistrate judge erred in issuing the warrant with a "no-knock" provision. Specifically, the judge stated in the warrant that "based on exigent circumstances of potential bodily injury to law enforcement officers, I specifically authorize no-knock entry into the residence." The district court found that even if the "no-knock" provision was not supported by reasonable suspicion, the officers had a good faith basis for believing the warrant was valid and therefore refused to suppress the drugs and firearms found in the search. *See United States v. Leon,* 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (establishing the good faith exception to the exclusionary rule). After thorough review we conclude that the "no-knock" provision was indeed supported by reasonable suspicion and, therefore, we need not consider whether the warrant, if otherwise invalid, would be saved by the good faith exception. *Cf. United States v. Jiminez,* 224 F.3d 1243, 1249 n. 1 (11th Cir.2000) (noting that there is no need to consider the good faith exception when there is probable cause to support the warrant).

Again, when reviewing the denial of a motion to suppress, we review findings of fact for clear error and the application of the law to those facts *de novo. Muegge,* 225 F.3d at 1269. The Fourth Amendment incorporates the important common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. *Wilson v. Arkansas,* 514 U.S. 927, 934, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). However, a "no-knock" entry is permissible under special circumstances. "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin,* 520 U.S. 385, 394, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997); *see also* ***1290** *United States v. Banks,* 540 U.S. 31, 36, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003) (noting that "[w]hen a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a 'no-knock' entry"). The showing an officer must make to receive a "no-knock" warrant "is not high." *Richards,* 520 U.S. at 394, 117 S.Ct. 1416. In determining whether reasonable suspicion exists to justify a "no-knock" entry, we consider the totality of the circumstances. *Banks,* 540 U.S. at 36, 124 S.Ct. 521.[4]

We have not yet had occasion to address the requirements for a "no-knock" entry, but the Supreme Court has done so on several occasions, and our sister circuits have heeded the Court's observation that the officer's burden "is not high." *See, e.g., United States v. Stevens,* 439 F.3d 983, 988-89 (8th Cir.2006) (finding a "no-knock" provision justified based on information from a confidential informant that a sawed-off shotgun was kept in a common area of the house to be searched); *United States v. Musa,* 401 F.3d 1208, 1214 (10th Cir.)(finding a "no-knock" entry justified when the case involved a search for drugs and where defendant had a violent past that included gun charges and assaults on law enforcement officers), *cert. denied,* 546 U.S. 918, 126 S.Ct. 295, 163 L.Ed.2d 257 (2005); *United States v. Wardrick,* 350 F.3d 446, 451-52 (4th Cir.2003) ("no-knock" search warrant justified where subject had a history of violent crime and authorities believed he would be armed and home at the time of the search).

In this case, the affidavit in support of the search warrant reveals that officers recovered the following items pregnant with the possibility of violence from Segura-Baltazar's trash: labels for two different types of magazines for semiautomatic handguns, an empty box of 12-gauge shotgun shells, and one live round of .45-caliber ammunition. That evidence

sufficiently supported the conclusion that there were weapons in the house. Moreover, the officer also set forth in the affidavit that he recovered empty boxes that likely once contained wireless surveillance cameras and monitors that "have the ability to 'see' in low light conditions." The officer asserted that based on his experience, "these types of cameras are utilized by individuals who engage in the distribution of illegal drugs as counter surveillance, to protect their business and provide early warning of those who might be surveying their residence to include law enforcement." Based on that evidence, the magistrate judge who issued the "no-knock" warrant was well within his discretion to conclude that knocking either might be dangerous or inhibit the effective investigation of this drug crime by allowing for the destruction of contraband evidence. *See Richards,* 520 U.S. at 394, 117 S.Ct. 1416.

***1291** Segura-Baltazar argues, nevertheless, that evidence of guns or drugs is not independently sufficient to justify a "no-knock" warrant. Some circuits have found that evidence of a firearm in a home does not alone create a basis for a "no-knock" entry. *See, e.g., United States v. Bates,* 84 F.3d 790, 795 (6th Cir.1996) (holding that "[e]vidence that firearms are within a residence, by itself, is not sufficient to create an exigency to officers when executing a warrant"). We need not address that question, because this case involves not only evidence of firearms (including magazines for semiautomatic handguns, an empty box of shotgun shells, and a live .45-caliber round) in the house, but also palpable indicators that the homeowner may have installed countersurveillance security measures that could readily provide the inhabitants with immediate knowledge of police presence on the property. The combination of weapons *and* countersurveillance devices in this drug case easily provides the reasonable suspicion that knocking would be dangerous or would allow the destruction of evidence. *See United States v. Cline,* 349 F.3d 1276, 1289-90 (10th Cir.2003) (finding entry justified when officers waited only ten seconds after knocking where there was evidence of weapons and cameras that would have immediately alerted the suspect that officers were on the property); *United States v. Nunn,* No. 91-50471, 1992 WL 21586, at *4 (9th Cir. Feb.10, 1992) (mem. unpublished opinion) (finding a "no-knock" entry justified where officers knew the subject was armed and the house had a closed-circuit camera system monitoring the grounds).

We have repeatedly said that when reviewing "the legitimacy of search warrants," we should not examine the "supporting affidavits in a hypertechnical manner; rather, a realistic and commonsense approach should be employed so as to encourage recourse to the warrant process." *United States v. Miller,* 24 F.3d 1357, 1361 (11th Cir.1994). We think it abundantly clear that a suspect's privacy and liberty interests are far more likely to be protected when a detached, neutral magistrate has the opportunity to review the evidence and rule on the efficacy of a "no-knock" provision. The police gathered substantial evidence in this drug investigation revealing that there were likely both guns and countersurveillance equipment located in the home, thereby demonstrating a reasonable suspicion that knocking and announcing would have been dangerous. The government need show no more. The "no-knock" provision authorized by the magistrate was proper, and the district court did not err in denying the motion to suppress.

IV.

Finally, Segura-Baltazar argues, as to sentencing, that the district court "erred in calculating the base offense level using the total weight of methamphetamine mixture seized, rather than only the amount of pure methamphetamine." The defendant was sentenced to 120 months on counts one and two and 60 months on count three, for a total sentence of 180 months. The 120-month sentence resulted from a mandatory minimum 10-year requirement for possessing at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine.[5] The government claims that the argument is moot, that regardless of Segura-Baltazar's base offense level, he was subject to a mandatory minimum of ten years' imprisonment, which is precisely the sentence he received. Therefore, it says, any error the district court may have made in calculating the guideline range is irrelevant; to the ***1292** extent the range was lower than 120 months, the mandatory minimum 10-year term controlled. *See* U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

Segura-Baltazar's argument is not moot. We believe the argument Segura-Baltazar has made is more in the nature of a challenge to the sufficiency of the evidence. Essentially, he says that the evidence was insufficient to support the drug quantity necessary to trigger the mandatory minimum. We do not read his challenge as addressing the district court's guideline calculation. Rather, we view his argument as saying that the evidence did not establish the existence of at least

"500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers," which was necessary to trigger the 10-year mandatory minimum. *See* 21 U.S.C. § 841(b)(1)(A)(viii). That is the argument he made before the district court, that is the argument we believe he makes in his appellate brief, that is the argument the government addressed in its appellate brief, and that is what was discussed at oral argument. Accordingly, we address it now.

Segura-Baltazar waived a jury trial, and the parties presented the district court with a joint set of stipulated facts. In that stipulation, both sides agreed that Officer Gooden, if called, would testify that he recovered from the house at 480 Sheringham Court "1.2 kilograms (net weight) of mixture and substance with a detectable amount of methamphetamine and dimethyl sulfone, a common 'cutting' agent for methamphetamine. The quantitative result of the mixture was less than 1%." If that mixture qualifies as a "mixture or substance containing a detectable amount of methamphetamine" as that phrase is used in 21 U.S.C. § 841(b)(1)(A)(viii), then Segura-Baltazar was subject to a 10-year statutory mandatory minimum, and not a Guideline range of 87 to 108 months, which the parties otherwise agree would have been the correct Guideline recommendation.[6] In short, the question is whether the "mixture" in this case satisfies the legal definition of a "mixture" under section 841. The district court held that it did and we agree.

As we have noted already, section 841 of Title 21 imposes a 10-year mandatory minimum for possession of "500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers." 21 U.S.C. § 841(b)(1)(A)(viii). In *Chapman v. United States,* 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), the Supreme Court squarely ruled that it is proper to include the weight of a cutting agent when determining the total weight of a "mixture or substance containing a detectable amount" of a particular drug. *Id.* at 459-60, 111 S.Ct. 1919 (quoting 21 U.S.C. § 841(b)(1)(A)). The Court acknowledged that "[i]n some cases, the concentration of the drug in the mixture is very low," but nevertheless determined that Congress intended for the *entire* mixture or substance to be weighed so "long as it contains a detectable amount" of the drug. *Id.* at 459-61, 111 S.Ct. 1919 ("Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine ***1293** the length of the sentence."). In reaching that conclusion, the Court described a "mixture" in these terms:

> A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other.

Id. at 462, 111 S.Ct. 1919 (citation omitted). The Court distinguished a "mixture" from a "container," such as a bottle or a car, from which a drug is easily distinguished and separated. *Id.* at 462-63, 111 S.Ct. 1919.

Here, there is no disagreement that the methamphetamine was combined with dimethyl sulfone, a common cutting agent. Segura-Baltazar simply argued that the mixture was so diluted it would not be marketable or usable on the streets. *See United States v. Rolande-Gabriel,* 938 F.2d 1231, 1237 (11th Cir.1991) (adopting a market approach and holding that "[t]he entire weight of drug mixtures which are usable in the chain of distribution should be considered in determining a defendant's sentence"). The district judge rejected the argument at trial and again at sentencing, noting that "I don't necessarily agree with you that nobody on the street would buy it."

Because the methamphetamine undeniably was mixed with a cutting agent, we hold that the district judge properly considered the combined weight of the cutting agent and the methamphetamine in concluding that the government carried its burden of proving the defendant was responsible for at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine. Quite simply, "Congress has made the policy decision that purity is not an element of § 841(b)(1)(A)(viii)." *United States v. Gori,* 324 F.3d 234, 239 (3d Cir.2003) (relying on *Chapman* and finding threshold for mandatory minimum satisfied where the average purity of the drugs seized was 2.7%). When the weight of the entire mixture is considered, it easily exceeds the 500-gram threshold necessary to trigger the mandatory minimum, and the district court's 10-year sentence was correct.

Segura-Baltazar contends that this case is controlled by *United States v. Jackson,* 115 F.3d 843 (11th Cir.1997). We remain unpersuaded. In *Jackson,* we considered a package that contained some 1004 grams of sugar and 10 grams of cocaine. Notably, the sugar was not used as a cutting agent, but was instead utilized "to trick a purchaser into thinking it

was cocaine." *Id.* at 848. A chemist testified that the cocaine was probably placed on the surface of a block of sugar, and that it likely would not have been detectable if mixed with the sugar. *Id.* Moreover, the chemist and a police officer testified that the cocaine, as packaged, would not have been marketable on the street. *Id.* Not surprisingly under these circumstances, we held that the contents of the package did not constitute a "mixture." *Id. Jackson* is distinguishable, however, because the drugs in that case were not mixed with a cutting agent and were not marketable or usable. The block of sugar in *Jackson,* which was essentially used to carry the cocaine, is more analogous to a container than a mixture. *See Chapman,* 500 U.S. at 462-63, 111 S.Ct. 1919. Thus, *Jackson* does not suggest that the weight of the cutting agent should have been excluded. *See United States v. Grant,* 397 F.3d 1330, 1336 (11th Cir.2005) ("We conclude that the district court should use the weight of the liquid LSD [which includes the water carrying medium] in applying Grant's statutory minimum sentence.").

***1294** In sum, the district court did not err in declining to suppress the evidence seized from the trash pulls or from the house. Moreover, it correctly considered the combined weight of the methamphetamine and the cutting agent in concluding that the government satisfied its burden of establishing at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine. Thus, we affirm both the conviction and the sentence.

AFFIRMED.

All Citations

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Footnotes

1 That is not to say it would have been error to decide whether the trash was inside or outside the curtilage. Whether trash is sufficiently exposed to the public to render any expectation of privacy objectively unreasonable is a fact-intensive inquiry, and we would not fault a district court for considering the location of the trash vis-à-vis the curtilage. We simply observe that the curtilage determination has no talismanic significance in concluding whether the government has violated the Fourth Amendment by rummaging through someone's garbage.

2 In this case, there is evidence that the trash collector confirmed with a woman inside the home that the trash next to the house was ready for collection before removing it from the property. However, the district court did not rely on a consent theory, and the government does not urge us to consider that issue on appeal. Accordingly, we do not rely on the fact that an occupant of the house apparently gave verbal permission for the trash collector to remove the garbage in upholding this search and seizure.

3 Segura-Baltazar also argues that the evidence from the trash pulls failed to provide probable cause for a search of 480 Sheringham Court. We are unpersuaded. As the district court found, the police recovered numerous documents from the trash bearing names of residents who were known to live at 480 Sheringham Court, including financial receipts, medical records, and mail. There was ample evidence in the garbage connecting the trash left in front of 480 Sheringham Court to the occupants of that residence and we reject Segura-Baltazar's argument to the contrary.

4 A federal statute also provides that an officer may break open a door or window to execute a search warrant if, "after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." 18 U.S.C. § 3109. The Supreme Court has held that "§ 3109 includes an exigent circumstances exception and that the exception's applicability in a given instance is measured by the same standard we articulated [under the Fourth Amendment] in *Richards.*" *United States v. Ramirez,* 523 U.S. 65, 73, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998). Thus, the federal statute "does not entitle a defendant to greater protections than does the Fourth Amendment." *United States v. Scroggins,* 361 F.3d 1075, 1080 (8th Cir.2004). Accordingly, we need only evaluate Segura-Baltazar's claims under the Fourth Amendment. *See id.*

5 Segura-Baltazar does not challenge the 60 months he received for count three.

6 Moreover, the district court unambiguously said on the record that it would have imposed a sentence of 87 months if it was not bound by the mandatory minimum. So if there was error it was not harmless.

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